IN THE
SUPREME COURT OF MISSOURI

NO. SC 97175

STATE EX REL. GENERAL CREDIT ACCEPTANCE COMPANY, LLC,

Relator,

v.

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

Respondent.

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

REPLY BRIEF OF RELATOR

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INTRODUCTION

As shown in the Relator's Brief, the Respondent Court abused its discretion in numerous ways on class certification. As a result, GCAC is being sued by a certified class, the vast majority of which have already had their claims against GCAC resolved or extinguished in court, but who seek to overturn and negate final judgments entered by courts in 45 counties across the state; GCAC is being sued for a Right to Cure Notice claim when another entity, a non-party, committed this alleged offense and GCAC is the wrong defendant, against whom assignee liability cannot be asserted and against whom no class member can trace an injury; GCAC is being sued under a baseless interest theory that the Court erroneously believed it was forbidden to assess, and which theory seeks to make all the compliant Pre-Sale and Post-Sale Notices GCAC sent violate Missouri law and the UCC; and GCAC is being sued, for the second time, by a class representative without any live claims or prospect of recovery if she prevails, who admits she has no Right to Cure Notice claim and is not a member of that class, and who is precluded from proceeding here on the other claims by the unappealed dismissal of her claims while she was a named party in a prior, duplicative class action against GCAC.

The Respondent court's erroneous rulings and abuses of discretion are so significant and thoroughgoing that this Court's Preliminary Writ was warranted, and should now be made permanent.

POINT I. The Classes Are Grossly Overbroad and Should Not Have Been Certified.

Almost ninety percent of the persons in the two classes certified below are debtors who have had their claims against GCAC resolved against them by final judgments in prior litigation, or who have had their debts owing to GCAC fully discharged, and their claims against GCAC assigned away and estopped in bankruptcy. GCAC has no final judgment for a deficiency against Weatherspoon personally. Nor did Weatherspoon file for bankruptcy. Accordingly, GCAC has been unable to litigate these issues prior to the hearing on class certification.

Weatherspoon takes the position that these thousands of persons, already determined to have been uninjured, and/or to possess no legally cognizable claim or grievance, must be included in any class, given notices, haled into court on a failure to opt out, subjected to counterclaims and levees of judgment, etc., because to acknowledge their inability to participate as plaintiffs in the lawsuit would be to decide "the merits," and to recognize the existence of an affirmative defense.

By Weatherspoon's reasoning, all the members of a settled class action could immediately refile a second, identical class action, so long as they found one new person to be named plaintiff, and that litigation would have to proceed through the useless waste of judicial resources of pre-certification discovery, class certification briefing, hearing, ruling and certification, with its attendant machinery of notice, mailing, opt-out, etc., all because the prior settlement is an affirmative defense ("accord and satisfaction"), and the court must avert its eyes from the reality that almost all class members no longer have a

claim. *Compare Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (D.C. Cir. 2001) (approving a pre-certification ruling that a prior settlement which included the three class plaintiffs barred the class action, as "in such circumstances [it] spares both the parties and the court a needless, time-consuming inquiry into certification.").

Class action is a procedural device designed to further the twin goals of efficiency and fairness; it is not a procedure to be reflexively employed to thwart those goals. Thankfully, class action law recognizes that "[a] class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. banc 2008). A "proper class definition … clearly underlies each of the mandatory elements for certification," *id*. An overly broad class definition "undermines judicial economy and efficiency, thereby interfering with one of the primary purposes of class action suits." *Dale v. DaimlerChrysler Corp*, 204 S.W.3d 151, 178 (Mo. App. W.D. 2006). And "the *in terrorem* character of a class action… can be magnified unfairly" when the class size is inflated "to include many members who could not bring a valid claim even under the best of circumstances." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824–25 (7th Cir. 2012) (quoting *Oshana v. Coca-Cola Co*., 472 F.3d 506, 514 (7th Cir. 2006), relied upon by this Court in *Coca-Cola v. Nixon*).

GCAC showed by detailed expert analysis that more than 87% of those in Weatherspoon's defined classes have already had their claims resolved against them by final judgments in prior litigation with GCAC, or have had their claims against GCAC extinguished in prior bankruptcy litigation.

Weatherspoon says (Response, 20-21) that the Respondent court rejected the testimony of GCAC's expert, forensic accountant Peter Karutz. The circuit court's ten-page Order granting class certification – written by Weatherspoon's counsel – does not discuss Mr. Karutz's expert testimony, or even mention his name. The words "evidence," "testimony," and "expert" do not appear. Instead, the court (erroneously) held that the fact that 87% of the class have no claims or damages was irrelevant, because to consider it would be to reach and decide "the merits."[1]

Weatherspoon contends that the circuit court and this Court are barred from taking *res judicata*, estoppel from bankruptcy, and the statute of limitations into account because these are affirmative defenses, and consideration of them would be to examine a "merits issue," and this can never be done.

Weatherspoon relies on *United Am. Ins. Co. v. Smith*, 371 S.W.3d 685, 695-96 (Ark. 2010). Arkansas is an extreme outlier; it rejects the class certification inquiry conducted by federal and other state courts: "we have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts." *Gen. Motors Corp. v. Bryant*, 285 S.W.3d 634, 641

[1] Weatherspoon repeatedly disparages Mr. Karutz, but never challenged his qualifications, or objected to the admission of his evidence. The one supposed flaw in Mr. Karutz's testimony that Weatherspoon highlights is that "GCAC's 'expert' opined the necessary sample size was 619 people…. Nevertheless, the 'expert' utilized a sample size of only 416 people." (Response, 20)

The 203 people in the initial sample excluded from further analysis were Illinois residents who had purchased cars and borrowed money in Illinois, via an Illinois consumer installment contract; had defaulted in Illinois and had their vehicles repossessed there; were not subject to Missouri law, but to Illinois law, which law does not permit class actions for UCC statutory damages or have a counterpart to section 408; and who were not within the class definitions put forward by Weatherspoon. The relevant analysis was the percent of putative class members with no claims or grievance.

(Ark. 2008). And the Arkansas class action rule is different from Rule 52.08 and Rule 23, and has no counterpart to 52.08(b)(3)(B), which directs the court to take into account prior litigation "commenced by or against" putative class members.

That 87% of the class are uninjured is not just a merits issue but is also a class certification issue. *Coca-Cola,* 249 S.W.3d at 861. Contrary to Weatherspoon, courts will examine a "merits" issue *if* it also bears directly on a class certification issue. "Frequently that rigorous [class certification] analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (citations omitted). "[M]erits determinations are permitted 'to the extent ... relevant to determining whether the … prerequisites for class certification are satisfied.'" *Gonzalez v. Corning*, 885 F.3d 186, 201 (3d Cir. 2018) (quoting *Amgen Inc. v. Connecticut Ret. Plans*, 568 U.S. 455, 481 (2013)); *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 81 (Mo. App. W.D. 2011) ("Our analysis may require consideration of the legal aspects of the merits of the Plaintiffs' causes of action because substantive law is relevant here as to class certification."). Weatherspoon's argument flies in the face of that central rule.

This Court follows that rule, and has resolved merits issues when necessary to determine whether a class could be certified at all. In *McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. banc 2012), on class certification this Court resolved a contested issue of contractual choice of law in order to decide whether common or individual issues predominate. Arkansas would regard the actions of this Court in *McKeage* to be an

impermissible delving into the merits. *Bryant*, 285 S.W.3d at 640 (Ark. 2008) (forbidding choice-of-law determinations on class certification).

Nor is the rule different if the issue that must be examined involves an affirmative defense. Obviously, for example, a court must address the proper statute of limitations, because it "determine[s] the composition of the class and might … determine whether the suit could be maintained as a class action at all." *Phillips v. Asset Acceptance, LLC*, 736 F3d 1076, 1081 (7th Cir. 2013). And *res judicata* is a rather peculiar form of affirmative defense, and is characterized in Missouri law as more akin to a motion to dismiss for failure to state a claim – that is, a defect in plaintiff's prima facie case. *Chesterfield Village v. City of Chesterfield*, 64 S.W.3d 315, 318 n.1 (Mo. banc 2002). Unlike an ordinary affirmative defense, *res judicata* may even be invoked *sua sponte* by the court, because it "not only benefits the defending party, but also benefits the court's ability to efficiently administer justice." *Patrick Koepke Const., Inc. v. Woodsage Const. Co.*, 119 S.W.3d 551, 555 (Mo. App. E.D. 2003). That is never more true than when assessing a class definition that, as here, needlessly inflates the number of plaintiffs by almost ten-fold.

As with judicial estoppel based on bankruptcy, *res judicata* is regarded as an affirmative defense only because the existence of the prior litigation already commenced by or against members of the class – whether a judgment for a deficiency action or a filing and discharge in bankruptcy – must be brought to the attention of the court from outside plaintiff's pleading. Yet Rule 52.08(b)(3)(B) expressly directs the court to consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class" here, on class certification. (Weatherspoon suggests

(Response, 33) that the rule applies only to litigation brought by putative class plaintiffs, but the Rule plainly says otherwise: "by or against").

And if a particular factual or legal issue is an obstacle to assessing the requirements for class certification, it makes no difference to those requirements whether the obstacle is an element of a claim or a defense. *Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 322 (4th Cir. 2006) (plaintiff bears the burden of showing compliance with requisites for class certification, even if one of these implicates the affirmative defense of statute of limitations).

Weatherspoon suggests that there is not a single case that has considered affirmative defenses in assessing whether a class was overbroad or class certification was improper. This is plainly wrong. *E.g.*, *Waste Mgmt. Holdings, v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("[W]e regard the law as settled that affirmative defenses should be considered in making class certification decisions.") Some examples from among many: *Thorn.*, 445 F.3d at 321-22 (limitations); *Phillips*, 736 F.3d at 1081 (same); *Mayo v. USB Real Estate Sec.*, 2012 WL 4361571, *5 (W.D. Mo. 2012) (judicial estoppel based on bankruptcy); *Watkins v. Consumer Adjust. Co.*, 2014 WL 3361771, *1-2 (E.D. Mo. 2014) (same); *Gawry v. Countrywide Home Loans,* 640 F. Supp.2d 942, 955-56 (N.D. Ohio 2009) (same); *In re Light Cigarettes Litig.*, 271 F.R.D. 402, 421 (D. Me. 2010) (statute of limitations and the voluntary payment doctrine); *Sacred Heart Health Sys. v. Humana*, 601 F.3d 1159, 1177 (11th Cir. 2010) (ratification and waiver).

Weatherspoon tries to avoid the effect of *Coca-Cola* by contending that GCAC relies on "an unnatural definition of 'uninjured.'" Not so. First, as shown (Brief, 44)

compliance by GCAC with the statutory requirements governing default, repossession, consumer notices, disposition of collateral and calculation of a balance owing are statutory elements of a deficiency action, 408.556.1, the entry of a final judgment against a debtor is a conclusive and binding determination that the debtor was not harmed by GCAC. Sixty per cent of the class cannot have been injured, because Missouri courts in 48 counties have already ruled to that effect. Second, *Coca-Cola* and the *Oshana* case it relied on used a broad, common sense definition of uninjured, and included within that those without a "grievance" or a claim for damages. (Brief, 41) That functional usage certainly includes the 27% who filed for bankruptcy and had their debts to GCAC wholly discharged, and any claim against GCAC either assigned to the bankruptcy estate and/or extinguished by judicial estoppel.[2]

Weatherspoon cites (Response, 22) the Newberg treatise for the observation that it is "rare" for affirmative defenses to defeat class certification. Newberg also says it is "required" that they be considered, *Newberg*, §4.55, and that they will defeat class certification when "unusually important," *id*., as they clearly are here. What is rare is for class counsel to propose a class 87% of whose members have no claim, have been adjudicated to have suffered no harm, have assigned away their claims, have no grievance, and can collect no damages. Newberg explains that the problems of a grossly overbroad

[2] Weatherspoon quotes *Vogt v. State Farm*, 2018 WL 4937069, *2 (W.D. Mo. 2018): "A defendant may prevail on an affirmative defense, but that does not mean that there is no injury in fact." *Vogt* is of no help to Weatherspoon. There 1% of the class -- 487 out of 24,000 – were uninjured because their claims were abandoned at trial by class counsel; the court excluded them from the class.

class often can be rectified by "altering or amending the class" definition. *Id*. To that end, courts routinely exclude plaintiffs with prior final judgments or who have filed for bankruptcy, in both settlement and contested classes. *E.g., Whitaker v. Navy Federal Credit Union*, 2010 WL 3928616, *1 (D. Md. 2010) (UCC settlement class excludes all consumers who "filed a bankruptcy petition" or "had a final judgment entered [against them] in a collection action"). GCAC cited more than a dozen such cases (A687). Weatherspoon's counsels' gross inflation of the class, and adamant refusal in seven years of litigation against GCAC to accede to its proper delineation, are what is indeed "rare."

Weatherspoon argued that "affirmative defenses are not self-proving." (Answer, 14) This is an admission that certification of the class as defined is impossible, as it would necessitate almost four thousand individual motion hearings, depositions, and/or mini-trials to litigate individual applications of *res judicata* and judicial estoppel from bankruptcy. *E.g.*, *Arnold v. Directv, LLC*, 2017 WL 1251033, *8 (E.D. Mo. 2017) (denying class certification on the grounds, *inter alia*, that applying judicial estoppel based on bankruptcy would make individual issues predominate over common ones).[3]

[3] After complaining (Response, 12) that GCAC presents too many points, Weatherspoon contends that GCAC's Point I is impermissibly multifarious. It is not. Of necessity it discusses an issue of class action procedural law (the requirement that a class not include large numbers of uninjured people), and the aspects of substantive law (*res judicata*, judicial estoppel in bankruptcy, limitations) that should have been considered under class action law in order to avoid the error of a grossly overbroad class. These are not independent points; they are "enmeshed" with each other, because "the applicable substantive law is relevant to a meaningful determination of the certification issues." *Green v. Fred Weber, Inc*., 254 S.W.3d 874, 880 (Mo. banc 2008).

***Res Judicata* bars those with final judgments in prior litigation with GCAC.**

GCAC showed (Brief, 46) that the "four identities" used to establish *res judicata* are met here. The Response says nothing at all about the four identities.

GCAC showed (Brief, 44) that compliance with the consumer law requirements for default, notice, repossession, sale and calculation of deficiency were elements of GCAC's prior deficiency actions that GCAC had to both plead and prove in order to have obtained the final judgments. 408.556.1. Having obtained the judgments, GCAC has necessarily done so. The Response says nothing at all about elements. But Weatherspoon's counsel very recently argued (successfully) to the Missouri Appellate Court what is incontestable: that a creditor's claim for a deficiency, and the debtor's claim for violation of the consumer notice provisions were "inextricably intertwined," because both claims depend on the sufficiency of the notices. *Lobel Fin. Inc. v. Bothel*, 2018 WL 6313493, *2 (Mo. App. W.D. Dec. 4, 2018).

Res judicata applies "not only to [1] points and issues upon which the court was required by pleadings and proof to form an opinion and pronounce judgment, but also to [2] every point properly belonging to the subject matter of the litigation and which the parties, exercising reasonable diligence, might have at the time." *King Gen'l Contr., Inc. v. Reorg. Church of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991). *Res judicata* here falls within the core area in point [1], above. Weatherspoon ignores that, and argues only about the scope of the compulsory counterclaim rule, which is within – but not the entirety – of point [2].

That argument is irrelevant here. GCAC need not establish that the class claims here are barred because they should have been raised in the prior litigation and were not raised in a counterclaim. GCAC has shown that the merits of the consumer notices, etc., were in fact raised in the prior litigation – because they were an element of GCAC's claim – and they were necessarily decided in those cases.

Citing some very broad *dicta* in *Hemme v. Bharti*, 183 S.W.3d 593 (Mo. banc 2006), Weatherspoon argues that "*res judicata* is no broader than the [compulsory counterclaim] rule." This is demonstrably wrong. While "*res judicata* and compulsory counterclaim, [are] not identical, [they] overlap." *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 532 (Mo. banc 2002) (*quoting Elam v. St. Ann*, 784 S.W.2d 330, 333 (Mo. App. E.D. 1990) ("[t]he concepts of *res judicata*, or claim preclusion, and compulsory counterclaim are neither identical nor mutually exclusive")). "[T]he compulsory counterclaim rule [i]s a special application of the principles of *res judicata,*" *Joel Bianco*, *id.*, and one that has no application here. It is not the whole of *res judicata*. How could it be? Some jurisdictions – *e.g.*, Illinois – have no compulsory counterclaim rule in any court, but they still recognize and apply *res judicata*. *E.g.*, *Tebbens v. Levin & Conde*, 107 N.E.3d 263, 286 (Ill. App. 1st Dist. 2018) (rejecting the argument that *res judicata* cannot exist outside a compulsory counterclaim rule, because *res judicata* extends to matters that "*could have* been brought").

Hemme is not contrary. There this Court held only that the compulsory counterclaim rule does not apply to require a defendant to bring its substantive claims as counterclaims against a codefendant who files a crossclaim against it for indemnity. But *Hemme* also

recognized that a party can be bound by a final judgment even when the compulsory counterclaim rule does not apply: "Although the [defendants] Hemmes were free to bring their substantive claims [against codefendant] in a separate suit, if [plaintiff] Harrison's original suit had gone to trial rather than settling, *Hemme* would be bound in her later suit by any apportionment of fault determined by the jury in the first case." 183 S.W.3d at 599. *First Community Credit Union v. Levison*, 395 S.W.3d 571, 580 (Mo. App. E.D. 2013), cited by Amicus, is inapposite, and said nothing about the preclusive effect of a prior final judgment; in *Levison* there was no such judgment.[4]

Weatherspoon repeatedly states (Response 12, 29, 36) that certain percentages of GCAC's judgments were by default or by consent. Weatherspoon even claims that GCAC says this (34). GCAC has never said this, and there is no evidence or testimony establishing this purported fact as fact. In any event, it is irrelevant. Unlike *collateral estoppel* (issue preclusion), to which Weatherspoon frequently refers, *res judicata* (claim preclusion) contains no requirement that a particular issue be actually litigated "on the merits." That is why r*es judicata* effect is given to consent judgments, *Commonwealth Land Title Ins. v. Miceli*, 480 S.W.3d 354, 366 (Mo. App. E.D. 2015), just as it is given to default judgments. (Brief, 48-49).

[4] Weatherspoon's analysis of *Consumer Finan. Corp. v. Reams*, 158 S.W.3d 792 (Mo. App. 2005), has it exactly backwards. There the creditor sought to use a prior judgment on one narrow issue to determine, by offensive collateral estoppel, the outcome in the second action, which was broader than the one decided issue. In our case, a narrow issue presented by the class action – compliance with the consumer laws -- was an element necessarily determined in the broader, prior action for a deficiency. Illustrated at A705-06.

GCAC established additional, independent bases for *res judicata* that Weatherspoon fails to contest: that *res judicata* always acts to bar a subsequent suit, such as that here, seeking to negate or undo a prior judgment or impair rights established thereunder. Restatement §22 expressly provides that *res judicata* applies in this instance in the absence of a compulsory counterclaim rule. Weatherspoon makes no response, except to issue an empty denial that the class claims would impair or negate the prior final judgments.

Finally, GCAC showed that Weatherspoon's action is an impermissible collateral attack on the final judgments in 48 counties across the state, seeking to have the Respondent court act a roving appellate court at large, unbound by the rules providing for such challenges. "A corollary of *res judicata* is that parties cannot collaterally attack the merits of a final judgment entered in a previous proceeding….Nothing is better settled than the principle that an erroneous judgment has the same *res judicata* effect as a correct one*."* *Atkinson v. Firuccia*, 2018 WL 5259202, *3 (Mo. App. W.D. 2018) (citing cases). Weatherspoon says nothing about this dispositive point.

Judicial Estoppel based on bankruptcy.

Judicial estoppel is especially appropriate here, where the plaintiffs have had their debt to GCAC discharged, yet now wish to turn around and sue GCAC free of that debt: "The actions of…Ms. Timmons are especially galling because she used the bankruptcy process to discharge or reduce debts owed to CRST and now seek[s] to recover funds from CRST free and clear of the bankruptcy process." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 680 (8th Cir. 2012).

Weatherspoon relies heavily on several cases from the 11th Circuit; but they apply a different standard than the one used by both federal and state courts in Missouri.

Weatherspoon argues that judicial estoppel should not be applied to class plaintiffs. But the unfairness to GCAC is hardly lessened when it is multiplied 1,100 times. And a class action cannot enlarge a plaintiff's rights, or impair a defendant's. GCAC cited (Brief, 54) several cases, including district court cases in Missouri, applying the same standard used in Missouri courts, which applied judicial estoppel in class actions to deny certification. Weatherspoon simply ignores these cases, and says she cannot find any. Here is another: *Arnold v. Directv, LLC*, 2017 WL 1251033, *8 (E.D. Mo. 2017).

POINT II. The Respondent Failed to Determine the Applicable Law and Certified a Claim Without Legal Basis.

For each of Weatherspoon's claims, the Respondent Court was required, but failed, to determine the applicable law before it could assess whether the evidence needed to establish the claims is common or individual. Weatherspoon argues that simply to decide what the applicable law is, is to "decide the merits."

GCAC showed (Brief, 63) that *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 91 (Mo. App. W.D. 2011) directly refutes Weatherspoon. She misstates that case:

> 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.

(Response, 45-46)

But the *Hope* plaintiff did not "admit" that the class were undamaged; she contended each plaintiff *was* damaged, by suffering an economic loss, *ipso facto*, from the mere purchase of a make of vehicle with a high rate of defects, whether an actual defect manifested itself in their particular vehicle or not. The *Hope* plaintiff's theory is like Weatherspoon's *per se* interest theory, where the mere mention of interest in a notice, *ipso facto*, is a violation.

How did the *Hope* court decide that actual damage required a manifestation of an actual defect to be shown by each plaintiff to establish breach of implied warranty? By "addressing the merits" -- examining the applicable law, and on that basis rejecting the class plaintiffs' theory that a breach of implied warranty was shown, *ipso facto*, by the purchase and without the need to show actual damage from a defect. "We find no authority, in Missouri or otherwise, for this [the *ipso facto*] proposition." 353 S.W.3d at 91. It is precisely this inquiry – what is the applicable law? – that the Respondent court failed to carry out. By Weatherspoon's reasoning, the *Hope* Court should have concluded that whether the *ipso facto* theory is a correct statement of the law is itself the common question justifying class certification (Response, 48-49). The Respondent Court erroneously accepted this absurd argument. (A5)

Once the *Hope* Court determined the actual law, it recognized that predominance was not shown:

> Because it appears [without the *ipso facto* theory] a majority of the putative class members here have no breach of implied warranty claim, the action in reality becomes hundreds or thousands of individual claims… requir[ing] individual determinations of whether each putative class member actually experienced manifestation of the bubbling defect, so as to be able to maintain a cause of action

> … and then subsequently, individual inquiries into the extent of damage sustained, whether the alleged defect was the cause in fact or proximate cause of the damage sustained…. The overwhelming requirement of individual determinations is fatal to a showing of predominance of common questions.

Hope, 353 S.W.3d at 91-92.

Weatherspoon's Interest theory has no basis in the applicable law. Weatherspoon contends §408.553 forbids the accrual of any interest after default and before judgment. GCAC showed (Brief, 64-65) that the plain words of 408.553 contradict this, because the section requires payment of the "amount which the borrower would have been required to pay upon prepayment of the obligation on the date of final judgment." Weatherspoon reaches her strained interpretation only by replacing the words "on the date of final judgment" with "on the date of default." (Response, 50) Weatherspoon says, absent her interpretation, that 408.553 limits nothing; but GCAC showed (Brief, 64-65) that it limits recovery of a part of the total finance charge stated on the face of the installment contract: it bars the recovery of that interest that would become due only if the obligation were not to be notionally "prepaid" on the date of judgment, but were to continue over the planned life of the contract.

GCAC also showed that a ban on pre-judgment interest directly conflicts with other Missouri law governing specifically what consumer lenders may charge on delinquent loan balances. Section 365.100 ("[I]nterest on delinquent payments"), expressly authorizes that "if the contract so provides, the holder thereof may charge, finance, and collect.…Interest on each delinquent payment at a rate which shall not exceed the highest lawful contract rate." And §408.020 – commonly known as the prejudgment interest statute -- also

authorizes the accrual of interest on amounts owing after they become delinquent and before judgment. Weatherspoon does not mention these two statutes, and she never explains how her construction of 408.553 can possibly be reconciled with them. It cannot.

Amicus claims (at 14) that "many, if not most" lenders charge no interest between default and judgment, naming Ally Financial and Ford Motor Credit. But both these lenders have been and are currently being sued by the same class counsel here for the same alleged violations of 408.553 -- charging contract interest after default and before judgment. *E.g., Ford Motor Credit v. Jones*, No. 1716-CV00182 (Jackson County, December 20, 2016); GCAC listed a small fraction of the numerous suits against Ally (Brief, 67).

Amicus regularly conducts 50-state surveys of U.S. consumer lending law, but does not point to a single statute, from a single jurisdiction, forbidding contract interest after default and before judgment, and rewarding the debtor in default with an interest-free loan. This conspicuous silence can only mean that Weatherspoon's reading of 408.553, which makes it conflict with other Missouri law, would also make it unique in the U.S.[5]

The applicable law makes the interest claims uncertifiable. As shown (Brief, 67), in the absence of the unsupportable *per se* interest theory, the class interest claims devolve into a series of individual accounting actions without common issues.

[5] Amicus claims (at 13) that "there is no difference" between GCAC and the payday lender in *Hollins* -- who charged an interest rate *of 199.71%*. 477 S.W.3d at 21. GCAC charged 28.92% (A329), which is less than that charged by credit cards issuers Wal-Mart (29.90%) and HSBC (29.99%) during the same period. *Haney v. Portfolio Recovery Assocs., LLC*, 2015 WL 1457216, *1 (E.D.Mo. 2015).

Weatherspoon says that §408.553 alone "isn't determinative" of the whole dispute. (Response, 47) But Weatherspoon's UCC claims (Response, 52) that the amounts stated in the Pre-Sale and Post-Sale notices "were inflated" depend wholly on her interest theory.

POINT IV. Weatherspoon Failed to Establish Predominance.

"If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." *Hale*, 231 S.W.3d at 224. Analysis begins with the elements of a claim**.** But Weatherspoon denies her notice claims have any elements: "there are no formal elements required…Weatherspoon must simply show the relevant statutes were violated." (Response, 46) Whether the unspecified "violations" are common, and rely on common evidence, neither the Respondent court nor Weatherspoon explain. And in another variant of an *ipso facto* theory, designed to sidestep the predominance hurdle, Weatherspoon contends (Response, 47) that she "is entitled to statutory damages under § 400.9-625(c)(2)" for violations of sections 408.553 (Interest claim); 408.554 and 408.555 (Right to Cure Notice claim); 400-9-614 (Pre-sale Notice claim) and 400.9-616 (Post-sale Notice claim). This is a gross misstatement of the applicable law.

First, a private right of action under 408.553, 408.554 and 408.555 is provided by §408.562 and by that section only. "[A]ny person who suffers any loss of money or property as a result of" a violation of section 408 "may bring an action…to recover actual damages." 408.562. A claim for an allegedly defective Right to Cure Notice does not exist in the absence of actual damages. Therefore, in order to make out a *prima facie* case, each plaintiff will need put forward individual evidence, varying from class member to class

member, regarding the existence of actual damages. Weatherspoon alleges none, and says none are needed. (Response, 46, 62, 68)

Weatherspoon argues (Response, 68) that "other civil remedies or penalties" mentioned by 408.562 are provided by the UCC: "Weatherspoon and the class are seeking damages under Section 9-625(c)(2)." But 9-625(c)(2) provides for no additional remedies or penalties for violation of non-UCC sections 408.553, 408.554 and 408.555.

Section 9-625 ("Remedies for Secured Party's Failure to Comply **with Article**") applies only to noncompliance **with Article 9**. Statutory damages under 9-625(c)(2) are for past violations of "this part" of Article 9 (**Part 6**: Default, sections 9-601 to 9-629): "If . . . a secured party **failed to comply with this part** [a consumer] may recover for that failure [statutory damages]…." (Emphasis added).

Weatherspoon cannot seek UCC damages for a violation of non-UCC section 408. And the Post-sale Notice claims under UCC 9-616 require actual damages: "a secured party who fails to comply with this section [9-616] is not liable for statutory minimum damages under Section 9-625(c)(2)." 400.9-616. Official Comment 4.

Individual Issues of Law and Proof Predominate for Each of the Claims

A Right to Cure Notice claim has four statutory elements, each of which requires proof by each individual debtor that varies from class member to class member. A debtor is entitled to a notice only if: (1) the collateral was not voluntarily surrendered; (2) this was the first default on the transaction; and (3) the default was only for failure to pay the required payment. And (4) the defect in the notice must have caused actual damages.

Actual damages are shown when the defect in the notice prevented the debtor from curing when the debtor attempted (and therefore had the means) to do so. *Burrill v. First Nat. Bank*, 668 S.W.2d 116, 117-18 (Mo. App. W.D. 1984) (plaintiff had no claim under 408.554 for a defect in Right to Cure notice, as this defect "was not a material error such as to mislead plaintiffs…. Plaintiffs make no attempt to show any prejudice to them (they did not pay off the indebtedness or any part thereof) by any claimed deficiencies in the notice."). This will require additional, partly subjective, evidence that varies from person to person.

Weatherspoon claims (at 60) that GCAC misstates *Burrill*, and accuses GCAC of being "misleading and disingenuous." According to Weatherspoon, the reference in *Burrill* to "material error" is not to a material error in the notice, but to one by the lower court; similarly, Weatherspoon claims that the reference to 'prejudice" is not to prejudice caused "by any claimed deficiencies in the notice," but to prejudice caused, again, by the lower court ruling being appealed. GCAC is content to leave it to the Court's judgment as to which reading of *Burrill* is accurate.[6]

Pre-Sale Notice UCC claims. Weatherspoon says nothing about her claim of public vs. private sale, and apparently concedes that, after years, she has put forward

[6] Weatherspoon cites *Mo. Credit Union v. Diaz*, 545 S.W.3d 856 (Mo. App. W.D. 2018), as if that case could somehow reverse *Burrill* and repeal the statutes. But *Diaz* does not discuss the prerequisites in 408.554-408.555 for entitlement to receive a notice, and does not address actual damages under 408.562. *Diaz* should not be read to replace the plain terms of section 408 with the Uniform Consumer Credit Code, which Missouri *has not enacted.*

nothing to suggest that the dispositions of collateral by GCAC over a ten-year period was accomplished in a uniform manner lending itself to class treatment.

Weatherspoon contends she has established uniformity in the notices with respect to the method of payment GCAC would accept to redeem. Yet the notices in the record vary in at least three material ways, and no time periods have been identified for any of the variants. Weatherspoon's citation (Response, 58) to deposition testimony is unavailing, as the deponent says he lacks knowledge and the testimony simply does not say what Weatherspoon claims it says.

Post-Sale Notice UCC claims. In Response to Point IV, Weatherspoon identifies (Response, 58-9) only one common issue: the Post-sale Notices "unlawfully calculated amounts-due by including interest barred by Section 408.553." If her interest theory is not applicable law, her Post-sale Notice claim based on it is equally uncertifiable.

POINT V. Weatherspoon Is Not a Member the Right to Cure Notice Class.

GCAC showed (Brief, 88-90) that Weatherspoon has testified, multiple times under oath, that she voluntarily surrendered her vehicle. She is therefore not within the Right to Cure Class, and cannot represent it. Weatherspoon contends (Response, 66) that her testimony can be undone by an allegation seeking to contradict that evidence, and because Weatherspoon was unqualified, as a non-lawyer, to state whether she voluntarily surrendered or not. "Class certification must be supported by the record." *Dale*, 204 S.W.3d at 163-64. The record establishes, beyond the reach of Weatherspoon's subsequent denials, that she is not a member of the Right to Cure Class.

POINT III. No Right to Cure Claims are Traceable to GCAC, a Subsequent Assignee.

GCAC showed (Brief, 72-74) that under section 408, Missouri common law and the UCC, there is no assignee liability that would permit Weatherspoon (or the class) to obtain an affirmative monetary award against GCAC for the assignor's violation of the Right to Cure Notice provisions, 408.554 and 408.555. Weatherspoon does not challenge this statement of law, and concedes its correctness here.

GCAC also showed (Brief, 69-72) that GCAC is an assignee who received assignment of Weatherspoon's paper weeks after any supposedly defective Right to Cure Notice was sent to her.

Weatherspoon says this does not matter, because GCAC can be held liable for the acceleration and repossession which are, she asserts, illegal *because* of the Right to Cure notice violation. Under Weatherspoon's formulation, anything the assignee does after the assignor sent the allegedly defective notices creates liability for the assignee stemming from the assignor's violation, even though the things the assignee itself does – acceleration, repossession – are in themselves provided for by law. (400.9-609: "After default, a secured party … [m]ay take possession of the collateral"; 400.3-304(b)(3): acceleration permitted). In Weatherspoon's telling, the assignor's violation follows the assignee and turns otherwise innocent and legal actions into illegal ones, subject to damages for violations of 408.553 and 408.554 – the sections which *the assignor* is alleged to have violated, before the assignment. If this formulation were correct, when would the assignee **not** be liable due to

the violation of the assignee? Never. This is simply assignee liability in another guise; it is unavailable under Missouri law.

POINT VI. Weatherspoon has No Actual Stake in the Case, as Her Claims are Moot.

GCAC showed (Brief, 94-96) that Weatherspoon can gain or lose nothing, as the statutory damages she can recover on prevailing are exceeded by her debt (which debt is available to GCAC only as set-off, as its affirmative claims against Weatherspoon are time-barred). Weatherspoon says nothing in her Response about the law of set-off, and has apparently abandoned her earlier arguments that set-off of debt is unavailable.

Tellingly, in her Response Weatherspoon does not contend she is claiming actual damages that would exceed her debt, rather than statutory damages that are indisputably smaller than her debt. She says (Response, 68) she "was not required to suffer actual damages." Opposing mootness, Weatherspoon argues only that (1) determining mootness is a merits inquiry; and (2) Weatherspoon is not 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." (Response, 72)

To take point (2) first: (a) What the classes seek is irrelevant, as Weatherspoon's mootness is measured by her own individual situation, and she has no deficiency judgment entered against her, "wrongful" or otherwise. (b) Any credit reporting slander claim is preempted by federal law, 15 U.S.C. §1681h(e). (c) Weatherspoon did not seek to certify such a claim, or any claim of any kind for equitable relief, in the certification motion and briefing, and so they are not part of the class claims. *Craft*, 190 S.W.3d at 377 (where

plaintiffs "did not formally seek class certification with respect" to these claims, they "did not meet their burden of proof showing certification would be appropriate."); *Green*, 254 S.W.3d at 882 n.9 (certification limited to those claims both pleaded and briefed).

As to point (1), mootness is a practical doctrine, which may be applied by the court *sua sponte*. *State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 614 (Mo. banc 2012). Mootness is an inquiry that is separate from and antecedent to a decision on the merits. It asks whether the plaintiff can gain anything, assuming plaintiff prevails on the merits. "[T]he feasibility or futility of effective relief should a litigant prevail" determines "whether to adjudicate a claim on its merits." *Adams v. RTC*, 927 F.2d 348, 354 (8th Cir. 1991) (claim by subordinated debt holder was moot when no recovery was possible, as the defendant's assets were insufficient to satisfy unsubordinated claims).

Whether the class representative has an actual, concrete stake in the litigation is not a "merits issue" to be postponed to some later date; it is a prerequisite for class certification that should have been decided on class certification.

POINT VII. Preclusion Based on Weatherspoon's Participation as a Party in *Deaver*.

Weatherspoon does not contest that under Missouri law an involuntary dismissal of one claim without prejudice will bar the reassertion of that claim if, after dismissal, the plaintiff(s) voluntarily dismiss the remaining claims, but not "the action," without prejudice.

Weatherspoon insists only (Response, 75) that she was never a party to *Deaver*: "[g]ranting leave for an individual to become a party to a suit doesn't automatically make

that individual a party." But Weatherspoon was granted leave to join the *Deaver* lawsuit as a party on March 17, 2014, and on April 7, 2014, *she did so*: with leave, she and Deaver filed an amended counterclaim, naming each of them as individual claimants. (A1023-42). A counterclaimant is a party. After her pleading was stricken as a sanction on April 24, 2014, she moved for reconsideration. A movant is a party. Her motion was granted on May 1, 2014 only to the limited extent that she was permitted to remain as a party, asserting only Deaver's UCC claims. She was never dismissed out of the case, and remained a party until the day, following denial of class certification, that Deaver dismissed his remaining claim, but not "the action."

Weatherspoon quotes hearing argument from GCAC's counsel saying she could file another action. The context makes clear that counsel was saying that she could bring claims, other than the UCC claims in *Deaver*, in another action. (A1053, 11:22-24; A1056, 24:16–25:23; A1057, 27:7–28:24). The Court agreed, and Weatherspoon's right to maintain a second action was "expressly reserved" by words in the Court's Order identifying: "R.S. Mo. 408 for damages relating to Right to Cure Notices." (A270). Accordingly, Weatherspoon is precluded from bringing any claim here other than that reserved claim.

CONCLUSION

For all the foregoing reasons and those in Relator's Petition and Brief the Court's Preliminary Writ should be made permanent, in whole or in pertinent part.

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CERTIFICATE OF SERVICE & COMPLIANCE PURSUANT TO RULE 84.06(c)

I, Timothy J. Wolf, an attorney, hereby certify that the foregoing brief was served upon all counsel of record on January 16, 2019 via the court's electronic filing system, contains the information required by Rule 55.03 and complies with the limitations contained in Mo. Sup. Ct. R. 84.06(b). Relator's Reply Brief contains 7,710 words.

Timothy J. Wolf