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

DAVID B. KARR, individually and on behalf of others similarly situated,	)	
Plaintiff,	)	Case No. 1916-cv26645
vs.	)	Division 14
KANSAS CITY LIFE INSURANCE COMPANY,	)	
Defendant.	)	

DEFENDANT KANSAS CITY LIFE INSURANCE COMPANY'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD

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Defendant Kansas City Life Insurance Company ("KCL") hereby submits suggestions in opposition to Plaintiff's Motion for Attorneys' Fees, Expenses, and Service Award.

I. INTRODUCTION

This case is one of many that Plaintiff's counsel is pursuing against various life insurance companies throughout the country, and in which they present virtually identical claims, achieving some, but not universal success.[1] Following the same game plan, this case is not remotely "extraordinary" or "novel" and therefore fails to warrant a substantial award of attorney fees. To the contrary, Plaintiff's self-proclaimed "excellent result" in this case conveniently forgets that his counsel voluntarily ***abandoned*** his conversion claim and the punitive damages potentially available to the class associated with that claim right in the middle of trial. This tactical decision is difficult to reconcile with the same lawyers choosing to aggressively pursue in other, strikingly similar cases precisely these claims. Indeed, this inconsistency betrays a conflict of interest that calls into question whether class counsel should be entitled to fees at all, let alone fees for a purportedly "extraordinary" result for a class that counsel elected to deprive of any chance of recovering an award counsel seeks elsewhere for their other clients.

The different treatment and allegiances of counsel for their many clients pursuing these cost of insurance cases is particularly inexplicable—or at least hard to justify—given that counsel's singular refrain throughout this case was to simply invoke *Vogt v. State Farm Life Ins. Co*. Indeed, counsel's reliance on *Vogt* as the guiding light for everything they urged this Court to do exposed their strategy in this case as essentially rote and mechanical, rather than novel or extraordinary.

[1] After a string of initial victories, the theories on which Plaintiff relied have been subsequently rejected by numerous courts. *See, e.g., Norem v. Lincoln Ben. Life Co.*, 737 F.3d 1145, 1148 (7th Cir. 2013); *Mai Nhia Thao v. Midland Nat. Life Ins. Co.*, No. 09-C-1158, 2013 WL 119871, at *2 (E.D. Wis. Jan. 9, 2013); *Maxon v. Sentry Life Ins. Co.*, No. 3:18-cv-00254, 2019 WL 4540057 (W.D. Wis. Apr. 12, 2018).

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Despite some superficial similarities, the cases are not the same—KCL and State Farm are different companies, they offered their insureds different policies with different contractual language and made different arguments at different times and in different ways throughout the life of each case. In short, KCL vigorously opposes the notion that *Vogt* equals *Karr,* while recognizing that Plaintiff's counsel attempted to litigate *Karr* based on a cookie-cutter blueprint of *Vogt*. Indeed, Plaintiff's counsel showed up to the final pre-trial hearing on December 5, 2022, and made clear this intention when he said: "What we are asking the Court to do is exactly what we did in *Vogt*." Attachment "A" (12-5-2022 Hrg. Tr.) at 52:20-21. That fails to justify the fees they now seek.

Relatedly, Plaintiff's request for a service award in the amount of $100,000 is both egregious and excessive. It is out of step with the overwhelming majority of service awards, and virtually impossible to reconcile with Plaintiff's testimony at trial disclosing his lack of typicality with absent class members and his failure to meaningfully contribute to the litigation. Indeed, he admitted to not even consulting with his retained expert, Mr. Witt, leaving that expert to calculate damages in a manner that failed to draw on Plaintiff's experience in any way. Plaintiff also testified that he did not understand the terms of his own policy and was principally concerned with recovering his death benefit, not the alleged "overcharges" from the cost of insurance payments—the central theory of the case.

In short, this Court should deny Plaintiff's Motion for attorney fees and service award in its entirety because they are not justified and reveal serious conflicts of interest that effectively pit both Plaintiff and his counsel against the absent class members they both purport to serve.

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II. ARGUMENT

A. Class Counsel's Request For Attorney Fees Is Excessive

"Missouri courts adhere to the 'American Rule' which states that, ordinarily, litigants must bear the expense of their own attorney's fees." *Arcese v. Daniel Schmitt & Co.*, 504 S.W.3d 772, 787 (Mo. Ct. App. 2016) (citation omitted). Indeed, although some cases have fashioned exceptions to this rule, they remain rare. *See, e.g.*, *Berry v. Volkswagen Group of America, Inc.*, 397 S.W.3d 425, 431 (Mo. Banc 2013). One such exception developed from the common fund doctrine, which affords a party's attorney a portion of fees from a common fund generated as the result of the litigation. *See Feinberg v. Adolph K. Feinberg Hotel Trust*, 922 S.W.2d 21, dd (Mo. Ct. App. 1996) (citing *Leggett v. Missouri State Life Insurance Co.*, 342 S.W.2d 833, 936 (Mo. banc 1960)).

Of course, even where the exception applies, as often occurs in class action litigation, "the court is not obligated to grant class counsel the total fee they request." *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 388 (Mo. Ct. App. 1997). Far from being anything close to automatic, Courts must evaluate several factors before awarding a request for attorneys' fees, including:

> (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed; (3) the difficulty and novelty of the legal and factual issues of the case; (4) the skill of the lawyers, both plaintiffs' and defendants'; (5) the time and labor involved; (6) the reaction of the class; and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Tussey v. ABB, Inc., No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *see also In re Alcolac, Inc. Litig.*, 945 S.W.2d 459, 461 (Mo. Ct. App. 1997).

Class Counsel in this case seeks one-third of the proposed judgment (nearly $10 million) in attorney fees and $276,431.13 in expenses, proclaiming that they have "achieved an extraordinary result." (Pl.'s SIS at 1). This assertion ignores several realities about the litigation

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including significant inefficiencies and even abandoned claims—and associated damages—that candidly call into question counsel's duties to the Class. For example, although counsel initially sought only compensatory damages, they spent significant time amending the petition to seek punitive damages, attempting to secure discovery to support it, and avoiding a summary judgment to strike it, only to voluntarily abandon those damages—as well as the asserted claim for conversion just before the applicable phase of trial commenced.[2] Thus, Plaintiff's narrative that Class Counsel "obtained the exact relief sought for Class Members" (*id.* at 17) ignores their eleventh-hour abandonment of the punitive damages they previously argued should be available to class members.[3]

More significantly, this case is not novel. Indeed, it is just one of many cases brought by Class Counsel against various enterprises in the life insurance industry based on the same basic theory that consumers of universal life insurance products somehow overpay for the cost of insurance despite receiving numerous and regular disclosures, with some jurisdictions accepting that theory and others rejecting it. *See, e.g.*, *Rogowski v. State Farm Life Ins. Co.*, No. 4:22-cv-00203 (W.D. Mo. Mar. 25, 2022); *Sheldon v. Kansas City Life Ins. Co.*, No. 1916-CV26689 (Mo. Nov. 7, 2019); *Whitman v. State Farm Life Ins. Co.*, No. 3:19-cv-06025 (W.D. Wa. Oct. 30, 2019); *Meek v. Kansas City Life Ins. Co.*, No. 4:19-cv-00472 (W.D. Mo. June 18,

[2] Class Counsel even audaciously seeks credit for success on a motion to add a prayer for punitive damages to the petition and for overcoming a motion to dismiss punitive damages, even though they voluntarily dropped the asserted conversion claim and abandoned any prospect of obtaining punitive damages for the class at trial.

[3] As discussed more fully in the concurrently filed Opposition to Plaintiff's Motion for Entry of Judgment, Class Counsel further failed to support the claim for damages on each separate Count. Indeed, Plaintiff's expert testified that the damages were the same for all three counts, that he did not differentiate between them, and moreover, that he did not calculate damages for Count III. So, even in light of instructing the jury of the Court's summary judgment order, Plaintiff's counsel still failed to submit evidence in support of the three distinct claims at trial.

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2019); *Bally v. State Farm Life Ins. Co.*, No. 3:18-cv-04954 (N.D. Cal. Aug. 15, 2018); *Smithson v. Jackson Nat'l Life Ins. Co.*, No. 1:18-cv-00599 (W.D. Mich. May 30, 2018); *Maxon v. Sentry Life Ins. Co.*, No. 3:18-cv-00254 (W.D. Wis. Apr. 12, 2018); *Barnes v. Security Life of Denver Ins. Co.*, No. 1:18-cv-00718 (D. Colo. Mar. 27, 2018).[4]

The suggestions in support of the pending motion describe the procedural history of the litigation and highlight various motions, but fail to provide any detail about the practical efforts undertaken, such as the amount of attorney hours spent litigating *this case*, as opposed to counsel simply repurposing work product from other matters. Indeed, the Court no doubt recalls the many times Class Counsel invoked the *Vogt* decision in their papers and at trial—an entirely natural result because it is counsel's swan song, and the case in which they devoted the bulk of their efforts. If it were otherwise, one might expect counsel to identify their time records or invoices relating to *this case* to support the fees claimed or expenses incurred. Instead, counsel has deprived this Court of any way to evaluate such matters. Plaintiff's offer to provide expense reports *in camera* is no answer because it robs KCL of the ability to challenge the propriety of the amount sought—something anathema to our adversarial system of justice.

Plaintiff's Motion consists of a bald request for fees merely because they litigated a case that resulted in a recovery for the class, without showing any support for any actual time or fees incurred or explaining why counsel would surrender a claim and an entire category of damages during the trial. This Court should therefore deny Plaintiff's Motion for attorney fees.

B. Plaintiff's Request For A Service Award Is Excessive and Not Justified By The Record

Plaintiff's request for a $100,000 service award should also be denied because it is excessive and unfair to the Class.

[4] The list goes on.

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In determining an appropriate service award, this court should consider: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefitted from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *In re United States Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving incentive awards of just $2,000 each to five named plaintiffs). The suggestions in purported support of the motion fail to even attempt to make such a showing.

The omission is unsurprising because Plaintiff testified at trial that he did not even understand various provisions of his own policy. Plaintiff also stated that was not concerned with his policy's cash value, as he only wanted his specified death benefit—something which he can still receive and has never been denied to him. Plaintiff further testified that he would not surrender his policy because his sole purpose in obtaining the policy in the first place was for the specified death benefit. Plaintiff admitted at trial that he still had no understanding of the damages he could have sustained or whether his pursuit of this case would ultimately benefit or harm the class members. Accordingly, aside from his willingness to put his name on the pleading and sit for a one-day, virtual deposition, it is unclear how Plaintiff substantively contributed to the case, let alone whether he was even an appropriate representative typical of other class members. Tellingly, the trial principally turned on expert testimony and data to which Mr. Karr's testimony did not contribute.

In light of the not-so-uncommon disconnect between class representatives and the progress of the litigation, other jurisdictions have expressed caution about the propriety of service awards. For example, in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003), the Ninth Circuit observed the general rule that "when a person 'join[s] in bringing [an] action as a class action . . . he has *disclaimed any right to a preferred position* in the settlement.' Were that not the case, there would

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be considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations." *Id.* at 976 (citation omitted). The *Staton* Court paid particular respect to this rule in reversing a service award unjustified by the record. Similarly, *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), explained that longstanding Supreme Court precedents "prohibit the type of incentive award . . . that compensates a class representative for his time and rewards him for bringing a lawsuit." *Id.* at 1260 (citing *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

Having shown no justification for the requested service award, the Court should deny an award in the amount of $100,000 as plainly excessive. State and federal courts covering this jurisdiction more routinely award much lower service awards. *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867-68 (8th Cir. 2017) (affirming service award of $10,000); *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 220 (W.D. Mo. 2017) (approving $2,500 service award to each class representative); *Fellows v. Am. Campus Communities Servs., Inc.*, No. 4:16-CV-01611-JAR, 2018 WL 3056046, at *7 (E.D. Mo. June 20, 2018) (awarding $5,000 service award); *Rawa v. Monsanto Co.*, No. 4:17CV01252-AGF, 2018 WL 2389040, at *9 (E.D. Mo. May 25, 2018) (approving service awards ranging between $2,500 and $10,000 for class representatives based upon their level of contribution); *Martin v. Safe Haven Sec. Servs., Inc.*, No. 19-cv-00063-ODS, 2020 WL 4816418, at *2 (W.D. Mo. Aug. 19, 2020) (awarding $10,000 service award to plaintiff's "go-to" plaintiff who "responded to two sets of written discovery, was deposed twice, [and] fielded counsel's questions," as opposed to the $5,000 awarded to the second named plaintiff who had a lesser role); *Paulson v. Dynamic Pet Prods., LLC*, 560 S.W.3d 583, 594 (Mo. Ct. App. 2018) (affirming settlement with incentive award of $5,000 each to three class representatives); *Bachman*

v. A.G. Edwards, Inc., 344 S.W.3d 260, 265, 268 (Mo. Ct. App. 2011) (approving class action settlement and award of $10,000 to class representatives). Even in Class Counsel's routinely quoted case, *Vogt v. State Farm Life Insurance Company*, the Court rejected Plaintiff's unopposed request for a $100,000 service award as unjustified. No. 2:16-CV-04170-NKL, 2021 WL 247958, at *4 (W.D. Mo. Jan. 25, 2021).

Accordingly, KCL respectfully requests that this Court deny Plaintiff's Motion for a service award in the amount of $100,000.

III. CONCLUSION

For the foregoing reasons, KCL respectfully requests that the Court deny Plaintiff's Motion in its entirety.

Dated: January 31, 2023

Respectfully submitted,

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Counsel for Defendant Kansas City Life Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023, I electronically filed the foregoing with the Clerk of the Court using the Missouri e-Filing system, which will send notice of such filing to all attorneys of record.

/s/ Lauren Tallent
Attorney for Defendant Kansas City Life Insurance Company

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EXHIBIT A

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION NO. 14
Honorable John M. Torrence, Judge

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

TRANSCRIPT OF HEARING

On Monday, December 5, 2022, the above cause came on regularly for hearing before the Honorable John M. Torrence, Judge of Division No. 14 of the Sixteenth Judicial Circuit, at Kansas City. The plaintiffs were represented by Mr. Patrick Stueve, Mr. Ethan Lange, Ms. Lindsay Todd Perkins, Mr. David Hickey and Mr. Ben Stueve of Stueve Siegel Hanson, LLP. The defendant was represented by Ms. Traci Martinez, Mr. James Randolph Evans, Mr. Daniel Delnero, Ms. Hannah Makinde, of Squire Patton Boggs, LLP, and Mr. John Shaw and Ms. Lauren Gleason of Berkowitz Oliver.

JESSICA MUSSER, CCR#889
Official Court Reporter, Division No. 14
Sixteenth Judicial Circuit at Kansas City

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MONDAY, DECEMBER 5, 2022

THE COURT: I'll call up Case No. 1916-CV266457. This is David Karr on behalf of the other class members vs. Kansas City Life Insurance Company. Can I get your appearances, please?

MR. STUEVE: Good morning, your Honor. Patrick Stueve here on behalf of plaintiffs. Along with me is my partner Ethan Lange. Other appearances are Joe Feierabend, David Hickey, from our firm, Lindsay Perkins from our firm, and Ben Stueve. Along with us is our client, David Karr and his wife Judy, who are -- David Karr is the class representative for the class.

MS. MARTINEZ: Good morning. Nice to see you again. Traci Martinez. With me are Randy Evans, Daniel Delnero, and Hannah Makinde, co-counsel John Shaw and Lauren Gleason. And with us from Kansas City Life are General Counsel Craig Mason, and Associate General Counsel Scott Harvison.

THE COURT: Thank you. I should tell you this. This is a good opportunity. In these courtrooms, when you turn your back to us, we can't hear you. It's like the sound goes out there and never comes back. So be cautious about that. And if you are going to get your backs to us, get loud.

MS. MARTINEZ: Get loud and proud.

Because they say liability with conversion held for a particular purpose requires identification of the precise sum converted. So that is an element of their conversion claim. That is also what you are telling us we are going to decide in the contract claim. Why not do them in the same phase?

MS. PERKINS: That is what we propose. I don't understand the disconnect there.

MR. EVANS: The disconnect is separating out the other elements in the conversion when the predicate for the conversion count is a part of the elements makes no sense. Because I'm just trying to think how will any of the -- how will Mr. Witt's testimony go? Because necessarily, he has to do for the tort claim the same thing he has to do for the contract claim. So why not try them together?

MS. PERKINS: That is, again, what we propose.

THE COURT: I think that is what they want to do.

MS. PERKINS: Exactly what we want to do.

MR. EVANS: No. What they want to do is have the contract -- no conversion -- contract decided first. And then conversion decided second, along with punitives, and then punitive damages. Maybe I'm

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misunderstanding.

MS. PERKINS: Counsel is misunderstanding.

THE COURT: Why don't you guys specify what your idea is, so that we are all on the same page? Because I'm coming and going from this page.

MR. STUEVE: So what we are proposing is exactly what we proposed in the Vogt case. To try both the breach of contract and the conversion claim together. Our evidence with respect to the disputed issues on the breach of contract and the conversion is the same.

The suggestion that they should be allowed to introduce evidence about their good faith and intent, we have already told you is not relevant for purposes of the conversion, certainly not relevant for breach of contract. Here is the instruction in Vogt, just so you can compare it to what we are proposing, your Honor. The suggestion that somehow we are inviting this Court to commit reversible error is utter nonsense. What we are asking the Court to do is exactly what we did in Vogt. And it was affirmed on appeal by the 8th Circuit. And as you know, the 8th Circuit is not a bastion for plaintiff's lawyers.

So the bottom line is, what we are proposing and the evidence is going to be, we are going

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to put on the evidence of what is a universal life policy? The jury needs to be told the Court has already found that this is what the contract means, that there was undisclosed mortality factors that were charged, the Court has found a breach already and what you are here to decide is the damages.

With respect to the conversion, like we said, the only issue, once the damages amount is determined, which is going to be the evidence of the overcharge -- the Court has already said that was wrongful in its summary judgment order -- it's a question of quantifying what that overcharge amount is for the breach of contract and the conversion. If the jury agrees with Mr. Witt and finds that there was an overcharge, there is liability for the breach of contract and the conversion. So that is what we are proposing for phase one.

In phase two -- and this is why we proposed it in the first place, because we knew what they were going to try to do is introduce punitive damages evidence about their intent, et cetera, in the compensatory phase, whether it's related to the contract or the conversion. So that is why our proposal, which is well within the Court's discretion, is let's try the compensatory damages claims, contract conversion.

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REPORTER'S CERTIFICATE

I, Jessica Musser, Certified Court Reporter, hereby certify that I am the official court reporter for Division No. 14 of the Jackson County Circuit Court, that on Monday, December 5, 2022, I was present and reported all the proceedings had and entered of record in the case of DAVID B. KARR, individually and on behalf of others similarly situated, Plaintiffs, vs. KANSAS CITY LIFE INSURANCE COMPANY, Defendant, Case No. 1916-CV26645. And I further certify that the foregoing pages contain an accurate reproduction of my shorthand notes of said proceedings.

/s/ Jessica Musser
Official Court Reporter
CCR No. 889