IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

DAVID B. KARR, individually and on behalf of others similarly situated,	)	
	)	Case No. 1916-CV26645
Plaintiff,	)	
	)	Division 14
vs.	)	
KANSAS CITY LIFE INSURANCE COMPANY	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF CLASS CERTIFICATION

This matter is before the Court on Plaintiff David B. Karr's Motion for Class Certification. On October 2, 2020, Plaintiff moved to certify this case as a class action pursuant to Missouri Supreme Court Rules 52.08(a), 52.08(b)(3), and 52.08(b)(2). On December 4, 2020, Defendant Kansas City Life Insurance Company filed its Suggestions in Opposition to Plaintiff's Motion for Class Certification. Plaintiff filed his Reply Suggestions on December 22, 2020.

Having considered the record, including the pleadings and parties' suggestions and the materials and exhibits attached hereto, the Court finds that Plaintiff has satisfied the requirements of Rule 52.08(a), Rule 52.08(b)(3), and Rule 52.08(b)(2), and therefore **GRANTS** Plaintiff's Motion for Class Certification for the reasons set forth in the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff David B. Karr ("Plaintiff") resides in Savannah, Missouri, and is a citizen of the State of Missouri.

2. Defendant Kansas City Life Insurance Company ("Defendant") is a corporation

incorporated under the laws of the State of Missouri, with its principal place of business in Kansas City, Missouri.

3. Plaintiff purchased from Defendant a "Flexible Premium Adjustable Death Benefit Life Policy" (the "Policy"), which as explained herein, meets the class definition. Pet. at ¶ 14. Defendant is the effective and liable insurer of the Policy, and policies meeting the class definition (the "Class Policies"). *Id.* at ¶ 16. Defendant has issued and administered, and currently administers, all aspects of the Policy and Class Policies, including collecting premiums, and determining, assessing, and deducting policy charges. *Id.* at ¶ 21.

4. Plaintiff requests certification of this action on behalf of "[a]ll Missouri citizens who own or owned a life insurance policy issued by Defendant in the State of Missouri, the terms of which provide or provided for: (1) an insurance or cost of insurance charge or deduction calculated using a rate that is determined based on Defendant's expectations as to future mortality experience; (2) additional but separate policy charges, deductions, or expenses; (3) an investment, interest-bearing, or savings component; and (4) a death benefit" (hereinafter, the "Class"). Plaintiff's Suggestions in Support of Plaintiff's Motion for Class Certification ("Pl.'s Sugg.") at p. 7. Excluded from the Class is Defendant, any entity in which Defendant has a controlling interest, any of the officers, directors, or employees of the Defendant, the legal representatives, heirs, successors, and assigns of the Defendant, anyone employed with Plaintiff's counsels' firms, any Judge to whom this case is assigned, and his or her immediate family. *Id.* Also excluded from the Class is any variable life insurance contract or policy that explicitly discloses all of the factors on which Defendant based its determination of cost of insurance rates and charges. *Id.*

5. As defined, Plaintiff's proposed Class seeks to represent at least hundreds of Class Members. Pet. at ¶ 60.

6. According to the Petition, Plaintiff and the Class purchased policies containing the same or similar limitations on the amounts that Defendant could charge its policy owners under the express terms of the Policy and Class Policies. *Id.* at ¶ 64.

7. Plaintiff asserts his interests are aligned with, and not antagonistic to, those of the proposed class, and Plaintiff is represented by counsel who are experienced and competent in the prosecution of class action litigation and have particular expertise with class action litigation on behalf of owners of universal life insurance policies. *Id.* at ¶ 65.

8. On October 1, 2019, Plaintiff sued Defendant alleging Defendant charged Plaintiff and the proposed Class in excess of amounts authorized by the express terms of the Class Policies. *Id.* at ¶ 1.

9. As alleged in Plaintiff's Petition, the terms of the Policy are not subject to individual negotiation and are materially the same for all policy owners. *Id.* at ¶ 18.

10. Plaintiff avers the terms of the Policy cannot be altered by the agent's representations at the time of sale, nor can an agent waive Defendant's obligations under the Policy, because "[n]o agent has the authority . . . to waive any of the [Defendant]'s rights or requirements, or to make or alter any contract or policy." *Id.* at ¶ 20.

11. Plaintiff further alleges that Defendant's obligations under the Policy cannot be obviated by informal consent, waiver, or some other act, or by any other discussion or writings, because only the President, Vice President, Secretary, or Assistant Secretary of Defendant has authority to change a provision of the Policy, and any such "approved change must be endorsed on or attached to" the Policy. *Id.* at ¶ 19.

12. Moreover, Plaintiff contends that in addition to a death benefit, the Policy and Class Policies provide policy owners an investment, savings, or interest-bearing component—the "cash

value"[1]—that accumulates value over time. *Id.* at ¶ 23. The funds held in the cash value are policy owner property that Defendant holds in trust for its policy owners. *Id.* at ¶ 25.

13. According to Plaintiff, the Policy expressly defines the specific charges that Defendant may assess and deduct from Plaintiff's premium payments and the Policy's cash value. *Id.* at ¶ 27. The Policy authorizes Defendant to deduct a premium expense charge of 7.5% from each premium payment for the first 10 years the policy is in-force and 3% from each premium payment thereafter. *Id.* at ¶ 28. The Policy also authorizes Defendant to take from the cash value a "Monthly Deduction" comprised of separately identified cost of insurance ("COI") and expense charges, as well as the cost of any additional benefits provided by riders. *Id.* at ¶ 29. Like the Policy, the Class Policies contain similar periodic deductions that Defendant is authorized to take from policy owners' cash values, including specifically, COI charges that are calculated using rates that Defendant must determine based on its expectations as to future mortality experience and separate, monthly expense charges. *Id.* at ¶ 40. Plaintiff contends that Defendant may assess and deduct only those charges allowed by the Policy. *Id.* at ¶ 27.

14. Plaintiff alleges that the Policy expressly identifies a separate COI charge deducted from the cash value each month, which the Policy defines as: "The charge [Defendant] make[s] for providing pure insurance protection using the current cost of insurance rates for this policy. It does not include the cost of any additional benefits provided by riders." *Id.* at ¶ 36.

15. Additionally, Plaintiff asserts the terms of the Policy also provide how the COI charge is calculated:

> The cost of insurance on any monthly anniversary day is equal to:
>
> Q x (R - S)

[1] Some Class Policies refer to the investment, savings, or interest-bearing component as the "accumulated value."

> "Q" is the cost of insurance rate (as described in Section 3).
>
> "R" is the Insured's death benefit on that day divided by no less than 1.0024663.
>
> "S" is the cash value (as described in Section 10.2) prior to subtracting the cost of insurance.

Id. at ¶ 37.

16. According to Plaintiff's Petition, with respect to the cost of insurance rate ("Q" in the above equation), the Policy expressly provides that:

> The cost of insurance rate on each monthly anniversary day is based on the Insured's sex, age and risk class. Age means the age on the Insured's last birthday.
>
> ***
>
> Monthly cost of insurance rates actually used will be determined by [Defendant] based on [Defendant's] expectations as to future mortality experience …

17. Plaintiff claims that age, sex, and risk class are factors commonly used within the life insurance industry to determine the mortality expectations of an insured or group or class of insureds. *Id.* at ¶ 39.

18. According to Plaintiff, because the Policy specifically identifies age, sex, and risk class in the COI provisions, and expressly states that the COI rates actually used will be determined based on Defendant's expectations as to future mortality experience, the parties agreed that Defendant's mortality expectations are what determine COI rates under the Policy. *Id.* at ¶ 40.

19. Plaintiff also contends the Policy defines "Expense Charges" as follows:

> The amount [Defendant] deduct[s] to cover [Defendant's] expenses. The premium expense charge is the amount [Defendant] deduct[s] from each premium payment. The monthly expense charge is included in the monthly deduction.

Id. at ¶ 32.

20. Moreover, Plaintiff alleges that in addition to a premium expense charge of 7.5% from each premium payment for the first 10 years the policy is in-force and 3% from each premium payment thereafter, the Policy authorizes Defendant to deduct a monthly expense charge in the

amount of $18.50 per month for the first policy year and $2.50 per month after the first policy year for all remaining policy years, as well as an increase expense charge of $1.44 per $1,000 increase in specified amount. *Id.* at ¶¶ 28, 30-31. Plaintiff avers that the premium expense charge, monthly expense charge, and increase expense charge are the only "expense charges" identified by the Policy. *Id.* at ¶ 34.

21. Plaintiff states in his Petition that although the Policy and Class Policies authorize Defendant to determine COI rates based on its "expectations as to future mortality experience," Defendant does not determine COI rates based on its "expectations as to future mortality experience." *Id.* at ¶ 42.

22. According to Plaintiff, Defendant considers and uses other undisclosed factors to determine such rates, including without limitation, expenses. *Id.* Plaintiff contends that by failing to determine COI rates based on its "expectations as to future mortality experience," Defendant causes those rates to be higher than what is explicitly authorized by the Policy and Class Policies. *Id.* at ¶ 43. And, the higher the COI rates used by Defendant, the higher the monthly COI charge. *Id.* at ¶ 45. Consequently, Plaintiff claims that Defendant withdraws from the cash value amounts for the COI greater than those authorized under the Policy and Class Policies. *Id.*

23. In fact, Plaintiff contends this overcharge is likely as high as 60% or more of the COI charge in the first several Policy years. Pl.'s Sugg. at p. 2.

24. Plaintiff claims that each of Defendant's past and future COI deductions from the cash values of Plaintiff and the Class constitutes separate breaches of contract. Pet. at ¶ 47.

25. Plaintiff additionally contends that by loading COI rates with undisclosed expenses, Defendant repeatedly breaches the Policy and Class Policies by impermissibly deducting amounts from the cash values of Plaintiff and the class in excess of the expense charge amounts expressly

authorized by the Policy and Class Policies. *Id.* at ¶ 49. Plaintiff claims Defendant's inclusion of hidden expense loads in the COI rates is not authorized under the expense provisions of the Policy. *Id.* at ¶ 50. According to Plaintiff, Defendant charged policy owners the expense amounts authorized under the Policy's and Class Policies' expense provisions, and therefore, did not have authorization to deduct additional expenses through COI charges. *Id.*

26. As a result of the above alleged wrongful conduct, Plaintiff asserts claims against Defendant for breach of contract, conversion, and declaratory and injunctive relief. *Id.* at ¶¶ 67-99.

27. On October 2, 2020, Plaintiff moved for class certification under Mo. Sup. Ct. R. 52.08(b)(3) and 52.08(b)(2).

28. On December 4, 2020, Defendant filed its opposition brief and exhibits, including an expert report.

29. On December 22, 2020, Plaintiff filed his reply suggestions in support of class certification.

CONCLUSIONS OF LAW

Legal Standard for Class Certification

1. To obtain class certification, Plaintiff must satisfy the requirements of Missouri Rules of Civil Procedure 52.08(a) and 52.08(b). As applicable here, those prerequisites are as follows:

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

b. There are questions of law or fact that are common to the class;

c. The claims of the representative parties are typical of the class claims; and

d. The representative party will fairly and adequately protect the interests of the class.

Mo. Sup. Ct. R. 52.08(a). Additionally, the questions of law or fact common to the members of the class must predominate over any questions affecting only individual members, and the class action must be superior to other available methods for the fair and efficient adjudication of the controversy. Mo. Sup. Ct. R. 52.08(b)(3). Finally, it is required that the class exists which is capable of legal definition, and the representative party is a member of the proposed class. *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409, 425 (Mo. Ct. App. 2015).

2. Class certification is a procedural matter in which the sole issue is whether Plaintiff met the requirements for class action under Missouri Rule of Civil Procedure 52.08. *See Elsea*, 463 S.W.3d at 416-17. The party seeking class certification has the burden of proof. *Dale v. Daimler-Chrysler Corp.*, 204 S.W.3d 151, 164 (Mo. Ct. App. 2006). The party seeking class certification satisfies its burden if there is evidence in the record, if taken as true, which would satisfy each requirement of Rule 52.08. *Elsea*, 463 S.W.3d at 417 (quoting *Hope v. Nissan N. Am. Inc.*, 353 S.W.3d 68, 74 (Mo. Ct. App. 2011).

3. "In class certification determination, the named plaintiffs' allegations are accepted as true." *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 227 (Mo. Ct. App. 2007). The issue is not whether the plaintiff will prevail on the merits, but rather whether plaintiff has met the requirements for a class action. *Id.* at 222. Arguments that tend to negate allegations in the petition should be ignored. *Id.* at 227. The determination of class certification is based primarily upon allegations in the petition. *Elsea*, 463 S.W.3d at 414. While some evidence relating to the merits may be considered in determining whether the class certification prerequisites have been met, "the court must look only so far as to determine whether, given the factual setting of the case, if the plaintiff's general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 377 (Mo. Ct. App.

2005).

4. Rule 52.08 is procedural therefore the Court should refrain from analyzing the merits of plaintiff's case when determining whether class certification is proper. *Hale*, 231 S.W.3d at 222. However, the Court's analysis of the evidence and record submitted to determine class certification may somewhat overlap with the merits of plaintiff's alleged cause of action. *Hope*, 353 S.W.3d at 74. Such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case. *Craft*, 190 S.W.3d at 377.

5. There is a presumption in favor of certifying the class in class certification hearings "because class certification may be modified or even terminated before a decision on the merits." *Plubell v. Merck & Co.*, 289 S.W.3d 707, 715 (Mo. Ct. App. 2009). Rule 52.08(c)(1) provides the mechanism for the modification or outright decertification of the putative class. *Elsea*, 463 S.W.3d at 416. Because class certification is subject to later modification, a court should err in favor of, and not against, allowing maintenance of the class actions. *Hale*, 231 S.W.3d at 222. The rule's requirements are construed in light of its objectives, i.e., to provide for the expeditious handling of disputes. *Id.*

Rule 52.08(a)(1) – Numerosity

6. Rule 52.08(a) does not require that joinder be impossible, merely that it be impracticable. *Elsea*, 463 S.W.3d at 418. Joinder of all members is "impracticable" when "it would be inefficient, costly, time-consuming and probably confusing." *Dale*, 304 S.W.3d at 167. Missouri courts have upheld class certification when the class is comprised of "100 or even less" members. *Id.* at 168. Plaintiff need not specify an exact number of class members but must show that joinder is impracticable through evidence or a reasonable estimate of the number of purported

class members, therefore the court may accept common sense assumptions to support a finding of numerosity. *Id.*

7. The allegations in the Petition, which the Court must take as true, establish that the persons who fall within the proposed Class "number in at least the hundreds," and that these members are geographically dispersed throughout the State of Missouri. Pet. at ¶ 60. Furthermore, Defendant does not appear to contest that numerosity is satisfied.

8. Accordingly, having considered the evidence in the record and the allegations of the Petition, which the Court must assume to be true, the Court concludes that Plaintiff satisfies the numerosity requirement of Rule 52.08(a)(1).

Rule 52.08(a)(2) – Commonality

9. Pursuant to Rule 52.08(a)(2), the common question may be of fact or of law, and need not be one of each. *Elsea,* 463 S.W.3d at 418. The fundamental question is whether the proposed class is seeking to remedy a common legal grievance. *Dale,* 204 S.W.3d at 175. "[I]f the same evidence will suffice for each member to make a prima facie showing as to a given question, then it is a common question." *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 581 (Mo. Ct. App. 2010). A single common issue may be the overriding one in litigation, despite that the suit also involves numerous individual questions. *Elsea,* 463 S.W.3d at 419. "[W]hat really matters in class certification is not the raising of common questions, but the ability of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (internal citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011) (citation omitted).

10. As Plaintiff alleges, at this stage in the litigation, there are questions of law and fact

common to the putative class which include:

a. Whether Defendant is permitted by the Class Policies to determine cost of insurance rates that are not based on its expectations as to future mortality experience;

b. Whether Defendant determines cost of insurance rates that are not based on its expectations as to future mortality experience;

c. Whether Defendant is permitted by the Class Policies to consider and use undisclosed factors to determine the monthly cost of insurance rates used to calculate cost of insurance charges;

d. Whether Defendant considered, added, included, used, or relied on undisclosed factors to determine the monthly cost of insurance rates used to calculate cost of insurance charges;

e. Whether Defendant is permitted by the Class Policies to charge expense amounts to policy owners in excess of the amounts disclosed in the Class Policies;

f. Whether Defendant charged expense amounts to policy owners in excess of the amounts disclosed in the Class Policies;

g. Whether Defendant breached the terms of the Class Policies or converted class members' property;

h. Whether the class sustained damages as a result of Defendant's breaches of contract and conversions;

i. Whether the class is entitled to damages, restitution, and/or other equitable relief; and

j. Whether the class, or a subset of the class, is entitled to declaratory relief stating the proper construction and/or interpretation of the Class Policies.

11. Plaintiff asserts that Defendant made and continues to make excessive deductions for COI charges because Defendant determines COI rates in a manner unauthorized by the Policy, and the resulting deductions from policy cash values are in excess of amounts permitted by the Policy's terms. Common evidence of Defendant's deductions on common form policies will establish whether or not Defendant is liable for breach of contract as a result of failing to determine COI rates using only its expectations as to future mortality experience as required under the express

terms of the Policy and Class Policies, and therefore inflating the COI charges deducted from policy owners' cash values with undisclosed loads (Count I). Likewise, common evidence will determine whether Defendant deducts undisclosed expenses through the COI charge, and whether the Policy and Class Policies limit the amount of expenses Defendant is permitted to deduct on a monthly basis to the fixed amount of the expense charges identified in the Policy and Class Policies (Count II). Common evidence will also determine whether Defendant's expectations as to future mortality experience have improved and whether Defendant has failed to reduce monthly COI rates for the Policy and Class Policies as required by their terms (Count III). And common evidence will determine whether KC Life converted policy owners' property by taking more of their money than authorized (Count IV).

12. Here, these questions and the answers to these questions will generate common answers that will drive the resolution of the litigation. The Court concludes that Plaintiff has met the commonality requirement of Rule 52.08(a)(2).

Rule 52.08(a)(3) – Typicality

13. "Typicality means that the class members share the same interest and suffer the same injury." *Elsea*, 463 S.W.3d at 420 (quoting *Hale*, 231 S.W.3d at 223). Typicality is fairly met if:

> Other class members have claims similar to the named plaintiff. If the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory, factual variations in the individual claims will not normally preclude class certification.

Hale, 231 S.W.3d at 223 (internal citations and quotations omitted). Even when there is a difference in the underlying facts of the representative's claim and class members' claims, the typicality requirement is met as long as the claim arises from the same event or course of conduct of the defendant as the class claims, the underlying facts are not significantly different and the

conduct and facts give rise to the same legal or remedial theory. *Elsea*, 463 S.W.3d at 223 (citation omitted).

14. Because every member of the Class was subject to materially identical policy language and Defendant performed (and allegedly breached) the Policy and Class Policies in the same way for each class member, the Court concludes that Plaintiff has met the typicality requirement of Rule 52.08(a)(3). *See Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2018 WL 1955425, at *5 (W.D. Mo. Apr. 24, 2018) (finding plaintiff's claims typical of those of the class because the claims arose from and related to the interpretation and application of the policy and the policy language, and State Farm's methodology for determining COI rates was uniform for all class members).

Rule 52.08(a)(4) – Adequacy

15. The adequacy requirement of Rule 52.08 requires that the representative parties will fairly and adequately protect the interests of the class. Mo. Sup. Ct. R. 52.08(a)(4); *see Dale*, 204 S.W.3d at 172. "[The adequacy] prerequisite applies both to the named class representatives and to class counsel." *Elsea*, 463 S.W.3d at 420-21 (quoting *Vandyne v. Allied Mortg. Capital Corp.*, 242 S.W.3d 695, 698 (Mo. banc 2008). In considering whether adequacy has been met, the Court must consider whether the class representative "has, or may develop during the course of litigation, any conflicts of interest that will adversely affect the interests of the class." *Vandyne*, 242 S.W.3d at 698 (internal quotation and citation omitted).

16. Plaintiff's interests do not conflict with the interests of other Class Members he seeks to represent, but rather, they are aligned. Plaintiff claims he was overcharged because Defendant failed to keep its promises in the Policy and to act within its authority in making deductions from his cash value. Because the terms of the Policy and Class Policies are the same

for every member of the Class, if Defendant used unauthorized factors to determine COI rates in excess of those authorized under the terms of the Policy and Class Policies, Plaintiff and all other policy owners suffered excessive COI charges. Plaintiff has a personal monetary interest in recouping the overcharges and his interests are not in conflict with the interests of the Class.

17. Contrary to Defendant's argument, Plaintiff's lawsuit only seeks recovery of losses resulting from KC Life's addition of non-mortality loads in its COI rates. As such, no Class Member could owe Defendant money as a result of this lawsuit. If the policy owner did not experience an overcharge, then the worst case is that the policy owner will not be entitled to any recovery. Additionally, because Plaintiff only requests that Defendant be enjoined from *overcharging* policy owners, no class member can be adversely impacted by the request for injunctive relief either, as no rates will be increased because of this action. Thus, no Class Member will be harmed by this lawsuit.

18. Moreover, Defendant's contention that Plaintiff's claims are barred by the statute of limitations does not impede class certification. As a practical matter, Defendant's statute of limitations defense against Plaintiff can be asserted against all other Class Members. Therefore, Plaintiff is not atypical, nor is he subject to a unique defense. Also, Plaintiff's arguments against this affirmative defense will involve proof of Defendant's alleged failure to disclose it was incorporating factors other than its expectations as to future mortality experience in its COI rates, and thus, will rely on common evidence from Defendant as compared to individualized evidence from Class Members.

19. Defendant also seems to contend that Plaintiff's alleged failure to provide a subjective interpretation of the COI rates provision renders him inadequate to serve as a class representative. But under Missouri law "[p]olicy terms are given the meaning which would be

attached by an ordinary person of average understanding if purchasing insurance." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 863 (8th Cir. 2020) (quoting *Westchester Surplus Lines Ins. Co. v. Interstate Underground Warehouse & Storage, Inc.*, 946 F.3d 1008, 1010 (8th Cir. 2020) (citations and internal quotations marks omitted)). Consequently, Plaintiff's subjective interpretation of the form life insurance policy is irrelevant.

20. Finally, Plaintiff is not bound by the class definition in his Petition. Nor is the Court, as certification orders may be altered or amended before a decision on the merits. *See* Mo. Sup. Ct. R. 52.08(c)(1). Defendant's rigid argument that a plaintiff is bound by the proposed definition in the petition lacks support and is rejected.

21. As for the adequacy of class counsel, Defendant does not raise any challenge. After review of counsel's resumes, the Court finds they are competent, experienced, and qualified with relevant expertise in class actions and COI cases.

22. Therefore, because Plaintiff has no interests in this matter which would be antagonistic to the interests of the putative class and because Plaintiff has retained competent counsel with experience in class action litigation, the Court finds that Plaintiff meets the adequacy requirement of Rule 52.08(a)(4).

Rule 52.08(b)(3) – Predominance

23. The predominance requirement of Rule 52.08(b)(3) tests whether "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Elsea*, 463 S.W.3d at 422 (internal quotation and citation omitted). Not every issue must be common to all class members. *Id.* Predominance can be satisfied "if there is one single common issue that is the overriding issue in the litigation." *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 688 (Mo. Ct. App. 2009) (citing *Dale*, 204 S.W.3d at 174). The single predominant issue "need not even be dispositive of

the case." *Id.* "[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." *Elsea*, 463 S.W.3d at 422 (internal quotation and citation omitted). When one or more of the central issues in the action are common to the class and can be said to predominate, the case may properly proceed as a class action, even though other important matters may have to be tried separately. *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007).

24. The standard for determining whether a question is common or individual turns on whether the evidence needed for each member to make a prima facie showing on the issue is common or individualized:

> 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. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

Dale, 204 S.W.3d at 175 (citation omitted).

25. Here, the same alleged misconduct of Defendant that gives rise to the causes of action asserted by Plaintiff are the same acts that give rise to all Class Members' rights of redress. Further, while the amount of damages may vary by Class Member, the calculation of damages is essentially the same for all members. *See, e.g.*, *Moser v. Keller*, 303 S.W.2d 135, 151 (Mo. 1957) (fact that amount of damages may be different for each member depending on the number of shares held did not preclude class certification). For these reasons, the predominance requirement of Rule 52.08(b)(3) is met.

26. Defendant, however, contends that if the COI rate provisions are ambiguous, predominance cannot be met because individualized extrinsic evidence would have to be considered to resolve the ambiguity. But Missouri law is clear: an ambiguity in an insurance policy "must be construed against the insurance company." *Vogt v. State Farm Life Ins. Co.*, 2018 WL 1747336 at *4 (W.D. Mo. Apr. 10, 2018); *see also Burns v. Smith*, 303 S.W.3d 505, 509

(Mo. 2010) ("In construing the terms of an insurance policy, this Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance, and resolves ambiguities in favor of the insured.") (citing *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007); *Martin v. U.S. Fidelity & Guaranty Co.*, 996 S.W.2d 506, 508 (Mo. banc 1999)); *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. 2009) ("In construing the terms of an insurance policy, this Court … resolves ambiguities in favor of the insured."); *Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo.*, 992 S.W.2d 308, 317 (Mo. Ct. App. 1999). Thus, even if the Class Policies' COI rate provisions were determined to be ambiguous, extrinsic evidence may not be considered to resolve the ambiguity, as it would be construed against Defendant as a matter of law.

27. For the foregoing reasons and at this stage in the litigation, the Court concludes that substantial common issues predominate over any individual issues and Plaintiff has met Rule 52.08(b)(3)'s predominance requirement.

Rule 52.08(b)(3) – Superiority

28. Rule 52.08(b)(3) requires a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Mo. Sup. Ct. R. 52.08(b)(3). The Court must balance, "in terms of fairness and efficiency, the merits of a class action in resolving the controversy against those of alternative available methods of adjudication." *Elsea*, 463 S.W.3d at 423 (citation omitted). Manageability is a factor that may be considered with respect to superiority, however it generally may not be used to deny a class certification unless efficient management is "nearly impossible." *Id.*

29. Here, the separate adjudication of claims between hundreds of individual class members throughout the state could lead to inconsistent results, potentially establishing

incompatible standards of conduct for Defendant. Further, the financial burden on individual Class Members could make it impracticable for them to pursue claims individually against Defendant outside of the class. If, however, it is determined through further discovery during the course of this litigation that individual issues predominate over common issues, the Court is able to re-examine its finding regarding superiority.

30. Therefore, at this stage in the litigation, the Court finds that Plaintiff has satisfied Rule 52.08(b)(3)'s superiority requirement.

31. Accordingly, the Court appoints Plaintiff David B. Karr as class representative, and the law firms of Stueve Siegel Hanson LLP and Miller Schirger, LLC, as class counsel.

Certification under Rule 52.08(b)(2)

32. Rule 52.08(b)(2) states that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Mo. Sup. Ct. R. 52.08(b)(2).

33. Defendant argues that Plaintiff's claims for declaratory and injunctive relief cannot be certified under Rule 52.08(b)(2) because the primary relief sought in this action is money damages. But Plaintiff's claims for declaratory and injunctive relief do not seek the recovery of money.

34. Accordingly, certification of Plaintiff's claims for declaratory and injunctive relief in accordance with Rule 52.08(b)(2) is proper.

CONCLUSION

For the reasons cited above, the Court finds and concludes that Plaintiff David B. Karr's Motion for Class Certification should be and is hereby **GRANTED**.

IT IS SO ORDERED.

July 12, 2021
Date

Hon. John M. Torrence, Judge, Division 14