IN THE
SUPREME COURT OF MISSOURI

No. SC97175

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

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the instant action under Mo. Const. Art. V, Sec. 4. The Circuit Court granted class certification. Relator filed for permission to appeal the certification order under Rule 52.08(f). The court of appeals denied the request. Relator then filed a petition for writ of prohibition with this Court, and a preliminary writ was issued.

STATEMENT OF FACTS

Introduction

In 2011, Helena Weatherspoon purchased a used Chevy Malibu from Car Credit City. (A00904).[1] As part of the purchase, Weatherspoon was required to sign a consumer credit contract with Car Credit City, which was immediately assigned to Car Credit Acceptance Company. (A0073). Under this agreement, Weatherspoon was to make retail installment payments on the car for a specified period of time. (A0073).

Mechanical Issues
and the First Unlawful Repossession

Shortly thereafter, however, Weatherspoon stopped making payments on the vehicle because it had unending mechanical issues. (A0074–77). Weatherspoon was led to believe these mechanical issues were covered by the vehicle's warranty, but the dealership failed to adequately resolve the issues after multiple attempts. (A00074–77). As a result, Weatherspoon stopped making payments on the vehicle and was subsequently mailed two form right-to-cure notices informing her she was in default of her loan and instructing her how she could remedy the situation. (A0078–79). The problem, however, was these notices didn't contain the statutory language in: "If you voluntarily

[1] GCAC's exhibits filed with its Petition and its Appendix to its Brief begin with "A." Respondent cites to the exhibits filed with GCAC's Petition. Citations to exhibits filed by Respondent with the Answer begin with "B."

surrender possession of the following specified collateral, you could still owe additional money after the money received from the sale of the collateral is deducted from the total amount you owe." (A0078-79).

Weatherspoon didn't respond to these notices and didn't cure the alleged default. Thus, her account was assigned to General Credit Acceptance Company ("GCAC") to provide the requisite notices of default, repossess the vehicle, send a notice of its plan to sell the vehicle at a private sale, sell the vehicle, provide Weatherspoon a statement of sale, and sue to collect any deficiency judgment. (A0080–82).

In December 2011, GCAC repossessed Weatherspoon's vehicle and mailed her a form presale notice advising her it intended to sell the car at a private sale. (A0092). This notice, however, was not authenticated, improperly accelerated the balance of the loan, and unlawfully stated redemption payments could only be made in cash. (A0092). Nevertheless, Weatherspoon was able to regain possession of the car.

Further Mechanical Issues
and the Second Unlawful Repossession

Shortly after retaking possession of the car, Weatherspoon again stopped making payments because the vehicle continued to have mechanical issues. (A0074–77). As a result, GCAC mailed Weatherspoon another form right-to-cure notice that again failed to contain the language in Section 408.554.4.

(A0094). Moreover, GCAC accelerated the balance due on Weatherspoon's contract without providing proper notice.

Weatherspoon didn't cure the alleged default, and GCAC repossessed the car a second time. (A00903). This repossession occurred despite GCAC failing to provide the required notice of repossession under Section 408.555. GCAC did, however, mail Weatherspoon a second presale notice containing the same errors as the first notice. (A00903). The vehicle was later sold at a public sale, and GCAC mailed Weatherspoon a form post-sale notice stating her deficiency balance and explaining how GCAC calculated the balance. (A0095–96). As with GCAC's previous notices, the language used in the post-sale notice was at odds with the statute.

Similar Treatment of Others

GCAC's interactions with Weatherspoon weren't unique. In fact, GCAC had sold at least 7,400 vehicles at public sales since 2008. (A0097–98). Each of these sales involved the same problematic form notices. For example, the company mailed each car owner a form right-to-cure notice that didn't contain the language in Section 408.554.4. (A0099–102).

Before each sale, GCAC's policy included mailing form presale notices to each consumer. (A00891–92). These forms changed a few times over the years, but before January 10, 2009, the form presale notice stated "[a]ll payments to redeem must be by cash, certified check or money order." (A00103–106). But

then from January 10, 2009 until some point in 2014, the form presale notice stated "[a]ll payments to redeem must be made in CASH only." (A00103–106). The final iteration of the form presale notice shows GCAC removed the unlawful limitation on payment methods (A00107), but GCAC's corporate representative testified—despite the change in the form—GCAC continued to allow redemption only in cash. (A00263–64). Also problematic was every iteration of GCAC's form presale notice stated the vehicle would be sold at a private sale, despite all records showing the vehicles were ultimately sold at public sales. (A00103–107). Finally, each iteration of the form contained language suggesting that redemption required payment of the full accelerated balance—again, in violation of Section 408.555. (A00103–107).

Filing of This Action, and
Class Allegations

Ironically, later in 2014 it was GCAC's counsel who suggested what should happen next: "If they want to have a claim based on these Right to Cure Notices or these Post-Sale Notices, they are not barred from doing that. They can do it tomorrow." *See* Weatherspoon's Answer to GCAC's Petition for Writ of Prohibition ("Answer") ¶ 9. And that's exactly what she did. *See* Answer ¶ 13.

In this action Weatherspoon and the class members assert GCAC has engaged in an unlawful and deceptive pattern of wrongdoing regarding

collection, enforcement, repossession, disposition of collateral, and collection of alleged deficiencies. (A00883). Specifically, Weatherspoon alleges:

1. The form right-to-cure notices violate Section 408.554 by not stating the required statutory language. (A00883–900 ¶¶ 2–3, 23).
2. GCAC wrongfully accelerated loans balances and obtained possession of vehicles (as to members of Class 2) by failing to provide proper notice under Section 408.555. (A00883–900 ¶¶ 24–28).
3. GCAC's form presale notices restricting redemption payments violate Sections 400.9-602 and 400.9-623 and were otherwise unlawfully misleading under the Uniform Commercial Code (UCC) by restricting redemption payments. (A00883–900 ¶¶ 4–5, 30–31).
4. GCAC's form presale notices are unlawfully misleading under the UCC by suggesting vehicles would be sold on the 14th day after repossession, because they were always sold later. (A00883–900 ¶¶ 4–5, 30–31).
5. The form post-sale notices failed to make requisite disclosures. (A00883–900 ¶¶ 6, 33–35).
6. The post-sale notices misstated balances due by including interest prohibited by Section 408.553. (A00883–900 ¶¶ 6, 33–35).

Further Proceedings

After about three years of litigation, Weatherspoon moved for class certification on September 29, 2017. Answer ¶ 14. After both parties filed briefs, a hearing was held on December 7, 2017. *Id.* at ¶ 15. On March 12, 2018, the Circuit Court granted class certification, after which GCAC sought permission to appeal the decision. *Id.* at ¶¶ 16–17. Less than three weeks later, the Court of Appeals denied permission. *Id.* at ¶ 18.

To help clarify potential issues, on May 10, 2018 the Circuit Court ordered that "to the extent the court's ruling on class certification appears to make a merits determination on any affirmative defense available to GCAC, including offset, that portion of the court's order is deemed stricken." Answer ¶ 19. Eight days later, GCAC filed a petition for a writ of prohibition with this Court to challenge the class certification. *Id.* at ¶ 20. The Court granted a preliminary writ on August 21, 2018. *Id.* at ¶ 21.

POINTS RELIED ON

I. The certified classes are neither overbroad nor in violation of Rule 52.08(b) because few, if any, of the class members have extinguished claims and Respondent considered and rejected GCAC's "expert" testimony analyzing the classes.

Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. banc 2007).

Kirk v. State, 520 S.W.3d 443 (Mo. banc 2017).

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

Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528 (Mo. banc 2002).

II. The circuit court couldn't review the merits of Weatherspoon's arguments at the class certification stage and was required to determine if common issues of fact or law predominate over individual issues; in this regard, whether Section 408.553 prohibits the accrual of interest after default and before judgment is one example of a common legal question predominating over individual issues.

Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. banc 2007).

Elsea v. U.S. Engineering Co., 463 S.W.3d 409 (Mo. App. 2015).

Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455 (2013).

Hollins v. Cap. Solutions Invs. I, Inc., 477 S.W.3d 19 (Mo. App. 2015).

III. Whether GCAC sent defective right-to-cure notices is a red herring because GCAC unlawfully accelerated the loans and repossessed the vehicles.

Mo. Credit Union v. Diaz, 545 S.W.3d 856 (Mo. App. 2018).

RSMo. § 408.555

IV. In applying Rule 52.08(b)(3), Respondent didn't clearly abuse his discretion in finding the predominance requirement met.

Mo. Credit Union v. Diaz, 545 S.W.3d 856 (Mo. App. 2018).

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

RSMo. § 408.553

V. Weatherspoon is a proper class member.

Savannah R-III Sch. Dist. v. Pub. Sch. Retirement Sys. of Mo., 950 S.W.2d 854 (Mo. banc 1997).

Mo. Credit Union v. Diaz, 545 S.W.3d 856 (Mo. App. 2018).

VI. Weatherspoon is a proper class representative.

Vogt v. State Farm Life Ins. Co., No. 2:16-CV-04170-NKL, 2018 WL 4937069 (W.D. Mo. Oct. 11, 2018).

Mo. Mun. League v. State, 465 S.W.3d 904, 908 (Mo. banc 2015).

VII. Weatherspoon's involvement in any previous litigation has no preclusive effect on the current claims.

VIII. GCAC's final point relied on presents no new legal or factual issues that require review by this Court.

SUMMARY OF ARGUMENT

GCAC has manufactured many merits inquiries it invites this Court to consider. But they aren't for this Court's consideration at this early procedural stage of the litigation. This is a writ proceeding, after all—not a full merits review after a final judgment. *See Younker v. Inv. Realty, Inc.*, 461 S.W.3d 1, 11–13 (Mo. App. 2015) (explaining, within the context of Section 512.020, the distinction between review of (1) an interlocutory order granting or denying class certification; and (2) a final judgment). A direct appeal will be available to address GCAC's arguments, ***after*** certification and ***after*** the Circuit Court addresses these merits inquiries. *Id.*

The limited issue before the Court in this writ proceeding concerns whether Respondent clearly abused his discretion to grant class certification such that GCAC "will suffer 'absolute irreparable harm' if writ relief is not granted[.]" *State ex rel. Peters-Baker v. Round*, No. SC96931, 2018 WL 6320826, at *2 (Mo. banc Dec. 4, 2018). Rather than focusing on that issue, however, GCAC eagerly dives into the merits of the classes' claims and its affirmative defenses. Respectfully, the merits of those claims and affirmative defenses aren't on trial here.

GCAC's approach in this proceeding resembles the one rejected by this Court in *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129 (Mo. banc 2007) (criticizing parties' and amici's attempt to shift focus of proceeding away from

the limited issue of insurance coverage, and toward the unripe issue of subrogation rights). There, the parties put the proverbial cart ahead of the horse: Though they were eager to debate the issue of subrogation, it didn't become an issue until the insurer paid for the covered loss. *Id*. at 134; *see also Keisker v. Farmer*, 90 S.W.3d 71, 74 (Mo. banc 2002) (noting that an insurer's right to subrogation arises when it has paid the insured for a covered loss).

Here, like the parties in *Seeck*, GCAC is putting the cart ahead of the horse in asking the Court to review the merits of the classes' claims—merits that become relevant only ***after*** the classes are certified. Just as in *Seeck*, where there could be no review of the insurer's subrogation rights until the Court resolved the question of coverage, here there can be no review of the merits of the classes' claims until those issues become ripe (*i.e.*, after a final judgment).

When reviewing Respondent's decision on class certification, the Court will see that he took proper, full account of Rule 52.08 and didn't commit the clear abuse of discretion necessary for this Court to issue the permanent writ demanded by GCAC. Indeed, Respondent limited his analysis to the elements of Rule 52.08 and refused to engage in the sort of full-blown merits review GCAC now asks this Court to conduct. And even if the question of class certification were a "close call" in this matter (it wasn't, as discussed below), deciding to certify a class in such a circumstance cannot be an abuse of

discretion under Missouri law. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. banc 2007).

Though eight points for review is entirely unnecessary, Respondent will address each in turn showing why every argument is unavailing for both procedural and substantive reasons. Before addressing these deficiencies in depth, the Court should know a few things because they were prominently featured in GCAC's writ petition, but are now buried in its brief: (1) Weatherspoon was ***not*** a party to *GCAC v. Deaver*, No. 11SL-AC28887-02 ("*Deaver*") when Deaver moved for class certification or voluntarily dismissed his case; (2) ***none*** of the class members have had their claims resolved against them in prior litigation, or extinguished in bankruptcy; and (3) the class members are ***not*** seeking to overturn final judgments (after all, approximately 98% of GCAC's judgments were by default or consent).

WRIT STANDARD

Respondent granted class certification for two classes. GCAC disagreed with the decision on class certification and filed a petition for review in the Court of Appeals. Under Rule 84.035, the Court of Appeals has discretionary authority to permit an appeal of the certification decision, but grants permission only in limited, special circumstances. *See, e.g.,* Missouri Court of Appeals, Western District, Local Rule XL(A) (noting circumstances to consider in granting petition for appeal). This interlocutory review is rare because the

process is disruptive, time-consuming, and expensive—and a trial court may fine-tune its class certification decision as the case progresses. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

Here, the Court of Appeals determined GCAC's petition for leave to appeal was unavailing, and now a writ of prohibition is equally inappropriate. An original remedial writ should only be issued in extraordinary circumstances. *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985).

First, this Court shouldn't intervene and issue a permanent writ unless Respondent has clearly abused his discretion. *State ex rel. McKeage v. Cordinnier*, 357 S.W.3d 597, 599 (Mo. banc 2012). A sufficient abuse of discretion occurs only when the certification order "is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008). And this Court has stated it's not an abuse of discretion to err in favor of certification in the midst of a close call. *Meyer*, 220 S.W.3d at 715.

Second, this Court shouldn't intervene and issue a permanent writ unless Relator will suffer "absolute irreparable harm" if writ relief isn't granted. *Round*, No. SC96931, 2018 WL 6320826, at *2 (Mo. banc Dec. 4, 2018). "Absolute irreparable harm" is necessary even if the writ proceeding involves an "important question of law decided erroneously that would otherwise escape

review." *In re NDC*, 229 S.W.3d 602, 604 n. 8 (Mo. banc 2007). And "absolute irreparable harm" only exists when no "adequate remedy exists by trial or appeal" or when "the proverbial bell has been rung, [and] its sound can neither be recalled nor subsequently silenced." *State ex rel. Richardson v. Randall*, 660 S.W.2d 699 (Mo. banc 1983); *State ex rel. Faith Hosp. v. Enright*, 706 S.W.2d 852, 854 (Mo. banc 1986).

GCAC has failed to even allege it will suffer "absolute irreparable harm" if writ relief is not granted. Indeed, this isn't a situation in which "absolute irreparable harm" will result because a direct appeal is available after a decision on the merits. *See, e.g., Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119 (Mo. banc 1979).[2] The Court should quash its preliminary writ

[2] The only thing GCAC alleges is that Respondent's Order put it in a "death knell" situation because the "grant of class status would put substantial pressure on the defendant to settle without regard to the merits of the case." The "death knell" doctrine doesn't equate to "absolute irreparable harm" and the doctrine has many shortcomings. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). If the death-knell doctrine had merit, "it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Coopers*, 437 U.S. at 470. So, if the "death knell" doctrine equaled "absolute irreparable harm," prohibition would no longer be reserved for uniquely limited situations. Regardless, other than mere assertions, GCAC makes no "showing it will be unduly pressured to settle because of the class's certification. [GCAC] failed to submit any evidence that the damages claimed would force a company of its size to settle without relation to the merits of the class's claims. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002); *In re Delta Air Lines*, 310

because there was no showing of "absolute irreparable harm" from Respondent's order to grant class certification. Regardless of whether there is "absolute irreparable harm," a writ of prohibition would always be inappropriate where, like here, there was no abuse of discretion.

STANDARD FOR CLASS CERTIFICATION

The issue of class certification is a procedural matter, and the sole issue for the circuit court to consider is "whether plaintiff has met the requirements for a class action." *Meyer*, 220 S.W.3d at 715. Neither the circuit court nor this Court has "authority to conduct a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits." *Id*. If the determination of class certification is a close call, this Court has expressly stated it is best to err "in favor of certification because the class can be modified as the case progresses." *Id*.

Rule 52.08 governs the procedure for certifying a class action. Certification of a class action requires: (1) the class be so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class exist; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will protect fairly and adequately

F.3d 953, 960 (6th Cir. 2002) (death-knell assertion "must go beyond [] general assertion[s] … [and] a defendant [] should provide the court insight into potential expenses and liabilities.").

the interests of the class. Rule 52.08(a); *Am. Fam. Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003).

If these factors are met, the circuit court is to also ensure "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods" of adjudication. Rule 52.08(b)(3). Finally, though not spelled out in the Rules, this Court has recognized whether a certified class is overbroad or too indefinite underlies each of the mandatory elements for certification. *Coca-Cola Co.*, 249 S.W.3d at 861.

Whether an action should proceed pursuant to Rule 52.08 as a class action rests within the sound discretion of the circuit court. *Id.* at 850. "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, 599 (Mo. banc 2012). Under this standard, the Court should conclude Respondent didn't commit a clear abuse of discretion in deciding the question of class certification.

ARGUMENT

I. The certified classes are neither overbroad nor in violation of Rule 52.08(b) because few, if any, of the class members have extinguished claims and Respondent considered and rejected GCAC's "expert" testimony analyzing the classes.

The circuit court certified two classes of individuals who purchased vehicles and later suffered the imposition of "an unlawful and deceptive pattern of wrongdoing regarding collection, enforcement, repossession and disposition of collateral, and collection of alleged deficiencies." (A0001). In its first multifarious point relied on, GCAC presents many meritless arguments asserting the classes are overbroad.

Besides being multifarious, GCAC's first point relied on should be denied for several procedural reasons. These arguments largely ignore (indeed, flout) the applicable standards of review discussed above. For example, GCAC spends significant time highlighting rejected "expert" testimony, even though the credibility and reliability of a witness is left to the discretion of the circuit court and shouldn't be disturbed by a higher court. Moreover, during the class certification stage, courts don't consider the merits of a claim or defense; as such, affirmative defenses aren't adjudged at this stage. Nevertheless, GCAC dives in and argues common affirmative defenses are meritorious and should prevent class certification.

Even if the Court was to review the multifarious first point and permit GCAC's premature attempt to litigate the merits, GCAC still comes up short. Every issue jammed into the first point relied on is meritless. The circuit court considered and properly rejected every argument.

A. GCAC's multifarious point relied on should be denied.

Under Rule 84.04, a point relied on should identify a single claim of reversible error, concisely state the legal reasons for the claim, and summarily explain why the stated legal reasons support the claim of reversible error.[3] "A point relied on violates Rule 84.04(d) when it groups together multiple, independent claims rather than a single claim of error." *Kirk v. State*, 520 S.W.3d 443, 450 n. 3 (Mo. banc 2017). In other words, points relied on containing "multiple allegations of error" are improper. *Id.*; *Alpert v. State*, 543 S.W.3d 589, 601 (Mo. banc 2018) (Fischer, C.J., dissenting). Such allegations are considered multifarious, "preserve nothing for review," and render the point relied on "subject to dismissal." *Kirk*, 520 S.W.3d at 450 n.3.

[3] Rule 84.04 applies to briefs written for direct appeals as well as for writs of prohibition. *See State ex rel. Jackson Cnty. Pros. Attorney v. Prokes*, 363 S.W.3d 71, 76 (Mo. App. 2011) (involving two points relied on to support a writ of prohibition). Moreover, Rule 97.01 states the rules of civil procedure apply to proceedings in prohibition when the rules governing prohibition are lacking detail. Because the rules governing prohibition do not cover how to draft points relied on, Rule 84.04 applies in this matter.

Here, GCAC's first point relied on presents at least six allegations of error:

1. The certified classes are overbroad in that they contain a significant number of uninjured claimants.
2. Rule 52.08(b)(3)(B) requires the court to consider previous litigation involving the current class members and here, previous litigation has occurred involving many of the class members.
3. Res judicata should be applied to prevent many of the class members from relitigating issues involved in previous judicial actions.
4. Judicial estoppel should prevent many of the class members from proceeding with claims left off their bankruptcy schedules.
5. The statute of limitations should be applied to bar a significant number of the class members from proceeding with their claims.
6. Under Rule 52.08(b)(3), a class action in this situation would not be the superior method for adjudicating the relevant claims.

Each issue involves a separate argument involving separate law, separate analysis, and separate precedent. As such, each of the above allegations of error belong in their own point relied on, if they are to be made

at all. "[T]his Court should not consider [the] defective point relied on and instead, should dismiss this appeal. Rather than gratuitously excusing violations of this Court's briefing rules, this Court should consistently enforce its rules as written and decline to review points relied on that violate briefing rules." *Alpert*, 543 S.W.3d at 601.

B. GCAC seeks to relitigate a factual matter determined by the circuit court.

GCAC's entire first point relied on is based on what it contends was "uncontested" and "unrebutted" testimony from its "expert."[4] This claim is wrong and ignores the applicable standard of review.

GCAC mistakenly premises its arguments on the notion that a significant number of class members' claims have been litigated, have been extinguished during the bankruptcy process, or are time-barred. But what GCAC masquerades as "uncontroverted fact" was refuted by Weatherspoon, was shown to be improper evidence, and was rejected by the circuit court.

For example, GCAC's "expert" opined the necessary sample size was 619 people. (A00665). Nevertheless, the "expert" utilized a sample size of only 416 people. (A00666). Moreover, Weatherspoon noted the "expert's" testimony included faulty conclusions based on flawed assumptions, unreliable

[4] Identifying GCAC's witness as an "expert" is generous. The record shows the witness used little if any specialized knowledge or techniques.

methodologies, and improper manipulations of data. (A00451-452; A00707-708; A00844-45). As such, GCAC's evidence was simply not reliable and was therefore rejected by the circuit court.

It is irrelevant the circuit court didn't mention the "expert" testimony in its order granting class certification because all "fact[ual] issues upon which no specific findings were made shall be deemed found in accordance with the result reached." Rule 73.01(c). As such, the circuit court must not have found GCAC's "expert" testimony credible. Such a finding is squarely within the discretion of the court. *Exchange Bank of Mo. v. Gerlt*, 367 S.W.3d 132, 136 (Mo. App. 2012) (holding the trial court is free to believe or disbelieve the testimony of a witness, whether the testimony is controverted or not).

GCAC has presented no valid reason for this Court to (1) set aside the circuit court's finding; and (2) engage in its own fact-finding. GCAC's first point relied on, rather than the circuit court's proper finding, should be disregarded.

C. GCAC's affirmative defenses are for the circuit court to decide later.

All GCAC's arguments contained in its first point relied on involve affirmative defenses: res judicata, judicial estoppel, and statutes of limitations. Each are listed in Section 509.090 as affirmative defenses. And the class certification stage isn't where the circuit court determines the merits of such defenses. Indeed, after certifying the classes in this case, Respondent clarified

in a later order he wasn't making any rulings on affirmative defenses (which, after all, would have been premature). (A011).

Rule 52.08 provides "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Rule 52.08(c)(1). "This means the trial court is normally required to make its determination regarding certification before the benefit of full discovery or the actual presentation of evidence." *Hope v. Nissan North America, Inc.*, 353 S.W.3d 68, 74 (Mo. App. 2011) (internal quotations omitted). Therefore, the "class certification hearing is a procedural matter in which the sole issue is whether plaintiff has met the requirements for a class action." *Meyer*, 220 S.W.3d at 715. In fact, as this Court has stated, "the trial court has no authority to conduct a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits." *Id.* Thus, even if affirmative defenses may exist and may apply to certain class members, class certification shouldn't be affected by these defenses. *Craft v. Philip Morris*, 190 S.W.3d 368, 383 (Mo. App. 2005); 2 Newberg on Class Actions § 4:57 (5th ed.) ("Statute of limitations defenses—like damage calculations, affirmative defenses, and counterclaims—rarely defeat class certification."); 2 Newberg on Class Actions § 4:55 (5th ed.) ("The general rule, regularly repeated by courts in many circuits, is that '[c]ourts traditionally have been

reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members.").

Though the above rule is universally adopted and applied, GCAC appears to have overlooked it. For example, the Supreme Court of Arkansas recently explained as follows: "This court has been clear it does not delve into the merits of the underlying claims when addressing certification. … A trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action." *United Am. Ins. Co. v. Smith*, 371 S.W.3d 685, 695-96 (Ark. 2010). There, the court refused to hear arguments during the certification stage concerning the statute of limitations, fraudulent concealment, causation, damages, etc., because all were merits arguments reserved for a later day. *Id.* As is universally known, the certification stage isn't the time to make or review arguments properly included in motions to dismiss or motions for summary judgment. *Id.*

Here, GCAC is fighting class certification by arguing the class members won't win on the merits. But before the merits of claims and affirmative defenses are analyzed, the circuit court must determine if a class can be certified. Certification is based on a list of factors, and the circuit court here properly addressed every factor. The circuit court, on the other hand, didn't evaluate the merits of GCAC's affirmative defenses because it had no authority to do so at this time.

To summarize (and before responding to GCAC's six separate allegations of error), GCAC has (1) presented a multifarious point relied on; (2) sought to have this Court evaluate the credibility of GCAC's expert witness, upon whose testimony it bases its entire point relied on; and (3) urged this Court to consider the merits of GCAC's affirmative defenses, upon which GCAC bases its entire point relied on. Any of those actions is alone a sufficient reason to deny GCAC's first point relied on. Nonetheless, an analysis of GCAC's six separate allegations of error made in the first point relied on further demonstrates why the point should be denied.[5]

D. GCAC's overbreadth analysis relies on an unnatural definition of "uninjured."

GCAC's first separate allegation of error is the certified classes contain a significant number of uninjured class members. But GCAC bases its argument on a definition of "uninjured" that ignores the question of injury and focuses instead upon whether a class member's claim is resolved. The circuit

[5] Respondent has attempted to identify every argument made within the point relied on and will address each of them in turn. Respectfully, however, the reason why Rule 84.04 exists is to provide Respondent proper, full notice of the claims of error so Respondent may fully address them. Having to guess at or extract separate claims of error out of a multifarious point relied on isn't what Missouri courts or responding parties on appeal should be required to do. Furthermore, doing so arguably makes an advocate out of this Court. *Wright-Jones v. Missouri Ethics Comm'n*, 544 S.W.3d 177, 178 n. 2 (Mo. banc 2018) ("Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates[.]").

court, however, didn't clearly abuse its discretion in refusing to adopt the unnatural "uninjured = resolved" definition proposed by GCAC.

1. The "overbroad" analysis.

"Overbreadth" appears to be a relatively new issue for Missouri courts to consider in class actions. A Westlaw search revealed only four cases dealing with the subject, and this Court appears to have first addressed it in 2008 in *Coca-Cola*, 249 S.W.3d at 861. In *Coca-Cola*, this Court stated certified classes shouldn't be "overbroad" in the sense of containing a significant number of "uninjured putative members." *Id.* The Court further clarified and stated, "injury is not synonymous with damages." *Id.* at 861 n.7. In case there was any confusion, recently the United States District Court for the Western District of Missouri specifically held that affirmative defenses have no bearing on a claimant's injury status. *Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2018 WL 4937069, at *2 (W.D. Mo. Oct. 11, 2018) ("A defendant may prevail on an affirmative defense, but that does not mean that there is no injury in fact.").

Though discussed as an overbreadth analysis, it appears the primary concern of the Court in *Coca-Cola* was whether the class definition prevented a finding of predominance. For example, the Court held overbreadth becomes an issue when the circuit court is unable to easily resolve "individual questions after the common questions have been answered." *Id.* at 861. Notably, this

concern is the same one that is tied to predominance. As with the predominance test, in *Coca-Cola* the Court held individual issues (such as damages) do not automatically render the class overbroad; in fact, the Court acknowledged these types of individual issues "typically will not defeat predominance" and therefore will not result in an "overbreadth" determination. Scholarly articles agree: Predominance and overbreadth are essentially one in the same. "[T]he predominance inquiry is the optimal analytical approach as each requirement under Rule 23 fulfills distinct goals … [and] it is apparent that overbreadth scrutiny falls neatly within the requirement's framework and actually encourages analytic clarity." David I. Berman, *Class Problem!: Why the Inconsistent Application of Rule 23's Class Certification Requirements During Overbreadth Analysis Is A Threat to Litigant Certainty*, 87 Fordham L. Rev. 253, 287 (2018).[6]

GCAC heavily relies upon *Coca-Cola,* this Court's first foray of sorts into the overbreadth analysis but ignores it doesn't support the "uninjured =

[6] The predominance test "ensures that sufficient similarities exist between class members to ensure that the consolidation of claims remains superior to alternate forms of litigation." *Id.* Of course, to satisfy predominance the class members must be pursuing "a common form of liability." *Id.* Similarly, the overbreadth test ensures there are not "a great number of [class] members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Id.* at 268. In other words, the overbreadth analysis ensures there are not an excessive number of class members who are unable to present a claim for liability. Therefore, both tests are ensuring the class members are

resolved" definition. Indeed, no court has read *Coca-Cola* like GCAC. *See Hope*, 353 S.W.3d at 77–78 (construing *Coca-Cola* as being a contention that "the class definition was too broad and too indefinite to be properly *manageable*"); *Lucas Subway Midmo v. Mandatory Poster*, 524 S.W.3d 116, 126 (Mo. App. 2017) (construing *Coca-Cola* as concern over having to conduct "'mini-trials' to determine the ***subjective*** tastes of each class member to determine if they were dissatisfied and thus injured").

Coca-Cola doesn't provide a technical definition of "uninjured," likely because the concept is straightforward: an individual is uninjured if the person hasn't been directly and negatively affected by the complained-of harm.[7] But, if a more precise definition is required, Black's Law defines "injury" as "the violation of another's legal right, for which the law provides a remedy." Black's Law Dictionary (10th ed. 2014). And Webster's defines "injured" as "wronged,

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pursuing the same issues of liability. As such, the "overbreadth scrutiny falls neatly within the [predominance] framework." *Id.* at 287.

[7] In *Coca-Cola*, the Court cited four cases from various jurisdictions to support the notion that including a large number of uninjured claimants in a class renders the class overbroad. Of those four cases, only one somewhat provides a definition of "uninjured": *Vietnam Veterans Against the War v. Benecke*, 63 F.R.D. 675 (W.D. Mo. 1974). In that case, the court said a class was overbroad because it contained persons "who have not sustained, or are not in immediate danger of sustaining, direct harm as a result of the actions allegedly taken by the defendants." *Id.* at 860-61. This definition connected the term "uninjured" directly to the complained-of harm. If the class contains a large number of people who haven't been or won't be affected by the complained-of harm, the class is overbroad.

offended." Webster's Third New International Dictionary Unabridged 1164 (2002).

Coca-Cola proceeded under the commonsense definition of "uninjured." There, a class of persons complained that Coca-Cola had deceived people into purchasing soda without advertising that saccharin was used as an ingredient. *Id.* at 862. Based on this complaint, the Court said the complained-of harm wasn't the drinking of Coca-Cola; rather, it was being deceived into purchasing something a person wouldn't otherwise have purchased. *Id.* Because the certified classes included persons who had simply imbibed the soft drink, the certified classes were overbroad (*i.e.*, "drinking Coke" didn't necessarily equate to "being deceived"). *Id.* The classes contained many people who didn't suffer injury. *Id.* Moreover, the classes in *Coca-Cola* could not be saved. To properly cut down the classes, the circuit court would have had to hold a mini-trial for every class member to determine his or her subjective preferences on saccharin: Does that member like or not like saccharin, and would that member's subjective preference change his or her purchasing behavior? *Id.* at 863. The Court determined a class premised on subjective preference is untenable. *Id.*

The *Coca-Cola* Court cited several cases from other jurisdictions to support its overbreadth analysis. One case, *Pagan v. Dubois*, shows the overbreadth analysis isn't complex. 884 F.Supp. 25 (D. Mass. 1995). In *Pagan*,

the alleged harm was a lack of Spanish-speaking staff at a federal prison. *Id.* at 26. The certified class, however, consisted of all Latino prisoners—even those who spoke proficient English. *Id.* at 28. The court ruled this class was overbroad because the English-speaking Latino prisoners weren't injured by any lack of Spanish-speaking staff. *Id.*

There is no parallel here: All class members were injured because GCAC mailed defective notices and GCAC unlawfully accelerated and unlawfully repossessed their vehicles. There is no concern over a class member's intention or subjective preference. GCAC "may prevail on an affirmative defense," such as res judicata, judicial estoppel, or offset but that doesn't mean the class members are uninjured. *Vogt*, No. 2:16-CV-04170-NKL, 2018 WL 4937069, at *2.

2. To determine whether a class action is overbroad, GCAC urges this Court to apply an unnatural definition of "uninjured."

Despite the commonsense definition and application of "uninjured" in cases like *Coca-Cola* and *Pagan*, GCAC invites this Court to adopt an unnatural definition that equates "uninjured" with "having a previous case resolved." GCAC argues a significant number of class members have had issues central to their claims resolved by judgment (98% of which were default or consent judgments) and, therefore, they are uninjured. In other words, according to GCAC, uninjured = allegedly resolved (*i.e.*, a claimant is uninjured

if the issues central to a person's claim has been allegedly resolved). But, this unnatural definition finds no support in precedent; furthermore, ***none*** of the class members have had their claims against GCAC resolved against them in prior litigation or extinguished in bankruptcy.

If anything is overbroad here, it is GCAC's proposed definition of "uninjured," which is untethered to the common meaning of "injury" and focuses instead on procedural posture. Under this definition, a person who has been subjected to the civil tort of battery is rendered "uninjured" so long as the person has had an issue central to the claim "resolved" (which would include a procedural dismissal or other disposition, regardless of whether the merits of the claim were examined or decided). This definition is nonsensical. The procedural posture or disposition of a case doesn't determine the existence of injury.

In one of the leading treatises on federal practice, the authors comprehensively discuss the concept of overbreadth. Wright & Miller, § 1760 A Class Must Exist, 7A Fed. Prac. & Proc. Civ. (3d ed. 2018)**.** The authors reviewed over 25 cases, and, unsurprisingly, not a single case dealing with the issue of overbreadth considered the class members' right to recover regarding alleged affirmative defenses (as GCAC urges here). In the cited cases, the courts largely determined the proposed class definitions were overbroad because persons who ***couldn't have been injured*** were included in the

classes. There was no discussion of res judicata, judicial estoppel, or any other affirmative defenses.

The case of *Suchanek v. Sturm Foods, Inc.*, 764 F. 3d 750 (7th Cir. 2014) is instructive. There, the court explained the overbreadth analysis focuses on determining whether the certified class is defined "so broadly as to include a great number of members who for some reason ***could not have been*** harmed by the defendant's allegedly unlawful conduct." *Id.* at 758. As such, there was no need during the certification stage to evaluate whether individual class members were actually injured. *Id.* at 757. So long as there were valid reasons to believe the class members ***could've been*** injured, the class was not considered overbroad. *Id.* at 758.[8]

GCAC's focus on procedural posture as part of an overbreadth analysis is an attempt to prematurely litigate the merits of a class action suit. GCAC's definition renders the overbreadth analysis nothing more than an analysis of res judicata or judicial estoppel. Therefore, GCAC seeks backdoor access to merits review of its affirmative defenses during the certification stage. But courts shouldn't consider affirmative defenses during the certification stage;

[8] If it is later found a substantial number of individual class members are not injured, the defendant will have a strong argument for a judgment largely exonerating it of liability. *Id.*

they are available to defendants after certification (or potentially in an early motion to dismiss).

There is no basis in the record for this Court to declare Respondent clearly abused his discretion in refusing to adopt GCAC's expansive (not to mention illogical) definition of "uninjured."

E. Rule 52.08(b)(3)(B) isn't determinative.

As part of its multifarious point relied on, GCAC refers to Rule 52.08(b)(3)(B), presents an argument, fails to cite any pertinent case law, and moves on.

GCAC refers to the requirement that a court consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Rule 52.08(b)(3)(B). GCAC then notes the order confirming class certification doesn't refer to that rule and assumes the circuit court gave it no consideration. But Respondent quoted that rule verbatim and found it supported class certification. (A00007–8).

Moreover, Rule 52.08(b)(3)(B) cannot be considered in isolation. Rather, the primary focus of Rule 52.08(b)(3)(B) and the other superiority factors "is the efficiency of the class action over other available methods of adjudication." *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 182 (Mo. App. 2006). Rule 52.08(b)(3) calls for a comparative assessment of the costs and benefits of class adjudication, including the availability of "other methods" for resolving the

controversy. GCAC wants this Court to look at 52.08(b)(3)(B) in a vacuum, but GCAC's approach would require a court to deny certification even where there is no realistic alternative to class treatment. The authors of Rule 52.08 "opted not to make the potential administrative burdens of a class action dispositive and instead directed courts to balance the benefits of class adjudication against its costs." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). Here, the benefits of class adjudication outweigh its costs.

Even looking at Rule 52.08(b)(3)(B) in a vacuum, GCAC's analysis is flawed. The intent of Rule 52.08(b)(3)(B) is to determine whether "individuals have an interest in controlling their own litigation." Newberg on Class Actions § 4:70 (5th ed.). The thought being:

> other pending litigation is *evidence* that individuals have an interest in controlling their own litigation. If other individuals have filed suit, they must want individual litigation, suggesting that a class action may not be superior; if individuals have not filed other suits, they appear to have little interest in pursuing individual litigation, and hence, a class action will likely be superior. *Id.*

GCAC, however, presented no evidence other members of the class have commenced litigation against GCAC.

Cases brought by GCAC for deficiency judgments against class members, and bankruptcies filed by class members, don't suggest individuals have an interest in controlling (or are able to control) their own litigation regarding defective presale notices. They prove the opposite by showing "the inability of

the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Dale*, 204 S.W.3d at 182. Nearly all the class members with judgments against them were uninformed and unable to defend themselves, let alone bring counterclaims for bad notices. This fact is evident. As Relator has repeatedly stated: 79% of the class members allowed default judgments to be entered against them and another 19% of class members agreed to consent judgments. This occurred despite each and every class member possessing viable legal claims. The class members here simply lacked the information and ability to proceed individually against GCAC.

A class action is more efficient over other methods of adjudication: there are thousands of claims; "the vast majority of the putative class members are unaware that their rights were violated;" and "in the absence of a class action, the potential expense of the litigation in relation to the relatively small recovery amount for each plaintiff would prevent most, if not all, injured parties from initiating a lawsuit." *Dale*, 204 S.W.3d at 182. Therefore, there was no abuse of discretion in the circuit court's analysis of Rule 52.08(b)(3)(B).

F. Res judicata should not be applied.

To the extent GCAC alleges separate error in point one for failure to apply the affirmative defense of res judicata, GCAC again relies on a faulty assumption. Specifically, in asserting that over half of class members have had

issues central to their claims resolved, GCAC relies on evidence the circuit court was entitled to disbelieve or disregard. And as discussed below, there are several other reasons why the circuit court properly declined to apply GCAC's premature affirmative defense.

Most importantly, res judicata doesn't apply here. Missouri courts have repeatedly held the doctrine of res judicata and the mandatory counterclaim rule are essentially one in the same. As such, the mandatory counterclaim rules and precedent are instructive because they clearly state the current claims did not have to be brought in associate circuit court. Therefore, res judicata shouldn't be applied to bar the current claims.

This Court stated the "counterclaim rule is simply the codification of the principles of res judicata and collateral estoppel." *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 523 (Mo. banc 2002) (internal citations omitted). The terms are used so interchangeably this Court stated "[i]f the compulsory counterclaim rule does not apply, neither does claim preclusion (res judicata)." *Hemme v. Bharti*, 183 S.W.3d 593, 599 (Mo. banc 2006). Here, the compulsory counterclaim rule doesn't apply. As this Court explained, in chapter 517 proceedings (*i.e.*, associate circuit court proceedings) the "use-it-or-lose-it technicality of the compulsory counterclaim rule" doesn't apply. *Becker Glove Intern., Inc. v. Jack Dubinsky & Sons*, 41 S.W.3d 885, 888 (Mo. banc 2001). More specifically, in "associate circuit division … pleading[s] [are]

not subject to Rule 55.32(a)" (*i.e.*, the compulsory counterclaim rule). *Id.* at 889. This holding is well-settled. *See, e.g., Stough v. Bregg*, 506 S.W.3d 400 (Mo. App. 2016) (noting defendants in associate circuit case weren't precluded from bringing their own claims against plaintiff in separate legal action); *Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792 (Mo. App. 2005) (permitting counterclaim to be brought in separate action because compulsory counterclaim rule does not apply to associate circuit court actions). Here, even though many class members were taken to associate circuit court, they were not required to assert the current claims as counterclaims.[9] Therefore, Res judicata doesn't apply.

Moreover, the class members are ***not*** seeking to overturn final judgments (nearly all of which are default judgments). Rather, the class members seek damages under § 9-625. They also seek injunctive remedies

[9] GCAC relies heavily on language in *King Gen. Contr. v. Reorganized Church* stating: "Unlike collateral estoppel, [res judicata] applies not only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." 821 S.W.2d 495, 501 (Mo. banc 1991). GCAC's reliance on this case is misplaced. The very next sentence clarified this means "a party may not litigate an issue and then, upon an adverse verdict, revive the claim on cumulative grounds which could have been brought before the court in the first proceeding." *Id.* Because all of the judgments were by default or consent, no issues were litigated and the class members aren't seeking to revive claims on cumulative grounds because they never asserted their claims in the prior litigation. Nor does *King* and its progeny suggest res judicata should be applied to make permissive counterclaims in an associate circuit division otherwise compulsory.

available under § 408.562, which authorizes a court to "provide such equitable relief as it deems necessary and proper" to remedy violations of "sections 408.100 to 408.561." The availability of these remedies is a merits inquiry no court has had reason to review yet.

G. Judicial estoppel is inappropriate here.

GCAC's separate arguments concerning the defense of judicial estoppel, like its other arguments, rely upon the rejected statistical analysis of its "expert." That analysis posited that over 1,100 class members have had their claims extinguished due to previous bankruptcy litigation, even though the expert reviewed only 114 data points. As with other things the "expert" said and did, Respondent was free to disregard and disbelieve.

In its argument to this Court, GCAC didn't discuss the elements required for asserting the defense of judicial estoppel: (1) a prior inconsistent position was taken; (2) the prior position was accepted by a judicial entity; and (3) the party asserting the inconsistent position will "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo. App. 2007).

Moreover, GCAC neglects the fact judicial estoppel is a discretionary tool provided to the circuit court. "[J]udicial estoppel is not a mandatory doctrine, but rather is an equitable doctrine, invoked by a court at its discretion." *Loth v. Union Pac. R. Co.*, 354 S.W.3d 635, 638 (Mo. App. 2011). Courts should

"seldom" grant summary judgment based on judicial estoppel. *Id.* at 643. That concern is amplified when a party is requesting a court to do so on a motion for class certification. GCAC fails to show how the circuit court clearly abused its discretion in choosing not to apply this discretionary tool at the class certification stage.

Further, Respondent has found no Missouri case in which judicial estoppel was used as a defense to class certification. The federal courts have heard such arguments, but generally grant class certification and rule on judicial estoppel during the later summary judgment proceedings. *See, e.g., Kunstman v. Aaron Rents, Inc.*, 2014 WL 1388387 (N.D. Ala. 2014) (after granting conditional certification, granting summary judgment against plaintiffs who "opted-in" to the class); *Burroughs v. Honda Mfg. of Alabama, LLC*, 2011 WL 13069513 (N.D. Ala. 2011). This Court should take the same approach and allow Respondent to address affirmative defenses based on judicial estoppel during the summary judgment phase.

Even though judicial estoppel has been used by some federal courts to dissolve class claims at summary judgment, those cases have generally

involved "opt-in" classes. *Id.*[10] This case involves an "opt-out" class under Rule 52.08(b)(3). *See* Rule 52.08(c)(2). This distinction is important:

> This court also finds that opting in to a class qualifies as taking a position in a case. … Indeed, to find otherwise would allow the Plaintiffs to circumvent the doctrine of judicial estoppel without any sound policy rationale for doing so. By specifically and deliberately signing a form that clearly made them party plaintiffs to this lawsuit, Plaintiffs knowingly joined this case which obligated them to disclose their participation to the bankruptcy court.

Kunstman, 2014 WL 1388387 at *6. Here, however, absent class members neither opt-in to the class nor sign forms that make them party plaintiffs to this lawsuit. Thus, class members aren't affirmatively taking an inconsistent position as is required for judicial estoppel to apply. *Kirk v. Schaeffler Grp. USA, Inc.*, 887 F.3d 376, 385 (8th Cir. 2018) ("Missouri courts routinely reject invitations to apply judicial estoppel upon determining that two positions are not clearly inconsistent."); *Cruz v. Dollar Tree Stores, Inc.*, No. CV 07-2050 SC, 2010 WL 4807072, at *1 (N.D. Cal. Nov. 19, 2010) ("The Court denies Defendant's Motion for Summary Judgment Based on Bankruptcy Filings. The Court is not persuaded that absent class members who have filed for

[10] These cases from the Eleventh Circuit predate *Slater v. U.S. Steel Corp.*, which overruled "the portions of *Burnes* and *Barger* that permitted the inference that a plaintiff intended to make a mockery of the judicial system simply because he failed to disclose a civil claim." 871 F.3d 1174, 1185 (11th Cir. 2017). The latest holdings by the federal appellate courts show judicial estoppel shouldn't overzealously be applied. *Metrou v. MA Mortenson Co.*, 781 F.3d 357 (7th Cir. 2015).

bankruptcy and who have not opted out of this case should be judicially estopped from being part of the class. Their participation in this class action is too passive for the equitable doctrine of judicial estoppel to apply."). Nor can it be said absent class members with no need to opt-in, like this case, are "gaming the judicial system." *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 290 (Mo. App. 2017); *E.E.O.C. v. Tobacco Superstores, Inc.*, No. 3:05CV00218-WRW, 2008 WL 2328330, at *8 (E.D. Ark. June 4, 2008) (applying 8th Circuit law) ("Since the class members did not file this action, they are not a party to this action, and they have no control over the EEOC's decision to bring this action, I will not expand the doctrine of judicial estoppel to hold that the class members abused the judicial process when they are not in control over the case.").

H. A statute of limitations defense isn't properly considered during the class certification stage.

GCAC's attempt to justify the premature consideration of its statute of limitations defense fails under Missouri law. In *Craft*, the defendants argued the application of a statute of limitations created an issue with predominance because certain individual claims were untimely. 190 S.W.3d at 383. But the court held "the fact that an affirmative defense may be available against certain individual class members and affect them differently does not, by itself, show that individual issues predominate." *Id.* The court went on to state

"[d]ifferences in the application of the statute of limitations to individual class members do not preclude certification." *Id.*

GCAC's arguments also lack merit because the six-year statute of limitations in § 516.420 applies. *See Baker v. Century Fin. Grp., Inc.*, 554 S.W.3d 426, 428 (Mo. App. 2018), transfer denied (July 3, 2018), transfer denied (Sept. 25, 2018) (rejecting the holding in *Rashaw*).

I. Superiority is satisfied.

GCAC's sixth separate allegation of error in point one concerns the element of superiority. Under Rule 52.08(b)(3), a class action must be shown to be the superior method for adjudicating the claims at issue.

GCAC's argument is its "expert's" affidavit combined with its affirmative defenses show that a class action suit isn't preferable. Once again, however, the circuit court was free to disregard or disbelieve the proffered statistical evidence, and the court correctly avoided prematurely adjudicating GCAC's affirmative defenses.

Moreover, even if some individual issues exist (they don't), a class action suit would remain the superior method for resolving the dispute. The courts have accepted many ways in which individual issues can be resolved in class action proceedings. Individual issues can be "handled through streamlined mechanisms such as affidavits and proper auditing procedures." *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1030 (7th Cir. 2018) (internal quotations

omitted). Therefore, despite GCAC's claim a number of individual issues will need to be resolved here, the class action mechanism remains superior.

The superiority element includes four factors to be considered by Respondent, all of which he considered and found to weigh in favor of class certification. To the extent GCAC argues otherwise, it relies on (1) "expert" testimony Respondent wasn't required to credit; and (2) affirmative defenses he was right not to consider at this stage of the litigation.

For all the reasons stated above, the Court should deny point one.

II. The circuit court couldn't review the merits of Weatherspoon's arguments at the class certification stage and was required to determine if common issues of fact or law predominate over individual issues; in this regard, whether Section 408.553 prohibits the accrual of interest after default and before judgment is one example of a common legal question predominating over individual issues.

Though GCAC wishes to debate the merits of Weatherspoon's contention regarding prejudgment interest under Section 408.553, this Court has emphasized the class certification stage isn't the proper time to decide the merits of claims. *Meyer*, 220 S.W.3d at 715. Not only is it improper to consider the merits of a class action suit during this phase of the proceedings, a circuit court actually "has no authority to conduct a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits." *Id.* Thus, GCAC is arguing the circuit court clearly abused its discretion by refusing to do something it had no authority to do.

A. The question for the circuit court was whether common questions predominate, not who will win on the merits.

GCAC vigorously encourages this Court to make premature merits determinations. But "[a] class certification hearing is a procedural matter in which the sole issue is whether plaintiff has met the requirements for a class action … [and] the trial court has no authority to conduct a preliminary inquiry into whether the plaintiff … will prevail on the merits." *Elsea v. U.S. Engineering Co.*, 463 S.W.3d 409, 416 (Mo. App. 2015). As such, now isn't the time to jump into an analysis of the merits—whether concerning Weatherspoon's claims or GCAC's affirmative defenses.

Class actions are a firmly established part of the judicial process. Missouri has adopted specific mechanisms, rules, and regulations to guide the process. The first step of the process is for the court to determine whether a class of persons with similar claims can and should be certified. *Dale*, 204 S.W.3d at 164. This certification process is a procedural process, where the court is to solely ensure a number of criteria are satisfied by the proposed class. *Id.* at 165. The rules make clear this first step of the process isn't a substantive merits evaluation. *Hope*, 353 S.W.3d at 74. If the procedural requirements are satisfied, the court is to grant certification. *Elsea*, 463 S.W.3d at 416. In fact, even if it is a close call, the court should err on the side of caution and grant certification. *Id.*

Under *Green v. Fred Weber, Inc*, a circuit court may look to the applicable elements of a claim before granting class certification. 254 S.W.3d 874, 880 (Mo. banc 2008). But this doesn't change the certification process into a merits evaluation. In *Green*, this Court found under the circumstances involved there, it was necessary to determine the elements of the relevant claim to determine if the common questions of law and fact were predominant issues (one of the procedural criteria). *Id.* at 881. If the common questions between the class members had no relation to the elements of the claim, the common questions wouldn't assist in the resolution of the legal claim and the procedural criteria wouldn't be satisfied. *Id.* But the Court ended the analysis there, noting "class certification is independent of the ultimate merits of the lawsuit." *Id.* at 880–81.

At no point in *Green* did the Court determine whether the class members would be successful in their nuisance claim, or whether the class members had a meritorious argument. On the contrary, this Court found "[t]he trial court has no authority to conduct an essentially binding preliminary inquiry into ultimate liability issues when it is making the threshold, procedural determination of class membership." *Id.* at 884. For example, an element of a nuisance claim requires the Court to determine whether a nuisance exists. The Court didn't analyze the definition of "nuisance," and didn't determine if the underlying facts of the class action could possibly constitute a nuisance.

Weatherspoon agrees that *Hope* is instructive, but not for the proposition stated by GCAC. There, the court restated the rule from *Green*: "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." *Id.* at 81. In other words, the elements of a claim may be determined to ensure the issue of predominance is satisfied. In that case, the defendants asserted an MMPA claim was not suitable for class certification because a number of individual legal issues were involved in the claims. *Id.* at 82. The court, however, concluded there was a common legal issue involved in the MMPA claim: Did the defendants fail to disclose something? *Id*. at 83. This question was common to all class members and predominated over any individual legal issues. *Id.* Thus, certification was proper. There was no need to define "disclose" or determine whether it was possible for the class to ultimately succeed with its claim; the Court simply determined predominance was satisfied.

GCAC focuses on the implied warranty UCC claim involved in *Hope*. But a fair reading of the case demonstrates *Hope* doesn't require courts to evaluate the merits of the proffered claims during the class certification stage. To establish a breach of an implied warranty, damages must be shown. *Id.* at 91. In *Hope*, the plaintiff admitted a significant portion of the class hadn't experienced damages. *Id.* Thus, predominance wasn't established. *Id.* at 92.

The court had no need to address the merits because by the plaintiff's own admission, the existence of damages wasn't common to class members.

GCAC believes the circuit court can only certify predetermined or well-settled questions of law. But again, the class certification stage is a procedural step during which the court merely decides if the requirements for a class action have been satisfied. *Meyer*, 220 S.W.3d at 715. The legal questions are identified, and the court must determine if these legal questions are common to the class and whether they predominate over any individualized issues. The legal questions aren't decided as part of the class certification stage. To the extent GCAC is concerned about whimsical claims, a motion to dismiss is more than capable of handling them. *See Craft*, 190 S.W.3d at 384.

Here, there are no formal elements required for Weatherspoon and the classes to successfully assert their claims. Rather, Weatherspoon must simply show the relevant statutes were violated and that she is entitled to statutory damages. *Boulevard Bank v. Malott*, 397 S.W.3d 458, 467 (Mo. App. 2013) (explaining a debtor need not even allege "actual damages" under § 400.9-625(c)(2), because the statute "provides a minimum statutory, damage recovery for a debtor independent of a showing of damage"); *Show-Me Credit Union v. Mosely*, 541 S.W.3d 28 (Mo. App. 2018) (same); *Savino v. Computer Credit, Inc.*, 164 F.3d 81, 86 (2d Cir. 1998) ("All that is required for an award of statutory damages is proof that the statute was violated"); *Brockbank v. Best*

Capital Corp., 534 S.E.2d 688 (S.C. 2000) ("In light of the undisputed fact that Creditor failed to give the required notice to Debtor, the trial judge erred in denying Debtor's motion for partial summary judgment on liability in the Article 9 cause of action"); *Muro v. Hermanos Auto Wholesalers, Inc.*, 514 F.Supp.2d 1343, 1352-53 (S.D. Fla. 2007) (granting summary judgment because the defendant's notification lacked some of the required elements and failed as a matter of law, so the plaintiff gets statutory damages).

The relevant statutes here are Sections 408.553, 408.554, 408.555, 408.556, 400.9-602, 400.9-611, 400.9-614, 400.9-616, 400.9-623. If Weatherspoon can establish a violation of one of these statutes, she will then argue she is entitled to statutory damages under § 400.9-625(c)(2). As determined by the trial court, Weatherspoon presented sufficient facts to state a claim that GCAC violated these statutes and she is entitled to statutory damages. Therefore, the legal questions have been identified, the court determined these were legal questions common to the class, and the court determined these legal questions predominated over any individualized issues. Respondent didn't clearly abuse his discretion.

B. Section 408.553 isn't determinative of this dispute.

Since moving for class certification, Weatherspoon has maintained that "the principal legal questions common to [her] and each class member" involve "whether GCAC's form right to cure, presale, and post-sale notices complied

with Chapter 408 and the UCC." (A083). GCAC tries to single out one provision in Chapter 408 to destroy certification, but that provision presents only a single question of law—one of nine, actually (A0084-85)—to be decided later during the merits stage. How that single question of law is ultimately decided isn't determinative of class certification or of the entire lawsuit.

In her motion for class certification, Weatherspoon identified many questions of law and fact common to all class members, including: (1) does the language within the form right-to-cure notices violate Section 408.554 and (2) did the form presale notices improperly state the rules for redemption in violation of Sections 400.9-602, 400.9-614, and 400.9-623 of the UCC? Only the ninth and last enumerated question of law involves Section 408.553, and the ultimate resolution of this legal issue on the merits has no bearing on the other predominant questions of law. Thus, a later "win" for GCAC on common question nine won't result in the decertification of the classes.

C. Section 408.553 creates a predominant legal question.

After class certification, GCAC may present arguments to show why it believes Weatherspoon won't succeed on the merits of common question nine. Weatherspoon plans to press her best arguments, too. The fact both sides will engage on this question of law supports the conclusion it's a predominant question. And at this stage of the litigation, predominance is all Weatherspoon must show, not that she will prevail on common question nine. Class

certification "requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013).

D. Weatherspoon's Section 408.553 claim is supported by the plain language of Section 408.553 and recent precedent.

If the Court were to evaluate the merits of Weatherspoon's Section 408.553 claim, the Court would see Respondent didn't clearly abuse his discretion in allowing Weatherspoon to proceed with this theory of liability. Weatherspoon asserts GCAC's notices were unlawful under Section 408.553 in that GCAC calculated amounts due by including interest charged during the period between the date the debtor defaulted and the date of final judgment. In other words, GCAC attempted to collect interest that hadn't become due.

Section 408.553 was enacted in 1979 with the title, "Recovery Limitation." Laws of Missouri 1979 p. 578; *Bullington v. State* ,459 S.W.2d 334, 341 (Mo. banc 1970) ("the title of a statute is necessarily a part thereof and is to be considered in construction."). It provides:

> 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.

All parties agree § 408.553 limits recovery in certain consumer transactions to the amount "required to pay upon prepayment of the obligation," but a critical question is the date to calculate the "prepayment" amount: "upon default" or "on the date of final judgment." If the "prepayment" amount is calculated "upon default," then § 408.553 limits a creditor's right to recover prejudgment interest because prepayment waives any interest not yet due. *See* Prepayment Clause, Black's Law Dictionary (10th ed. 2014). If the "prepayment" amount is calculated "on the date of final judgment," then § 408.553 limits nothing because it would include the principal and interest due as of the date of judgment as agreed in the contract," which is the same a creditor would recover if § 408.553 didn't exist. *See Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992) ("The legislature is presumed not to enact meaningless provisions.").

By enacting Section 408.553, the legislature sought to prohibit compound interest. "Compound interest generally is not allowable on a judgment." *Wallemann v. Wallemann*, 817 S.W.2d 548, 549 (Mo. App. 1991). "Compound interest is interest upon interest; where accrued interest is added to the principal sum and the whole treated as a new principal for the calculation of interest for the next period." *Id.* "Simple interest is interest computed ***solely on principal***." *Id.* (emphasis added). Section 408.553 allows post-judgment interest "at the simple interest equivalent of the rate provided in the contract."

If the underlying judgment includes prejudgment interest, there would be interest upon interest because the prejudgment interest was added to the principal sum and the whole treated as a new principal (*i.e.* the judgment balance) for calculation of post-judgment interest.

Only one state appellate court has reviewed this question: *Hollins v. Cap. Solutions Invs. I, Inc.*, 477 S.W.3d 19 (Mo. App. 2015). In a concurring opinion signed by the majority, the Eastern District Court of Appeals stated, "This statute indicates interest on these types of loans does not begin to accrue until the date of a 'final judgment' … Therefore, the trial court's judgment, which includes $729.90 in interest from the date the debtor defaulted until the date of the default judgment is in violation of the statute." *Id.* at 29. Though this is the only appellate opinion discussing the interpretation of Section 408.553, GCAC makes no mention of it.

While only one appellate opinion has discussed the proper interpretation of § 408.553, several circuit courts have addressed this exact issue, including: *CSAC, Inc. v. Crawford*, No. 1522-AC03346-02 (22d Cir. July 28, 2017), *Midwest Accept. Corp. v. Rivers*, No. 1722-AC10854-01 (22d Cir. Oct. 31, 2018), and *The Loan Company v. Sims*, No. 1422-AC04574-01 (Mo. Cir. Jun. 27, 2018). All three courts addressed this exact issue and determined the *Hollins* concurring opinion stated the proper interpretation of § 408.553. *Sims*'

provided the most in-depth analysis, relying on the plain language of § 408.553 and *Hollins*'s:

> To begin with, the section heading is entitled "Recovery Limitation", suggesting to the reader that the legislature intended to limit the recovery on consumer installment loans. Looking at the body of the section it is clear to this [C]ourt that the legislature intended that lenders be able to recover "no more than the amount which the borrower would have been required to pay upon prepayment of obligation", suggesting that the total prepayment amount is the limit on recovery. "On the date of the final judgment" meaning the date the judgment is final. "Together with interest thereafter" meaning the date of final judgment interest will accrue. "At the simple interest equivalent of the rate provided in the contract" meaning … the application of the stated and agreed upon interest rate in the contract to the judgment amount.

Sims, No. 1422-AC04574-01 (Order of Partial Summary Judgment p. 4).

Therefore, according to *Hollins*, *CSAC*, *Midwest Accept.,* and *Sims*, the amounts stated in GCAC's presale and post-sale notices to the class members were inflated. GCAC unlawfully charged the class members with interest prior to obtaining any final judgment. Therefore, based on the form notices, it appears GCAC acted unlawfully in every claimant's situation. As a result, this is a proper issue for class certification and Respondent didn't clearly abuse his discretion in determining this was a valid issue whose merits must be litigated at a subsequent proceeding.

III. Whether GCAC sent defective right-to-cure notices is a red herring because GCAC unlawfully accelerated the loans and repossessed the vehicles.

GCAC contends it isn't the proper defendant in this class action because it supposedly didn't send the right-to-cure notices. This contention, however, contradicts GCAC's earlier assertion it was the entity that sent the notices. (A0081). In a prior notice of removal to federal court, GCAC stated it was assigned accounts "to provide the requisite notices of default." (A0081 ¶ 2). Even if GCAC now denies this assertion, it created a common issue of fact that predominates over any individualized issues.

Moreover, GCAC ignores it was the entity that accelerated the loans and repossessed the vehicles. These were actions taken by GCAC and these are the unlawful actions GCAC is defending. Regardless of who attempts to give notice, Section 408.555.1 precludes accelerating a contract, taking possession of a vehicle, or otherwise enforcing a security interest "until twenty days after a notice of the borrower's right to cure is given." § 408.555.1; *Mo. Credit Union v. Diaz*, 545 S.W.3d 856, 859 (Mo. App. 2018). Therefore, even if GCAC can be believed that it didn't send any of the improper notices (despite what it told the federal court), the improper accelerations of the loans and improper repossessions are actions attributable to GCAC.

As much as GCAC wants to spin itself out of liability, it's being sued because it either: (1) mailed defective notices, (2) acted upon defective notices,

or (3) never sent right to cure notices at all before takings actions not allowed by Section 408.555.1. The right-to-cure notices are deficient and whether GCAC sent them, GCAC had no right to accelerate the loans or repossess the vehicles—because these acts are prohibited by Section 408.555.1 until lawful notice is provided. The assignee liability argument is a red herring.[11] Regardless of whether GCAC sent the notices, liability still exists.

IV. In applying Rule 52.08(b)(3), Respondent didn't clearly abuse his discretion in finding the predominance requirement met.

Under Rule 52.08(b)(3), the trial court was required to find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." The trial court, here, held

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[11] Consistent with its track record, GCAC completely misrepresents *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), saying the United States Supreme Court "dismiss[ed] the class action where class did not assert any injury in fact," and this Court should "follow *Spokeo* and dismiss [the] class action…." Relator's Brief pp. 76–77. The Supreme Court didn't dismiss the case. *Spokeo*, 136 S. Ct. at 1550. The Court remanded the case, explaining "the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, [so] its standing analysis was incomplete." *Id*. Further, *Spokeo* cannot be used to support a standing argument, because the Court expressly stated "***[w]e take no position*** as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct." *Id*. (emphasis added). On remand, the Ninth Circuit explained "[t]he Court did not call into question our conclusions on any of the other elements of standing," the Supreme Court merely "held our analysis was incomplete." *Robins v. Spokeo*, Inc., 867 F.3d 1108, 1111 (9th Cir. 2017), cert. denied, 138 S. Ct. 931, 200 L. Ed. 2d 204 (2018). Ultimately, the Ninth Circuit found ***the plaintiff had standing*** (*i.e.*, Robins sufficiently established an injury-in-fact). *Id*. at 1118 (emphasis added).

the class's claims were based on "language in form documents" and the interpretation of these form documents create common issues that "predominate over any individual issues." (A006). This finding is rooted in the relevant pleadings and the evidence presented, and Respondent didn't clearly abuse his discretion by reaching this conclusion.

A. Standard for Predominance.

The trial court is required to determine "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" prior to granting class certification. Rule 52.08(b)(3). The objective is to ensure the "class action promises important advantages of economy of effort and uniformity of result." *Am Fam.*, 106 S.W.3d at 489.

The trial court, however, wasn't required to go through an exhaustive merits determination to ensure the predominance requirement was satisfied. This requirement "does not demand that every single issue in the case be common to all the class members." *Id.* at 488. Rather, the trial court was simply required to find "that there [was] substantial common issues which predominate over the individual issues." *Id.* (internal quotations omitted).

As such, "[t]he predominant issue need not be dispositive of the [entire] controversy or even be determinative of the liability issues involved." *Cordonnier*, 357 S.W.3d at 600 (internal quotations omitted). Similarly, predominance can even exist whenever "the suit also entails numerous []

individual questions," such as "questions of damages or possible defenses to individual claims." *Am. Fam.*, 106 S.W.3d at 488. The trial court is simply required to determine that a "single common issue [] predominates over other individual issues." *Green*, 254 S.W.3d at 881. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Elsea*, 463 S.W.3d at 419.

B. Predominance exists here.

As the trial court properly held, the form documents involved in the members' claims render predominance easily satisfied. At the heart of this dispute, the certified classes are simply seeking to determine whether GCAC violated any statutory provisions through its form documents and uniform business practices, and ultimately, whether those violations are sufficient to provide the claimants with uniform statutory damages. "Claims arising from interpretations of form contracts appear to present the classic case for treatment as a class action." *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017) (finding "the commonality and predominance requirements of [FRCP] 23(b) are satisfied" because every contract was "identical or substantially similar"). Likewise, the claims of Weatherspoon and the Class are based on the interpretation of identical or substantially similar form notices and present a classic case for class action treatment. Although it's possible there might be individual questions regarding burden of proof and affirmative defenses, the

form documents at the heart of this dispute readily satisfy the predominance requirement. Respondent didn't clearly abuse his discretion in finding predominance satisfied.

1. There are predominant issues regarding the legality of GCAC's presale notices.

The certified classes plan to litigate the question of whether GCAC's form presale notices were unlawful. One way in which the classes allege the form notices are unlawful is that they violate Sections 400.9-602, 400.9-614, and 400.9-623 by impermissibly restricting redemption options. Specifically, the classes allege GCAC improperly limited payment options to redeem the collateral.

The classes have alleged and introduced evidence showing GCAC mailed form presale notices to each class member. (A00891-92). They have acknowledged the form presale notices have changed a few times over the years, but there are only a limited number of form notices sent by GCAC and all contain the same issue: they unlawfully limit redemption options. Before January 10, 2009, GCAC's form presale notice stated that "[a]ll payments to redeem must be by cash, certified check or money order." (A00103-106). The form presale notice used from January 10, 2009 until some point in 2014 stated "[a]ll payments to redeem must be made in CASH only." (A00103-106). The final iteration of the form presale notice shows GCAC removed the unlawful

limitation on payment methods (A00107), but GCAC's corporate representative testified that—despite the change in the form—GCAC continued to allow redemption only in cash. (A00263-64).

Despite GCAC's assertions, the use of unlawful redemption language in the form presale notices was a "uniform policy or practice." The trial court was presented three form presale notices, and either by uniform language or uniform practice, GCAC limited the class members' payment options for redemption. Therefore, a common and predominate question exists regarding the legality of this limitation on redemption. Other common and predominate questions remain regarding the presale notices—including whether they misstated the date of the sale or type of sale—but a single common and predominate issue has been demonstrated regarding the presale notices and, therefore, additional discussion of the other issues is unnecessary. *See Green*, 254 S.W.3d at 881 (holding the trial court didn't need to identify a second predominant issue because "a single common issue that predominates over other individual issues can satisfy the predominance requirement.").

2. GCAC's form post-sale notices pose a common and predominant question.

The certified classes also present a common and predominate issue regarding the legality of GCAC's method for calculating the amounts-due listed on each post-sale notice. Specifically, Plaintiffs claim GCAC, as a matter of

regular course, unlawfully calculated amounts-due by including interest barred by Section 408.553. Under Section 408.553, GCAC was prohibited from charging interest during the period between the declaration of default and final judgment. Nevertheless, the post-sale notices uniformly demonstrate GCAC was including the unlawful interest in its calculations of amounts-due.

GCAC's argument regarding the post-sale notices is difficult to decipher. The argument largely states generalizations such as the notices "var[y] from person to person," but it appears GCAC is specifically arguing the issues with the post-sale notices are not common and predominant because the amounts-due vary from class member to class member (resolution "would entail numerous accounting inquiries particular to each individual plaintiff").[12] But, this is a misstatement of the issue. The classes aren't specifically challenging the amounts-due listed on each post-sale notice. Rather, they are challenging GCAC's method of calculating amounts-due and asserting GCAC included unlawful interest in its formula. This issue poses a predominate question common to all claims.

[12] In GCAC's final argument under Point Relied On VI, GCAC more specifically states it believes the interest issue under Section 408.553 would require the court to "delve into individual account actions."

3. GCAC's right-to-cure notices also raise a common and predominant issue.

GCAC's form right-to-cure notices sent to all class members violate Section 408.554 because they don't strictly comply with the statute. Specifically, they don't include mandatory statutory language. GCAC argues this isn't a predominating issue, because a "Right to Cure notice claim" has several elements that will require individualized proof from each class member. GCAC, however, fails to cite a single case to support its contention that a claim for violation of Section 408.554 requires proof of the five elements it lists.[13] In fact, a recent appellate decision demonstrates these five elements don't exist. *Diaz*, 545 S.W.3d 856. In *Diaz*, the court held a lender must "strictly

[13] GCAC cites *Burrill v. First Nat. Bank of Shawnee Mission* to support the existence of the supposed elements regarding damages. 668 S.W.2d 116, 118 (Mo. App. 1984). This case, however, has never been cited by another appellate court of Missouri. In fact, aside from an unreported case written by the Superior Court of Connecticut, Weatherspoon's counsel couldn't find any cases that referenced *Burrill*. *See Boston Safe Deposit & Tr. Co. v. Brooks*, No. CV 90-0376176S, 1993 WL 78164, at *2 (Conn. Super. Ct. Mar. 3, 1993).

GCAC's argument under *Burrill* is a misstatement of the law and could be considered misleading and disingenuous. First, the *Burrill* case never states the two elements stated by GCAC. Moreover, the *Burrill* case is clearly distinguishable from Weatherspoon's. It involves a post-trial claim of error where the appellate court was determining whether a prejudicial error occurred at the trial court. Therefore, the language cited in GCAC's brief regarding "material error" and "prejudice" was the language the appellate court was required to use to determine whether a prejudicial error occurred to justify overturning the trial court's holding—the appellate court wasn't creating a new prejudice element necessary for establishing a "Right to Cure notice claim."

comply" with Section 408.554 before accelerating a loan, before obtaining a deficiency judgment, and before it can enforce against collateral. *Id.* at 860 (explaining "deficiency judgments after repossession of collateral are in derogation of the common law"). There, a single violation of § 408.554.1—without any regard to the supposed five elements—constituted a breach of statute and rendered the lender unable to obtain a deficiency judgment. *Id.*

Even if GCAC's phantom elements were correct, they wouldn't defeat predominance for the classes' claims about the right-to-cure notices. GCAC states the first element requires each debtor to prove the collateral wasn't voluntarily surrendered. The claims of improper right-to-cure notices, however, are only made by Class 2. And Class 2 is defined to include only those debtors who have had "the possession of their collateral taken … involuntarily."

The second element supposedly requires this to have been each debtors' first default. But no matter what default number this was for each debtor, GCAC was required to send a statutorily compliant right-to-cure notice. As the *Diaz* court stated, repossession cannot occur if a non-compliant right-to-cure notice was sent to the debtor. *Id.* at 862.

The third element supposedly requires the defaults to have only been "for failure to pay the required payments." This issue, however, has no role in determining whether the form right-to-cure notices violated § 408.554 by

leaving out mandatory statutory language. Moreover, even if this proof were necessary, it could be easily obtained through a mechanical and ministerial review of GCAC's records. *Elsea*, 463 S.W.3d at 419 ("A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions."). It takes little effort to determine the cause of default.

And finally, the supposed fourth and fifth elements of a "Right to Cure notice claim" look at damages and whether "actual damages" have been shown. But here, the classes have presented another common and predominating issue: does § 9-625(c)(2) create statutory damages for violations of UCC provisions. Even if actual damages had to be shown, this Court has rejected the contention that the need to prove actual damages defeats predominance. *Cordonnier*, 357 S.W.3d at 600 (holding "predominance is not precluded when there needs to be an inquiry as to individual damages.").

C. Conclusion for Point IV

The issue of predominance is readily satisfied here. The general issue of whether GCAC adhered to statutory requirements when repossessing and collecting on loans predominates over the entire dispute. Moreover, the questions regarding the presale, post-sale, and right-to-cure notices predominates over the litigation. And finally, the certified classes present an additional common and predominate question as to the availability of statutory

damages under § 9-625(c)(2). Therefore, the trial court did not clearly abuse its discretion in determining predominance was satisfied.

V. Weatherspoon is a proper class member.

The trial court certified two classes and named Weatherspoon a proper class representative. To make this determination, the trial court was required to find: (1) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and (2) "the representative parties will fairly and adequately protect the interests of the class." Rule 52.08(a). In other words, the named class representative must have claims typical of the class and must adequately protect the interests of the class. In finding "typicality" and "adequacy," the court held "Weatherspoon's claims are typical of the claims she asserts for the classes," and "Weatherspoon has met [the adequacy] requirement." (A0005).

GCAC objects to Weatherspoon's role as the class representative, alleging Weatherspoon isn't a member of the certified classes. GCAC arrives at this conclusion by analyzing the merits of Weatherspoon's claims and determining Weatherspoon wasn't entitled to a lawful right-to-cure notice (an essential feature of Class 2). Therefore, according to GCAC, Weatherspoon's claims aren't typical of the class claims, so she isn't adequate.

A. Weatherspoon has presented sufficient allegations and evidence to demonstrate her claims are typical of the class; now isn't the time to debate the merits of those claims.

While Missouri courts are to ensure class representatives are members of the certified classes they claim to represent, this analysis requires no in-depth review of the merits of the representatives' claims. "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Hale v. Wal-Mart Stores Inc.*, 231 S.W.3d 215, 223 (Mo. App. 2007). Generally, a summary review of the claims made by the class representative versus the claims made by the class will be satisfactory. *Savannah R-III Sch. Dist. v. Pub. Sch. Retirement Sys. of Mo.*, 950 S.W.2d 854, 858 (Mo. banc 1997). For example, in *Savannah* the Court was able to determine the named class representatives didn't possess the same claims as a number of the class members by simply looking at the claims being made. *Id.* The named representatives were all school districts while a claim by the class regarded the constitutionality of a statute geared toward individual teachers. *Id.* Since no teachers were named representatives, the school district representatives were not adequate representatives of the class. *Id.*

Here, Weatherspoon claims she had her vehicle repossessed, she was mailed presale, post-sale, and right-to-cure notices, and those notices were unlawful. These are the same claims made by the classes. As has been the case throughout GCAC's briefing, GCAC is anxious and eager to debate the merits of the claims. But again, this isn't the time to debate the merits of a classes' or any class members' claims. *Meyer*, 220 S.W.3d at 715 (holding the trial court

had no "authority to conduct a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits"). At this point in time, the courts are to accept the classes' allegations as true and construe all evidence in favor of the classes. *Elsea*, 463 S.W.3d at 417.

B. Weatherspoon presents a claim based on the statutorily invalid right-to-cure notice she received.

If the Court so desires to review the merits of GCAC's assertion that Weatherspoon cannot satisfy the "elements" of a right-to-cure claim, GCAC still falls short. First and foremost, as demonstrated in the response to Point Relied On IV, the stated "elements" required for presenting a right-to-cure notice claim have no foundation in precedent. GCAC cites no precedent to support these elements and Respondent has found no case either. Rather, Section 408.554 provides a right-to-cure notice isn't always required, but if a notice is sent it "shall" be written in a certain form and certain information "must" be included. Based on the plain language of the statute, failing to strictly follow one of these enumerated requirements violates Sections 408.554 and 408.555. *Diaz*, 545 S.W.3d at 862. The plain language of the statute doesn't impose the various "elements" asserted by GCAC. Nevertheless, Weatherspoon has made sufficient allegations and provided sufficient evidence to satisfy the "elements" stated by GCAC.

1. Weatherspoon's vehicle was involuntarily taken by GCAC.

Class 2 contains those persons who have had "the possession of their collateral taken by GCAC involuntarily." (A0010). Weatherspoon is part of this class because she had her vehicle taken involuntarily. GCAC challenges this assertion because Weatherspoon has testified she "voluntarily surrendered" the vehicle, intending to convey that GCAC or a hired repossession company didn't physically take the car. This testimony, however, isn't sufficient to remove Weatherspoon from the class for several reasons.

Under the proper standard of review for class certification, the court is to accept allegations as fact, view all evidence in the light most favorable to certification, and ignore contrary evidence. Here, Weatherspoon has alleged her vehicle was involuntarily taken (A00885). Moreover, Weatherspoon testified both repossessions of her vehicle were involuntary and she didn't give GCAC permission to repossess the vehicle the second time. (Exh. 34, pp. 93-94; 137-40). Thus, there is evidence in addition to the allegation.

Second, "voluntary surrender" and "involuntary repossession" are legal terms and Weatherspoon isn't qualified to make a determination as to whether her actions constitute involuntary repossession or a voluntary surrender.

2. Whether this was Weatherspoon's first, second, or fifth default, she was entitled to a statutorily lawful right-to-cure notice.

Here, Weatherspoon defaulted, cured the default, and then defaulted again. After the first default, she received a statutorily non-compliant right-to-cure notice. Similarly, after the second default, she received a statutorily non-compliant right-to-cure notice. GCAC asserts Weatherspoon had no legal right to receive a second right-to-cure notice, but GCAC makes no mention of the first non-compliant notice. Moreover, whether Weatherspoon had a right to a second right-to-cure notice is a legal question reserved for debate at a later time.[14] Finally, whether Weatherspoon was entitled to receive a second right-to-cure notice, she received one and it was not compliant with Section 408.554.4.

3. Under the applicable standard of review, there are sufficient allegations and evidence to show Weatherspoon's default was a result of non-payment.

GCAC makes a further legal merits argument asserting Weatherspoon wasn't entitled to a right-to-cure notice because her default wasn't the result of non-payment, it was the result of a lapse in insurance. But again, allegations are to be accepted as fact during the class certification stage and any evidence should be reviewed in the light most favorable to certification. Here,

[14] Even if this debate occurred today, Section 408.555 requires a second right to cure notice. 14 Mo. Prac., UCC Forms Form 9:4052 (3d ed.)

Weatherspoon testified she always had insurance on the vehicle. (Exh. 34, pp. 49, 133). At this stage of the proceedings, that is sufficient to show Weatherspoon's default was the result of non-payment (as alleged).

Moreover, GCAC's "NOTICE OF DEFAULT" (form right-to-cure notice) provides "[i]f you pay the AMOUNT NOW DUE (immediately above) by the LAST DATE FOR PAYMENT (above) you may keep your vehicle and continue with the contract as though you were not late," which implies "failure to make a required payment" was the sole reason for default.

4. Weatherspoon was not required to suffer actual damages to properly assert a right-to-cure claim.

Finally, GCAC argues Weatherspoon isn't a member of Class 2 because she hasn't suffered actual damages, as is supposedly required to maintain a right-to-cure claim. But this same argument was made in Point Relied on IV, and it remains just as disingenuous now as it was then. First, GCAC cites Section 408.562 for the proposition that actual damages must be established, but this section is only a single statute providing damages for violations of the right-to-cure rules. The statute specifically states it is "[i]n addition to any other civil remedies or penalties provided for by law." Section 408.562. Here, Weatherspoon and the class are seeking damages under Section 9-625(c)(2).

Second, Weatherspoon again relies on the *Burrill* case for the proposition that prejudice must be shown. 668 S.W.2d at 117–18. As stated before, the

word "prejudice" was only used in the *Burrill* case because the appellate court was determining whether the claimed error was material or not (*i.e.*, determining whether the claimed error was prejudicial). The *Burrill* case never states prejudice must be shown to establish a claim based on a defective right-to-cure notice.

C. Conclusion for Point V

As is evident, GCAC is eager to argue the legal merits of Weatherspoon's claims. At this point in time, however, such an argument is improper. Weatherspoon has both alleged and provided evidence showing she received defective right-to-cure notices and had her vehicle involuntarily taken. Therefore, she is a member of Class 2, her claims are typical of the class, and she is a proper class representative. The trial court did not clearly abuse its discretion in reaching this conclusion.

VI. Weatherspoon is a proper class representative.

Weatherspoon's individual claims are premised on the defective notices mailed by GCAC and its unlawful acceleration and repossession. The presale, post-sale, and right-to-cure notices were all statutorily non-compliant, and Weatherspoon is entitled to damages based on GCAC's failure to adhere to the statutory regulations. Nevertheless, GCAC claims Weatherspoon has no stake or interest in this litigation and, therefore, her claims are moot. This argument,

however, is premised on an improper definition of mootness and an improper analysis of the merits of GCAC's affirmative defenses.

A. Weatherspoon's claims are not moot.

"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." *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001). A judgment has no practical effect whenever the judgment is completely "unnecessary or makes granting effectual relief by the court impossible." *Id.* The mootness doctrine is intended to prevent the court from issuing advisory opinions. *Mo. Mun. League v. State*, 465 S.W.3d 904, 908 (Mo. banc 2015). As such, it's often invoked when a statute's constitutionality has been challenged but, since the inception of the case, the statute has been repealed or replaced. *See, e.g., In re B.T.*, 186 S.W.3d 276, 277 (Mo. banc 2006) (holding the controversy was moot because the relevant statute was repealed and replaced).

Here, a judgment on the merits is requested to determine if GCAC sent Weatherspoon and the class members statutorily unlawful notices and whether Weatherspoon and the class members are entitled to statutory damages as a result. There is nothing moot about this controversy because the court is perfectly able to provide relief and an opinion wouldn't merely be advisory. Weatherspoon has plenty to either gain or lose through this lawsuit.

She received unlawful notices and had her vehicle repossessed. Now Weatherspoon seeks to recover damages for GCAC's statutory violations.

B. Affirmative defenses have no bearing on the issue of mootness.

Like a broken record, GCAC is again attempting to litigate the merits of this suit during the class certification stage of the proceedings. GCAC asserts: (1) it has an affirmative defense of setoff and recoupment; (2) it can and will successfully prove this affirmative defense; and (3) once this affirmative defense is applied to the damages calculation, it becomes clear Weatherspoon cannot walk away from this suit with any monetary compensation. This argument was rejected in *Vogt*, No. 2:16-CV-04170-NKL, 2018 WL 4937069, at *2 (denying decertification based on setoff: "The fact that that they did not sustain net damages does not mean that they had no injury and no standing to resolve the dispute.").

The *Vogt* decision follows this Court's consistent admonishment not to inquire into the merits on class certification. Cases across the nation have held: to consider affirmative defenses at the class certification stage is to improperly intrude into the merits of the case. *See Fraley v. Williams Ford Tractor & Equip. Co.*, 5 S.W.3d 423, 431-32 (Ark. 1999) (providing an extensive string cite of federal courts across the nation determining affirmative defenses play no role in the certification stage).

Second, affirmative defenses like setoff and recoupment are claims that have to be litigated. GCAC will have to present the court with evidence and satisfy its burden of proof before any determination can be made about setoff or recoupment. On the other hand, mootness is a threshold issue that can be determined based on the face of the claims. Whether Weatherspoon is able to walk away from this litigation with any monetary compensation has no bearing on the realness of this suit and a court's ability to effectuate relief.

Finally, these affirmative defenses do not render the claims moot because the classes seek to have the negative information from a wrongful deficiency removed from their credit reports. Even if monetary damages are not available, equitable relief can be provided.

VII. Weatherspoon's involvement in any previous litigation has no preclusive effect on the current claims.

This isn't the first time GCAC has faced litigation for its statutorily defective notices. In 2012, another consumer filed a counterclaim against GCAC based on violations of statutory presale notices. GCAC argues res judicata should be applied against Weatherspoon because Weatherspoon was granted permission to join that suit. But, Weatherspoon was never made a party to that suit. Therefore, the previous *Deaver* case has no bearing on the current claims.

A. Facts Pertinent to This Point

1. On August 8, 2011, General Credit Acceptance Company, LLC ("GCAC") sued David Deaver for a deficiency judgment. (B1–4).

2. On April 20, 2012, Deaver counterclaimed against GCAC, asserting a putative class action for violations of statutory presale notices. (B5–19).

3. On August 22, 2012, GCAC voluntarily dismissed its claims against Deaver with prejudice, leaving Deaver's counterclaim remaining. (B21).

4. On December 31, 2013, Deaver moved for class certification. (B23–27).

5. On February 24, 2014, Deaver moved for leave to amend his claim to add Plaintiff Helena Weatherspoon. (B28–31).

6. On March 6, 2014, the *Deaver* court granted "leave to Deaver to amend his counterclaim to add plaintiff and additional claims." (A00238).

7. On April 6, 2014, Deaver filed a First Amended Counterclaim attempting to name Weatherspoon as an additional named plaintiff. (B32–51).

8. But on April 25, 2014, the *Deaver* court struck Deaver's First Amended Counterclaim, and ordered that the case "proceed on Deaver's original counterclaim filed April 9, 2012." (B52).

9. Deaver asked the Circuit Court for reconsideration of his amended counterclaim, and at a hearing on the Motion to Reconsider, GCAC argued

Weatherspoon shouldn't be a part of Deaver's case. Instead, GCAC suggested Weatherspoon file a new, independent action: "They can file Ms. Weatherspoon's claim in another action. They can file it tomorrow, and she will not be prejudiced. If they want to have a claim based on these Right to Cure Notices or these Post-Sale Notices, they are not barred from doing that. They can do it tomorrow." (B59).

10. The Circuit Court later ruled that "Deaver [was] granted leave to add Plaintiff Helena Weatherspoon to original counterclaim." (A00244).

11. Despite being granted leave to join the *Deaver* counterclaim as a named party, Weatherspoon didn't join. And GCAC acknowledged this fact in a May 9, 2014 brief to support a motion for judgment on the pleadings. In that brief, GCAC noted that "Weatherspoon has declined to file any formal joinder in the Counterclaim against GCAC." (B66).

12. The fact that Weatherspoon wasn't a party to the *Deaver* case was reconfirmed when, for example, (A) at a May 30, 2014 hearing in *Deaver*, the only parties in attendance were GCAC and Deaver (*Deaver v. GCAC*, 11SL-AC28887); and (B) in a June 27, 2014 writ petition filed by GCAC, Weatherspoon was not identified as a party, and GCAC acknowledged that "Deaver is the only putative class representative." (B112, B113, B117, B118, B120, B121, B127).

13. The *Deaver* court also told the parties Weatherspoon wasn't a party to *Deaver* at the May 30, 2014 hearing: "Listen guys, let me try to repeat this, W[ea]therspoon isn't in the case anymore, so obviously, the scheduling order doesn't apply to her, okay. You can even do a memo to that [e]ffect, if you want to, just to make it absolutely clear on the record." (B109)

14. Three days after GCAC acknowledged that Weatherspoon had declined to join in Deaver's counterclaim, she filed her own action against GCAC—as GCAC suggested that she do at the hearing referenced in Paragraph 9 above—for violations of statutory presale notices. (B142–56).

15. A timeline of the pertinent pleadings, motions, hearings, orders, and other filings in *Deaver* and this case is attached to the Answer. (PPH 1–3).

B. Granting leave for an individual to become a party to a suit doesn't automatically make that individual a party.

Without any support rooted in law, GCAC suggests Weatherspoon became a party to the case as soon as Deaver was granted leave to add her as a party. But there are two steps for adding a party to a lawsuit. First, leave must be granted. Second, the court must accept the addition of the party. While Deaver was granted leave to add Weatherspoon as a party, the second step was never taken. Weatherspoon never became a party to the suit; the Circuit Court struck Deaver's First Amended Counterclaim and ordered that the case "proceed on Deaver's original counterclaim." (B52). It's undisputed Deaver was

the only named party on the original counterclaim. Weatherspoon's name only appeared on Deaver's First Amended Counterclaim that the court ultimately struck, which effectively denied Deaver's request to add Weatherspoon.

Granting leave, in and of itself, does nothing. For example, if a plaintiff is granted leave to amend his petition, the petition doesn't automatically become amended when leave is granted. Leave must be granted and then the plaintiff is authorized to submit an amended petition. Until the amended petition is filed and accepted by the court, nothing about the suit has change. As such, Black's Law Dictionary defines "leave of court" as "judicial permission to follow a nonroutine procedure." (10th ed. 2014). Leave provides a party permission to do something—leave doesn't by itself do anything.

In *Deaver*, the court granted leave to afford Deaver the opportunity to amend the counterclaim, add Weatherspoon, and assert additional claims. But the amended counterclaim adding Weatherspoon was stricken on May 1, 2014, and the case was to "proceed forward on Deaver's Original Counterclaim filed April 9, 2012"—a counterclaim that didn't include Weatherspoon. (B52). Deaver's motion to reconsider was denied and at the hearing GCAC stated: "They can file Ms. Weatherspoon's claim in another action. They can file it tomorrow, and she will not be prejudiced." In other words, GCAC acknowledged Weatherspoon wasn't a party to the suit as a result of the stricken counterclaim.

On multiple occasions GCAC acknowledged Weatherspoon wasn't a party to the *Deaver* case. For example, in a June 27, 2014 writ petition filed by GCAC in *Deaver*, Weatherspoon wasn't identified as a party, and GCAC acknowledged "Deaver [was] the only putative class representative." (*GCAC v. Deaver*, ED101633).

Weatherspoon was not a party to the *Deaver* action. The *Deaver* court said so to make it abundantly clear. But even if she had been, based upon the grant of leave to amend, neither res judicata nor claim preclusion have any effect here. After the Circuit Court struck Deaver's First Amended Counterclaim, the case "proceed[ed] forward on Deaver's Original Counterclaim," and that counterclaim was later voluntarily dismissed by Deaver. Under the plain language of the rules, a voluntary dismissal has no prejudicial affect and does not bar future litigation of the claims. *See* Rules 67.01 and 67.03.

VIII. GCAC's final point relied on presents no new legal or factual issues that require review by this Court.

GCAC essentially uses its final point relied on as an extended conclusion section. Rather than providing any new legal or factual arguments, GCAC summarizes its arguments and urges the Court to usurp the role of the trial court and issue an advisory opinion, an advisory opinion that would effectively

end the class action without affording the class (and the trial court) the opportunity to proceed as allowed under Rule 52.08.

Class actions are a firmly established part of the judicial process. Missouri has adopted specific mechanisms, rules, and regulations to guide the process. This process exists to "promote judicial economy by permitting the litigation of the common questions of law and fact of numerous individuals in a single proceeding." *Dale*, 204 S.W.3d at 164. The first step of the process is for the court to determine whether a class of persons with similar claims can and should be certified. *Id.* The class certification process is a procedural process in which the court is to ensure the class satisfies Rule 52.08's criteria. *Id.* at 165. This process is explicitly not a substantive merits evaluation. *Hope*, 353 S.W.3d at 74; *see also Meyer*, 220 S.W.3d at 715 (explaining class certification is a procedural matter where the sole issue is whether the requirements of Rule 52.08 have been satisfied). If the procedural requirements are satisfied, the court is to grant certification. *Elsea*, 463 S.W.3d at 416. In fact, even if it is a close call, the court should err on the side of caution and grant certification. *Id.*

In GCAC's final point relied on, it throws out many various arguments that have already been addressed throughout the other points. But GCAC uses these arguments to assert it would simply be unfair to permit the litigation to go forward. While GCAC may find this well-established process unfair, the

current class members find it unfair they had their vehicles repossessed despite fundamentally flawed notices. Here, Weatherspoon and the class members have shown the certification procedural issues have all been satisfied, and the trial court agreed. Therefore, the decision should not be disturbed, and the classes should be allowed to proceed with their claims to determine the merits of those claims.

GCAC claims the decision to certify the classes has placed it in a "mirror image of the death-knell situation." This is an argument made by every single defendant to a class action, asserting the certification of a class creates substantial undue pressure to settle regardless of the merits. Of course, GCAC is going to make this argument because the certification order is requiring GCAC to confront the possibility it sent unlawful notices or took unlawful action in thousands of cases. If the classes' allegations are correct, GCAC faces the possibility of paying substantial damages. But because every single defendant in a class action makes this same argument, this Court should follow the advice of the Sixth Circuit Court of Appeals: any "discussion" of the death-knell factor "must go beyond [] general assertion[s] … a defendant [] should provide the court insight into potential expenses and liabilities." *In re Delta Air Lines*, 310 F.3d at 960.

It is time to move beyond generalities. The trial court analyzed the factors required for class certification, determined class certification was

appropriate, and determined a class action was necessary to advance the class members' claims. If GCAC wants to claim this decision creates undue pressure to settle, it needs to come forward with specifics—something completely lacking from GCAC's briefing.

Rather, a recent decision out of Connecticut seems to describe the situation well: "defendant's analysis … is an unfocused, scattershot attack on the trial court's decision, effectively seeking de novo review. … [S]uch wholesale attacks rarely produce results, tend to cloud the real issues, and in themselves cast doubts on the appellants' claims." *Standard Petroleum Co. v. Faugno Acquisition, LLC*, 191 A.3d 147, 159 (Conn. 2018). Here, GCAC is no doubt throwing everything it has against the wall to see what sticks. The Court should not allow this approach to cloud the real issues. The trial court did not clearly abuse its discretion in certifying the current classes, and the claims should be allowed to proceed.

CONCLUSION

There "are situations in numerous substantive contexts in which even the most aggressive class action naysayers will not be able to conclude 'certification denied.' One can think of many such contexts—for example claims based on a single event, a common document, or a uniform business or discriminatory practice." Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 307

(2014).[15] To say GCAC is an aggressive class action naysayer is an understatement, but this case is a consumer case based on common documents and uniform business practices, so this case is ideal for class treatment. "[C]lass certification [is] proper given that there [is] a simple set of facts common to all class members applying the same legal theory under a uniform [] law where damages are statutorily set…." *Karen S. Little, L.L.C., v. Drury Inns, Inc.*, 306 S.W.3d 577, 584 (Mo. App. 2010).

For the reasons argued above, in Weatherspoon's Answer to GCAC's Petition for Writ of Prohibition, and in her Suggestions in Opposition, the Court should quash the preliminary writ issued in this matter.

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[15] Arthur R. Miller is considered one of this nation's leading scholars in the field of civil procedure, helped write the federal rule upon which Missouri Rule 52.08 is modeled, and is the co-author with the late Charles Wright of *Federal Practice and Procedure*. (A00497–501). This multi-volume series is considered an essential reference for judges and lawyers regarding civil procedure, including the procedure for class actions. *See, e.g.*, *Coca-Cola*, 249 S.W.3d at 861 (citing *Federal Practice and Procedure*); *Meyer*, 220 S.W.3d at 716 (same).

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Certificate of Service and Compliance

I certify that this brief was filed electronically with the Clerk of the Court on December 18, 2018, to be served by operation of the Court's electronic filing system on all counsel of record. I also certify that this brief complies with Supreme Court Rule 84.06(b) and contains 20,663 words, all inclusive, as determined by the Microsoft Word software used to prepare this document.

/s/ Jesse B. Rochman