IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHAD HANSEN AND MELISSA HANSEN, on behalf of themselves and all others similarly situated	)	**No. 18 CV 244**
	)	**Judge Rebecca R. Pallmeyer**
Plaintiffs,	)	**Magistrate Judge Jeffrey I. Cummings**
v.	)	
COUNTRY MUTUAL INSURANCE CO. d/b/a COUNTRY FINANCIAL; and ELITE CONSTRUCTION CO. INC.	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW AND FACT IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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NATURE OF THE CASE

This lawsuit arises from Defendant Country Mutual Insurance Company and its corporate relatives (herein "CMIC") consistent use of improper claims estimating practices and misuse of claims estimating software. A review of CMIC's claims sample set shows that CMIC on average pays one third less than the market price for repairs.[1] In addition to calibrating its claims personnel to achieve consistent claims handling across all claims, CMIC also focuses its claims personnel on preventing "leakage" and reducing "claims severity."[2] Leakage and claims severity are repeatedly addressed in claims personnel's performance reviews, and CMIC's management training materials make clear that employee compensation is tied to performance.[3] Class certification is proper and necessary because CMIC breaches its insurance contracts and reaps massive windfalls through the use of a few common tactics. Despite intentionally underpaying the average claim by thousands of dollars, individual litigation for most claimants is not economically feasible.

The Plaintiffs and all of the putative class members had or have real and/or personal property

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[1] CMIC along with many other large property and casualty insurers hired McKinsey & Company to redesign their claims department and turn it into a profit center. While CMIC admits to hiring McKinsey, it produced only a handful of documents regarding the McKinsey recommendations. One of those documents shows that McKinsey's task was to "reduce loss overpayments" (*i.e.*, leakage), and that McKinsey was the source of CMIC's "best practices" which are designed to control "leakage." (*See* Ex. A, at 2-3.) CMIC's "best practices" are designed to get an estimate and check into the hands of the claimant quickly, and the claim closed for the amount CMIC estimated. (*See* Ex. B.) While CMIC's production is missing a substantial number of documents, CMIC's claims practices have all of the hallmarks of other McKinsey clients including Allstate's "Core Claims Process Redesign" ("CCPR") project in that adjusters were to be calibrated to pay claims at a level below what any of the adjusters were paying claims at prior to McKinsey; and that adjusters were to be compensated based on their ability to control claim "leakage" and severity. (*See* Exs. C & D, at 4-5 (respectively).)

McKinsey found that the largest savings were to be found in the claims estimating portion of the claim. (*See* Ex. E.) It can also be inferred from CMIC's deletion of the "I received a fair settlement" question from its internal customer service survey that CMIC knew the answer to the question was going to become increasingly unfavorable.

[2] *See* Ex. F [claims dept. newsletters focusing on leakage and severity]; and Ex. G [pages from performance reviews of CMIC's claims personnel directly involved in Plaintiffs' claim showing focus on controlling leakage and severity]. "Leakage" is the term used by McKinsey and CMIC to define an "overpayment" and "claim severity" is simply the amount paid to the claimant.

[3] *See* Ex. H.

claims that CMIC admitted are valid claims, that were paid, but paid in an amount substantially below what was owed under CMIC's insurance policies. The underpayments result from CMIC's uniform claims practices, policies, and procedures. CMIC sells insurance policies with three levels of coverage: actual cash value; replacement cost; and extended replacement cost (which would cover structure repairs beyond policy limits). Regardless of the level of coverage, CMIC's insurance policies provide that CMIC will only pay the "actual cash value" of damaged or destroyed property following a covered loss if the loss was estimated at more than $2,500.[4] CMIC is supposed to pay the replacement cost if the claimant repairs or replaces the damaged property within one year of the date of loss. CMIC's insurance policies consistently define "actual cash value" as:

> 1. "Actual cash value" means:
> a. For buildings or structures the lesser of the following, as determined by "us":
> (1) The cost actually and necessarily incurred to repair or replace the damaged property using standard new construction materials of like kind and quality and standard new construction techniques, less depreciation; or
> (2) Fair market value.
> b. For property other than buildings and structures the lesser of the following, as determined by "us":
> (1) The cost to repair or replace the damaged property using materials of like kind and quality, less depreciation; or
> (2) Fair market value.[5]

CMIC's insurance policies also state that CMIC will consider "wear and tear, deterioration, obsolescence, age, physical condition and reduced market value of the property" in determining depreciation.[6] A review of CMIC's claims practices and the patterns revealed in its claim sample set shows that CMIC violates the foregoing provisions that exist in all of its insurance policies by:

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[4] If the loss was caused by wind or hail, with the exception of Georgia, CMIC's estimated replacement cost would be paid in the initial payment if the loss was estimated to be less than $15,000. In 2017, CMIC changed its policies to *inter alia* reduce the threshold at which depreciation is withheld from $15,000 to $5,000.

[5] *See* Ex. I, at 2 [Country Mutual-000101].

[6] *See id*.

(1) underestimating the replacement cost through refusing to include sufficient materials and labor in its estimate of the cost to repair; (2) concealing the fact that CMIC altered the unit prices for items included in the estimate; and (3) simply depreciating on age and assuming average condition.[7] These three actions result in the claimant receiving far less than the "actual cash value," and generally makes it difficult, if not impossible, for insureds to recover the policy benefits for which they had paid premiums. CMIC's conduct violated the explicit requirements of its contracts that require the payment of actual cash value and replacement cost, as well as the implicit covenant of good faith and fair dealing. CMIC also attempts to conceal the fact that it produced and produces lowball estimates by instructing its adjusters that [redacted]"[8] This directive not only instructs adjusters to engage in improper claims practices but is incorrect based on CMIC's own data.

Class certification is proper because all of the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3) have been met. CMIC's misconduct does not vary between class members, nor are there substantial variations in state law – should this Court determine that another state's laws apply to a subset of the putative class. Once the trier of fact determines that CMIC breached its contracts and/or violated 215 ILCS 5/155 (herein "§ 155"); the only question left for the trier of fact will be to determine the amount of money CMIC cheated claimants out of – including the Plaintiffs. The

[7] CMIC even hid the column on the inventory worksheet to prevent claimants from indicating the condition their items were in. (*See* Ex. J, at 15-16.) CMIC's adjuster calibration training also instructs adjusters to only [redacted] (*See* Ex. K, at 64 [Country Mutual - 027994].)

[8] Ex. L, at 8 [Country Mutual - 041263] (emphasis added). Given that CMIC does not perform repairs itself, and CMIC's "expert" admits that "[w]hile property adjusters are trained in construction methods and repair techniques, most have never been contractors," CMIC's instruction to its adjusters is a factually and legally incorrect statement in every respect. Given that CMIC owes for the cost of repair and those repairs are carried out by contractors and not CMIC, [redacted] § 919.80(d)(7)(C) of Illinois' insurance regulations demonstrate as much. [redacted].

trier of fact will make this determination from the same evidence the Plaintiffs will use in presenting their individual claims. That evidence includes a comparison of CMIC's scope of real property repairs and property valuations, with the price goods and services were actually available for purchase at in the open market by Plaintiffs and class members.

ARGUMENT

In determining whether a class will be certified, the merits of the case are not examined beyond what is necessary for the Court to satisfy itself that the requirements of Federal Rule of Civil Procedure 23 have been met.[9] This Court should resolve any doubt regarding the propriety of certification in favor of allowing a class action so that class actions will remain an effective vehicle for deterring corporate wrongdoing.[10] "Rule 23 must be liberally interpreted" and read to "favor maintenance of class actions."[11] Broad discretion is conferred to the federal district courts to determine whether certification of a class action lawsuit is appropriate.[12]

Under Federal Rule of Civil Procedure 23(a), "one or more members of a class may sue or be sued as [a] representative part[y]" only if "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law *or* fact common to the class; (3) the claims

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[9] *See Beaton v. Speedy PC Software*, 907 F.3d 1018, 1025 (7th Cir. 2018) ("At this early stage in the litigation, the merits are not on the table. *Abbott*, 725 F.3d at 810 (describing class definition as a 'tool of case management'); *Messner*, 669 F.3d at 811 (class certification should not be turned into a 'dress rehearsal for the trial on the merits'). [Plaintiffs] bears the burden of showing that each requirement is met by a preponderance of the evidence. *Steimel v. Wernert*, 823 F.3d 902, 917 (7th Cir. 2016)."). Since the purpose of this motion is limited to the appropriatness of class certification, Plaintiffs have not included all of the evidence that demonstrates their likely victory.

[10] *In re Folding Cartons Antitrust Litigation*, 75 F.R.D. 727, 733 (N.D. Ill. 1977); *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969)("the interests of justice require that in a doubtful case, such as was presented here when considered by the trial court, any error, if there is to be one, should be committed in favor of allowing the class action.").

[11] *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 427 (N.D. Ill. 2007) (citing *King v. Kansas City Southern Industries*, 519 F.2d 20, 25-26 (7th Cir. 1975)).

[12] *See Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 474 (7th Cir. 1997) (citing *Retired Chicago Police Ass'n. v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993)).

or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."[13]

Finally, in addition to meeting all of the requirements of Rule 23(a), Plaintiffs must prove their action meets at least one subsection of Rule 23(b).[14] Plaintiffs are seeking to have the class certified under Rule 23(b)(3). Such a certification is appropriate if "the court finds that the questions of law *or* fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[15]

I. The Proposed Class Meets All Four Requirements of Fed. R. Civ. P. 23(a)

A. Numerosity is Present For Either a Nationwide or Illinois-only Class

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."[16] Generally, if a proposed class has more than forty people, then numerosity is satisfied.[17] The data produced by CMIC shows that there are over 400,000 putative class members.[18] As demonstrated by Exhibit M, even if this Court rejects Plaintiffs' proposed class definition, any class definition this Court might settle on satisfies the numerosity requirement. Further, CMIC has admitted that the overwhelming majority of CMIC's claims are adjusted using the software and

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[13] Fed. R. Civ. P. 23(a) (emphasis added); *see also Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998) (outlining and describing the elements to satisfy Rule 23).

[14] *See id*.

[15] Fed. R. Civ. P. 23(b)(3) (emphasis added).

[16] Fed. R. Civ. P. 23(a)(1).

[17] *See Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (citing cases certifying classes with 10-23 members); *Swanson v. American Consumer Industries, Inc.*,415 F.2d 1326, 1333 (7th Cir. 1969) (finding forty class members sufficient to certify class).

[18] *See* Ex. M (CMIC did not produce data for claims before 2010 or after May 31, 2019).

corresponding estimating practices that are at the core of the putative class's claims.[19]

B. There is adequate commonality to certify this class

The commonality prong of Rule 23 is met if there are "questions of law ***or*** fact common to the class."[20] "The Supreme Court has explained that 'for purposes of Rule 23(a)(2) even a single common question will do.'"[21] Factual variations among the class grievances do not defeat a class action.[22] Class certification has been upheld by the Seventh Circuit even though class members had "suffered" to different extremes.[23] In fact, "[i]t is routine in class actions to have a final phase in which individualized proof must be submitted" because if "commonality of damages were also essential, 'then class actions about consumer products are impossible.'"[24] Commonality usually exists where there is "a common nucleus of operative facts" and "[c]ommon nuclei of fact are typically manifest where [...] the defendants have engaged in standardized conduct towards members of the proposed class..."[25] Cases involving interpreting form contracts where a virtually identical

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[19] *See* Ex. N [Keck. Dep. Tr.], at 44:13-16; Ex. O [Bieber Dep. Tr.], at 90:21-91:16.

[20] *Lacy v. Cook Cty.*, 897 F.3d 847, 864 (7th Cir. 2018) (quoting Fed. R. Civ. P. 23(a)(2)) (emphasis added).

[21] *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 755 (7th Cir. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011)).

[22] *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980); *see also, Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977) (holding that so long as the common issue of law or fact is alleged, it is irrelevant to class certification if a variety of activities are complained of, or violations alleged).

[23] *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992) (commonality requirement satisfied because all students had been affected by a poor educational program even though some students passed state licensing exam).

[24] *Suchanek*, 764 F.3d at 756 (citations omitted); *see also Sparano v Southland Corp.*, No. 94 C 2098, 1996 WL 681273 at *1 (N.D. Ill. Nov. 21, 1996) ("it is generally understood that the need to determine individual questions after resolution of the common question will not preclude a finding of commonality since the court may order separate hearings or use other appropriate measures to resolve these issues. *Guardian Life*, 145 F.R.D. at 473.").

[25] *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir.1998) (citations omitted).

provision(s) are involved "present the classic case for treatment as a class action."[26]

Plaintiffs have identified the following common questions of law or fact:

a. whether CMIC systematically and knowingly undervalues material or labor costs in the estimates it prepares, and whether such conduct is unlawful;

b. whether CMIC systematically and knowingly writes estimates for repairs to real property that it knows are missing materials and/or labor that are necessary to complete the repairs, and whether such conduct is unlawful;

c. whether CMIC owes insureds for property that is necessarily damaged in the process of repairing damaged property that was damaged by a covered peril;

d. whether CMIC's practice of mechanically applying one depreciation rate to an entire category of property without regard to the brand, model, or quality of the claimant's property is unlawful;

e. whether CMIC's depreciation tables, formulas, and/or assumptions about insured property that overstate the amount of depreciation are unlawful;

f. whether CMIC's claims policies impermissibly shift burden to the claimant of proving that the depreciation taken is excessive;

g. whether CMIC systematically and knowingly refuses to pay market rates for demolition of real property which is necessary so that property repairs can be completed, and whether such conduct is unlawful;

h. whether CMIC systematically and knowingly refuses to pay for materials and/or labor required to protect property during repairs and/or pay for post-repair/post-construction cleaning, and whether such conduct is unlawful;

i. whether CMIC systematically and knowingly refuses to pay for permits, taxes, and

[26] *Id*. (citations omitted).

fees required to make the claimant whole under the terms of the insurance policy;

j. whether CMIC's practice of using price lists from the month of the loss rather than at the time the scope of repair/replacement is agreed to results in the insured receiving less than they are entitled to under their insurance policy, and whether such conduct is unlawful;

k. whether CMIC's systematic and knowing refusal to pay overhead and profit to contractors is unlawful;

l. whether CMIC's institution of claims handling policies, practices, or procedures that incentivize claims personnel to write estimates using "average grade" and below "average grade" materials and/or require claims personnel justify every item on an estimate that is written above the lowest or average grade (depending on category) material is unlawful;

m. whether CMIC's institution of policies and practices that incentivize claims personnel to make it difficult for insureds to recover the full replacement cost of damaged or destroyed property is unlawful;

n. whether CMIC violates its contractual obligations or engages in unreasonable and vexatious delay by allowing the implementation of claims handling policies, practices, or procedures set forth in paragraphs (a) - (m) above;

o. whether CMIC violates its contractual obligations or engages in unreasonable and vexatious delay by allowing the implementation of claims handling policies, practices, or procedures that force the insured/claimant to accept a "low ball" settlement or pursue litigation to receive what they are owed;

p. whether CMIC violates its contractual obligations or engages in unreasonable and vexatious delay by failing to evaluate a claimants' property beyond its age in

determining the amount of depreciation that applies;

q. whether CMIC breaches its contractual obligations or engages in unreasonable and vexatious delay by making inaccurate like kind and quality determinations in the estimates prepared for CMIC's insureds;

r. whether Illinois' unreasonable and vexatious delay statute (215 ILCS 5/155) applies to CMIC's handling of claims involving property not located in Illinois and/or policies issued to residents of states other than Illinois given that: the claims handling polices, procedures, and practices were designed in Illinois; claims are monitored from Illinois; and claimants/insureds are directed to communicate with CMIC in Illinois; and

s. the appropriate types and measures of damages, and the data sources for calculating damages.

As demonstrated, there are numerous common legal and factual issues that apply to every class member. Therefore Plaintiffs have surmounted the "low hurdle" created by Rule 23(a)(2).[27]

C. The Claims Plaintiffs Seek to Have Certified are Typical of the Class

"The issue of typicality is closely related to commonality and should be liberally construed."[28] A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to claims of other class members and his or his claims are based on the same legal theory."[29] The typicality requirement does not demand that all the class members suffer the

[27] *In re Groupon, Inc. Secs. Litig.,* No. 12 C 2450, 2014 WL 5245387, at *2 (N.D. Ill. Sept. 23, 2014); *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992).

[28] *Saltzman*, 257 F.R.D. at 480 (citing *See Keele*, 149 F.3d at 595; *Whitten v. ARS Nat'l Servs. Inc.*, No. 00 C 6080, 2001 WL 1143238, at *3–4 (N.D. Ill. Sept. 26, 2001)).

[29] *De La Fuente v. Stokey-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

same injury as the named representative.[30] Nor does the presence of individual damages render the class unsuitable for certification.[31] Instead, courts look to the defendant's conduct and the named plaintiff's legal theory to determine if the requirement of typicality is satisfied.[32]

The claims Plaintiffs seek to have certified for class treatment are typical of the class. First and foremost, CMIC's Fed. R. Civ. P. 30(b)(6) witness admitted that Plaintiffs' claim was generally handled consistent with CMIC's claims policies and practices.[33]

1. Plaintiffs' Contents Claim is Typical of the Putative Class's Claim

While CMIC's underestimating of replacement cost primarily impacts structure claims,[34] CMIC's wilful refusal to follow the explicit requirements of its insurance policies regarding depreciation results in damage to all claimants. The insurance policies CMIC sells require it to consider "wear and tear, deterioration, obsolescence, age, physical condition and reduced market value of the property," when determining the depreciation of an item.[35] On both structure and contents claims, CMIC's adjusters simply input the age of the line item into Xactimate/XactContents and set the program to assume average condition. By assuming "average condition" on all items,

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[30] *Id*. at 232-3.

[31] *Id*.

[32] *Id*.

[33] *See* Ex. O [Bieber Dep. Tr.], at 51:16-19.

[34] CMIC cannot undervalue the replacement cost of contents as easily as structure because the claimant knows how much an item costs and can easily insist that CMIC find a vendor selling a content item for the price estimated on CMIC's inventory. This is not the case with structure claims where line items have a single unit price with combined material and labor cost; and where the claimant likely does not have enough knowledge to know what is required to complete a structural repair or the going rate for a tradesperson to complete the repair.

[35] *See* Ex. I, at 2 [Country Mutual-000101] ("The cost to repair or replace the damaged property using materials of like kind and quality, less depreciation; or Fair market value;" and factors considered: "wear and tear, deterioration, obsolescence, age, physical condition and reduced market value of the property.")

CMIC over depreciates every item with this improper assumption by *forty* percent.[36] This results in an artificially low actual cash value payment and *inter alia* a breach of contract on both structure and contents claims. While it is impossible to calculate with absolute certainty the effect of this improper assumption of average condition on structure claims, Plaintiffs' contents expert was able to offer an opinion about the damage caused by this assumption as used by CMIC.

Plaintiffs' contents expert, based on his years of experience in the contents estimating and replacement industry, estimates that CMIC underestimates the ACV of contents by five to seven percent on the typical contents claim.[37] CMIC's overdepreciation of contents claims is more significant than for structure claims because it should be easier to recover withheld depreciation on structure claims. Unlike contents claims, a properly estimated structure claim typically only requires the claimant hire a general contractor or a few contractors to complete all of the work and recover all of the withheld depreciation. However on contents claims, CMIC will almost always reap a windfall because the claimant typically has to replace dozens if not hundreds of items in order to avoid being harmed by CMIC's improper assumptions regarding the pre-loss condition of a claimant's contents. Further, the replacement has to be completed within one year of the date of loss. The likelihood of an insured replacing all of their contents is very low and about [redacted] of the contents claims in the sample set recovered none of the depreciation.[38] Of the [redacted] claims in the sample set with contents depreciated, only [redacted] recovered all of the withheld depreciation.[39] On a dollar basis, only [redacted] of the depreciation withheld on contents was

[36] Despite stating that Plaintiffs' home was in good condition after the loss (*See* Ex. P, at 2), CMIC described all of Plaintiffs' contents as "average" condition which resulted in the amount of depreciation being forty percent higher than it should have been. (*See* Ex. Q and Ex. R, at 3.)

[37] *See* Ex. J, at 27.

[38] *See* Ex. S.

[39] *See id.*.

recovered.[40] Plaintiffs' contents expert estimated CMIC underestimates the ACV of contents claims on average by $3.7-5.2 Million each year during the putative class period.[41]

2. Plaintiffs' Structure Claims Were Undervalued For the Same Reasons as Class Members in the Sample Set

Plaintiffs' structure claims are typical of the class in that CMIC employed most of the same tactics on Plaintiffs' structure claim as CMIC employed on claims in the sample set. There are four primary reasons why CMIC's replacement cost estimates are unrealistically low: (1) improper scope;[42] (2) using the wrong labor rate;[43] (3) specifying materials that are below the quality that previously existed;[44] and (4) using artificially low prices which CMIC has concealed it lowered, that

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[40] *See id*.

[41] *See* Ex. T, at 11. Plaintiffs' experts' analysis was hindered by the fact that CMIC appears to have only produced information about contents estimated using Xactimate. Starting in 2013, CMIC's adjusters had access to XactContents so the majority of contents data from Xactware remains unproduced. Further, even the Xaxctimate line item data CMIC produced is incomplete.

[42] Where supplement requests existed in the sample set, they were frequently for inadequate scope related to CMIC's failure to include enough material in its estimate. When it comes to underscoping roof claims, CMIC's management instructed adjusters that they are not to order Eagleview reports to resolve the dispute. (*See* Ex. K, at 35 [Country Mutual - 027965].) CMIC's sample set demonstrates that despite not having, and not obtaining evidence to refute the contractor's assertion, CMIC did not budge from its estimated quantities. Further, supplement requests were frequently rejected either because the work had been completed or for an otherwise undisclosed reason.

One major example of missing scope on roofs was CMIC's failure to pay steep and/or height surcharges that are necessary to account for decreased labor efficiency when working on steep and/or high roofs. In the sample set [redacted] of roof claims were clearly missing one or both of these surcharges. There were [redacted] of roof claims where it cannot be determined if a steep surcharge was missing based on the information in the claim file or independent research on Google Maps/Earth. In some instances, including the Plaintiffs' claim, CMIC only paid the steep/high surcharges for replacing shingles but not their removal or vice versa. Further, CMIC instructed its adjusters to underestimate the number of squares for this surcharge on every claim. The significance of these two charges is that on average they add [redacted] to the per square cost of the shingles on a roof, but got as high [redacted] in the sample set claims.

[43] The single largest example of CMIC using the wrong labor rate is CMIC using the general demolition labor rate for roof removal. On virtually every claim CMIC estimates the removal surcharges using the general demolition labor rate as opposed to the roofer labor rate which is on average [redacted] higher. (*See* Ex. U, at 6-7.) The failure to use the correct labor rate impacted not only the shingle removal unit price, but steep and height removal surcharges where they were present.

[44] *See* Exhibit K, at 53 [Country Mutual - 027983]. CMIC's training materials – to the extent they were produced – instruct adjusters to use "standard grade" materials in writing flooring estimates. "Standard grade" is below the "average grade" and usually costs twenty-five to forty percent less than "average grade"

are inexplicably and unjustifiably below the prices on the price list CMIC represented it was using on a given claim.[45] A review of Plaintiffs' claim, and a comparison of CMIC's estimated price to the bid ultimately accepted, demonstrates how severe CMIC's underestimation is:

Comparison of Country's Estimate to Bids

Trade	Defendant Country's Last Estimate Before Bid	Amount Ultimately Approved or Paid	Difference	% Difference
Cabinetry	$6,829.80	$19,048.00	$12,218.20	278.90%
Flooring	$7,442.37	$32,110.17	$24,667.80	431.45%
Insulation	$5,329.14	$13,136.00	$7,806.86	246.49%
Plumbing	$3,895.88	$12,299.91	$8,404.03	315.72%
Drywall	$14,406.24	$16,956.00	$2,549.76	117.70%
Siding	$18,820.30	$23,697.00	$4,876.70	125.91%
Roof	$11,171.38	$12,600.00	$1,428.62	112.79%

items in Xactimate's price lists. (*See* Ex. V.) If adjusters include line items that are above "average" grade – which with few exceptions is either the lowest or second lowest material grade – adjusters have to provide documentation sufficient to satisfy a closed file reviewer that the higher grade material was necessary. If the reviewer is not convinced of the need for the higher quality material based on the documentation in the file, the adjuster's compensation is impacted as adjusters' performance reviews ask repeatedly about the adjuster's control of leakage and claim severity. (*See* Ex. O [Bieber Dep. Tr.], at 127:12-131:1; Exs. G & H.) Country was even attempting to implement a real time alert system where any estimate that includes items above average grade and without an explanation as to why a higher grade is necessary gets flagged in realtime for management. (*See* Ex. W.)

On the Plaintiffs' claim, CMIC's proposed repair and estimate was to sand and stain hand scraped wood floors. Based on Xactimate pricing and CMIC's measurements, CMIC proposed to underpay this portion of Plaintiffs' claim by 85%. Plaintiffs prefaced their statement "based on Xactimate pricing and CMIC's measurements" because of the few flooring claims in the sample set with bids or final invoices, CMIC's estimates were on average deficient by [redacted]. CMIC's measurements were also notably off on aspects of Plaintiffs' claim and claims in the sample set.

CMIC's undervaluing flooring claims is not limited to wood floors. CMIC instructs its adjusters to estimate using "standard grade" carpet but they can [redacted] if there documentation of higher grade carpet. (*See* Ex. K, at 53.) Based on CMIC's Xactimate data dump, CMIC's adjusters specify "standard" or "average" grade carpet on [redacted] of claims. CMIC does this despite Xactware defining the most prevalent carpet type in the U.S. (nylon) as "high grade." The average price difference between the carpet CMIC includes in its estimate and the lowest grade carpeting that they were estimating to replace is [redacted] per square foot.

[45] On the Plaintiffs' claim the price changes were not concealed but they were also not justified. An example of a price change on Plaintiffs' claim is CMIC's adjuster adding a line item for the removal of carpet, but editing the description to state the line item covered removal of both carpet and pad. In just family room of Plaintiffs' home CMIC shaved $67.50 of the replacement cost on its estimate.

The foregoing table takes each trade (*e.g.*, drywall, insulation, etc...) from the last estimate issued by CMIC before all of the line items for a given trade were replaced by a lump sum from a bid. On the Plaintiffs' claim, and at least one in the sample set, the adjuster deleted line items beyond those covered by the bid being entered into the estimate. Despite Plaintiffs submitting documentation showing trades being completed, CMIC's outside counsel kept asking for more documentation, even though CMIC admitted in its deposition that CMIC felt it had overpaid and was done paying.[46]

Another method used by CMIC to improperly underpay claims is to use the wrong labor efficiency. Since Xactimate bundles labor and materials into a unit price, Xactimate has to account for the fact that construction crews will be more efficient where they have uninterrupted access to the structure and they are starting from scratch. While the "new construction" labor efficiency should be limited to new construction, and the "Restoration/Service/Remodel" efficiency used on all other estimates; CMIC adjusters used the "new construction" labor efficiency to reduce the replacement cost value of its estimates by approximately [redacted] on claims as low as [redacted] Further, both claims in the sample set that were over [redacted] had this labor efficiency improperly applied to them.

The only claim that approaches the value of the Plaintiffs' claim in the sample set has an insured experiencing the same problems as the Hansens. The [redacted] suffered a fire on their large house which was converted from a church. CMIC's initial estimate was [redacted], which after seven months grew to [redacted][47] Like the Hansens, CMIC asserts that this claimant wanted to act as his own general contractor. What is more likely is that this claimant could not get a general contractor willing to accept the project for CMIC's repair estimate.

[46] *See* Ex. O [Bieber Dep. Tr.,], at 300:15-302:4.

[47] Plaintiffs' expert upon a conservative rewriting of the estimate written by CMIC's adjusters arrived at a repair cost of [redacted] and opined that it could easily have been [redacted]

What the [redacted] claim demonstrates is that the Hansens, despite the size of their claim, are not outliers. Rather, the magnitude of the Hansen's claim simply highlights the significance of underpayments that are occurring on smaller claims.

CMIC's gross underestimation of smaller claims is demonstrated by one claim in the claims sample set where CMIC was forced to find a contractor to perform the repairs. One feature of Illinois law that CMIC does not mention to any claimant is § 919.80(d)(7)(C) of Illinois' insurance regulations. That section provides that an estimate prepared by or for an insurer must:

> be reasonable, in accordance with applicable policy provisions, and of an amount which will allow for repairs to be made in a workmanlike manner. If the insured subsequently claims, based upon a written estimate which he obtains, that necessary repairs will exceed the written estimate prepared by or for the company, the company shall review and respond promptly in writing to the insured in regard to his written estimate and provide the insured with the name of a repair shop or contractor that will make the repairs in a workmanlike manner.

On the claim where CMIC complied with this obligation, its preferred contractor came in [redacted] than CMIC's estimate. Two things are noteworthy about this claim. First, the claim file does not contain the proposal the claimant necessarily submitted to CMIC to trigger the CMIC's compliance with § 919.80(d)(7)(c). The absence of this proposal demonstrates that Plaintiffs' argument is correct in that CMIC's adjusters are [redacted]. Second, CMIC accepted a proposal that: (1) had unit prices about [redacted] higher than CMIC's estimate; (2) significant waste ([redacted] waste on a simple hip roof where CMIC only allows [redacted] waste); and (3) included overhead and profit where CMIC's guidelines that provide it should not have been paid.

While there was only one claim involving § 919.80(d)(7)(c), four other claims in CMIC's claim sample set involve contractors that participate in CMIC's contractor PPO. A review of

CMIC's agreement with its preferred contractors shows that it allows its preferred contractors to write estimates with allowances that it will not allow its staff or independent adjusters to write.[48] Further, while preferred contractors are supposed to stick to Xactimate's checkpoint price list, CMIC paid [redacted] preferred contractors who actually did the repairs on pricing higher than the Xactimate checkpoint price list.[49] Not only is this an admission by CMIC that it knows its estimating practices result in estimates that most contractors will not perform repairs for, but that Xactimate's prices are also not accepted by most contractors.[50]

3. Plaintiffs' Method for Proving Their Claim Demonstrates They Are Typical of the Class They Seek to Represent

Plaintiffs plan to prove their claim and the claims of the class by putting into evidence CMIC's: (1) claims policies, practices, and procedures; (2) CMIC's internal audit procedures and results to illustrate CMIC's estimating policies and practices since CMIC claims it cannot find the

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[48] *See* Ex. X, at 27 & 30. CMIC's preferred contractors get to write estimates that include: [redacted] Based on the claims in the sample set, the first two provisions amount to on average increase of [redacted] beyond what CMIC's adjusters estimate. While the value of the third provision is incalculable, based on the sample set the average value of the fourth provision (O&P) is [redacted] difference is significant when one considers CMIC's average estimate in the sample set is [redacted] CMIC pays this inflated pricing because the preferred contractor submits the scope to CMIC for approval before giving it to the claimant. (*See id.*, at 31.) As one claim showed, the contractor gladly agreed to [redacted]

[49] *See id.*, at 34 & 37.

[50] Not only are CMIC's contractors editing Xactimate pricing, but CMIC is receiving proposals from claimants' contractors showing that what is likely the going rate in the market for a given task is above Xactimate pricing. This was certainly the case with the [redacted] As such, CMIC knew that its estimates did not [redacted] and its refusal to pay more than those estimates is the very definition of bad faith. (*See* Ex. L, at 8 [Country Mutual - 041263].)

bulk of its relevant training materials;[51] and (3) data comparing the estimates CMIC prepared on Plaintiffs' claim and the claims in the sample set to the bids/invoices that were obtained by Plaintiffs and sample set claimants. In the process of proving CMIC's bad faith on Plaintiffs' individual claim, Plaintiffs will necessarily prove the class's claims and damages. Plaintiffs propose to calculate classwide damages by taking the average percentage difference between the amount CMIC paid on a claim and the amount CMIC should have paid based on bids. Calculation by this method is proper given that CMIC typically did not include contractor bids in the file unless it was necessary to justify how the claim was paid. Nevertheless, based on his review of the sample set, Plaintiffs' structure claims expert believes that on average, CMIC underpaid claims by [redacted] if measured from CMIC's final estimates in the few cases where CMIC revised its estimate, or [redacted] from CMIC's initial estimate.

As for the common questions presented above, Plaintiffs: (1) have suffered from each of the policies, practices, procedures being challenged; and (2) will prove their case using the same evidence that is applicable to the class's claims. Therefore, Plaintiffs have satisfied the typicality requirement as they are clearly members of the class they seek to represent.

D. The Plaintiffs and Their Counsel Will Adequately Represent the Putative Class

"The adequacy requirement is satisfied where the named representative (1) has retained competent counsel, (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy, and (3) does not have interests antagonistic to those of the class.[52] "The burden is on the

[51] *See* Exhibit Y which is a chart showing the training materials Plaintiffs requested from CMIC. CMIC claims to have almost no Learning Resource Center (training) materials for courses that are focused on issues relevant to showing commonality and typicality (identified on Exhibit Y in blue text). CMIC makes this assertion despite producing numerous documents discussing the need for consistent claims handling between claimants; documents showing CMIC has courses on [redacted]; and testimony from two employees at the top of CMIC's claim's department's that consistent claims handling is "very valued" and "very important" at CMIC. (*See* Ex. N, at 198:16-20; Ex. O, at 27:24-28:3).

[52] *In re Steel Antitrust Litigation*, No. 08 C 5214, 2015 WL 5304629, at *4 (N.D. Ill. Sept. 9, 2015) (citing *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 480 (N.D. Ill. 2009) *aff'd*, 606 F.3d 391 (7th Cir. 2010).)

party opposing class certification to demonstrate that representation will be inadequate."[53] The Court "has to take objections by defendants to adequacy of class counsel with a grain of salt."[54] Finally, a class representative is adequate even where the representative's claims are not exactly the same as other class members.[55]

The Plaintiffs' counsel is experienced in handling class actions and complex civil actions involving unlawful business practices, especially those practiced by insurers. The Plaintiffs' counsel has previously litigated against CMIC and obtained a judgment on behalf of his client including for violations of § 155. The Plaintiffs' counsel is able and accomplished. Plaintiffs' counsel has and will continue to serve as a competent, thorough, and rigorous advocate for the interests of the class. The Plaintiffs' counsel is fully capable of conducting the proposed litigation of this case, and has been involved in the successful prosecution of class actions against other insurers who misused pricing databases to underpay claimants. Further, the proposed named Plaintiffs not only have a substantial claim which ensures that they will vigorously pursue this litigation; but have demonstrated their commitment to this litigation over the past six years – including both Plaintiffs constantly contacting CMIC before litigation commenced and actively monitoring this litigation.[56] Additionally, not only does the proposed class benefit from having representatives with a substantial claim (most class representatives have a *de minimus* claim and leave the pursuit of the case to class counsel), but none of the relief sought by the proposed named Plaintiffs is antagonistic to the relief sought by the class. Therefore, both the Plaintiffs and their counsel are adequate representatives of the class.

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[53] *Id.,* (citing *Robin v. Doctors Officenters Corp.*, 686 F.Supp. 199, 203 (N.D. Ill. 1988) (citing *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982))).

[54] *Williams v. Balcor Pension Investors*, 150 F.R.D. 109, 119 n. 10 (N.D. Ill. 1993).

[55] *See id.*

[56] *See* Ex. Z [Chad Hansen Dep. Tr.], at 241:23-243:10; Ex. AA [Melissa Hansen Dep. Tr.], at 279:9-282:6.

II. The Proposed Class Meets Both Requirements of Fed. R. Civ. P. 23(b)(3)

In addition to satisfying the prerequisites of Rule 23(a), this Court must find that, "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[57] The factors supplied by Rule 23(b)(3) as pertinent to the predominance and superiority criteria are: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."[58]

A. Class Members Have No Interest or Ability in Prosecuting a Separate Action

The present action is precisely the sort of case contemplated by Rule 23(b)(3): a situation in which a defendant sells an identical (or materially similar) product to hundreds of thousands of unsuspecting consumers, resulting in millions of dollars in unlawful profits, but insufficient damage to most class members to make individual suits practicable.[59] One of the primary functions of the class suit is to provide a device for vindicating claims, which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.[60]

The interest of members of the putative class in individually controlling the prosecution or

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[57] Fed. R. Civ. P. 23(b)(3).

[58] *Id.*

[59] *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 616 (1997) (citing Adv. Comm. Notes, 28 U.S.C. App., p. 698, to describe the extent of a proper class certification).

[60] *See id*. at 614 (quoting Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967)); *see also Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

defense of separate actions is virtually nonexistent because the individual damages are small in comparison to the litigation costs necessary to prosecute the claim to its conclusion.[61] As mentioned earlier, Plaintiffs' counsel has litigated against CMIC before and is familiar with CMIC's tactics of protracting litigation. In that case, CMIC delayed the trial for three years. The only issues were (1) whether the loss was due to vandalism or theft; and (2) whether the property had been unoccupied for sixty consecutive days prior to the first loss. In response to numerous motions to compel, CMIC repeatedly certified its production as complete even though it had not produced key documents (*e.g.*, the claims diaries). CMIC filed a motion for summary judgment that was designed to delay the trial, and was clearly copied from another lawsuit, as it made reference to facts not involved in the litigation. CMIC's motion was denied as untimely, but would have been denied as there was an obvious question of fact. At trial in that lawsuit, CMIC presented minimal evidence in support of its denial to the point that the trial judge found that CMIC "essentially recategorized [plaintiff's] claim, […] in order to avail themselves of an otherwise unavailable exclusion." Despite this finding by the trial judge, CMIC filed an appeal which asserted arguments the appellate court characterized as arguing for "an absurd result" and "completely without merit."

Plaintiffs' counsels' experience with CMIC is not atypical as there was a lawsuit [redacted] CMIC's claims and litigation strategy is consistent with McKinsey's advice to insurers in how to reduce claims values. CMIC intentionally prolongs litigation in order to develop a reputation amongst attorneys that even when they win, it will cost so much to win that the attorney

[61] CMIC has previously asserted it has spent hundreds of thousands of dollars defending against a claim it values at thirty thousand dollars ($30,000.00).

and client have a pyrrhic victory.[62]

Turning to the facts of Plaintiffs' claim, CMIC has still failed to pay amounts that it has admitted in writing are owed. Further evidence of the fact that Plaintiffs' claims are typical of the class is the fact that Plaintiffs' claim was handled by two senior adjusters and the supervisor of CMIC's Large Property Loss Unit.[63] Further, long before CMIC involved outside counsel in the claims process, CMIC's office of general counsel was involved in Plaintiffs' claim.[64] Even if CMIC decides to amend its testimony that Plaintiffs' claim was generally handled consistent with CMIC's claims policies and practices;[65] the fact that Plaintiffs' claim was handled by numerous high ranking individuals within CMIC strongly suggests that Plaintiffs' claim was handled consistent with CMIC's claims policies. Further, the aforedescribed misconduct demonstrates that a class action is the only effective tool for pushing back on CMIC's abuse of claimants and wasting of judicial resources.

Finally, when deciding whether a class action is superior to other available methods to adjudicate a controversy, this Court may consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually."[66] In the sample set there were [redacted] Several other claims in the sample set [redacted]

[62] In looking for other related litigation to answer the question posed by Fed. R. Civ. P. 23(b)(3)(B), Plaintiffs' counsel observed numerous cases where the attorney's fees requested were four to five times the judgment. Each of those cases were for more than $20,000.00. Given some courts reluctance to award attorney's fees that are significantly more than what the client recovered or what was at stake, attorneys are going to be unwilling to take cases involving the amount of damages at issue for most putative class members.

[63] *See* Ex. O [Bieber Dep. Tr.], at 22:21-23:21; 27:9-12 (in terms of the overall hierarchy of CMIC's claims department, Bieber there are only three people higher in the organization and Bieber supervises CMIC's top adjusters who are responsible for training adjusters who handle smaller claims).

[64] *See* Ex. AB [Online Activity Log (a/k/a claims diary)], at 16.

[65] *See* Ex. O [Bieber Dep. Tr.], at 51:16-19.

[66] *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974).

[redacted] This suggests that a fair number of CMIC's insureds are poor and/or uninformed because most people know not to file insurance claims for small value claims.

In the present action, superiority is satisfied because a class action is not only the best method available for the adjudication of the claims of each individual class member, but probably the only way most class members will ever get compensated in an amount sufficient to complete the repairs to their home.[67]

B. There is No Overlapping Litigation on this Same Issue

The purpose of the second prong of the superiority analysis is to ensure "there is no concern of duplicating litigation already begun by class members."[68] CMIC has not disclosed any other litigation seeking class certification. Plaintiffs' counsel's investigation has revealed other litigation, but from what Plaintiffs' counsel has seen, none of the actions delve into CMIC's valuation practices generally and none of those cases sought class certification. As such, this factor of the superiority analysis weighs in favor of certification.

C. Illinois is a Desirable Location for Concentration of this Litigation

Illinois is the most desirable location for litigation against CMIC as Illinois is not only the location of CMIC's corporate headquarters and top management, but the location from which CMIC: creates and revises its insurance and claims policies; supervises claims personnel; and monitors the estimating of out-of-state claims. Illinois is also where fifty percent of CMIC's claims are located and it is the state where CMIC directs policyholders from other states to contact CMIC

[67] *M. Berenson Co., Inc. v. Faneuil Hall Marketplace Inc.*, 100 F.R.D. 468, 471 (D. Mass 1984) ("[T]he benefits to the large number of class members, many of whose claims are so small that their size does not provide the impetus to bring individual actions, clearly outweigh any problems which may arise in the management of the class action. Economy will undoubtedly be achieved. Not only economy which will benefit members of the class, but economy which will benefit the judicial system as well").

[68] *Johnson v. Diakon Logistics*, No. 16-CV-06776, 2020 WL 405636, at *7 (N.D. Ill. Jan. 23, 2020).

with complaints about the insurance policy.[69] As an Illinois based company, CMIC could reasonably expect to be subjected to Illinois law for their actions not only in Illinois, but nationwide.[70] Under Illinois law, this Court can adjudicate the claims of a nationwide class without engaging in the cumbersome conflicts of law analysis because Illinois has adopted the most significant contacts rule,[71] and Illinois has the most significant contacts with this litigation.[72] Illinois also has an interest in ensuring that it is not viewed as a safe harbor for corporate scofflaws.

D. The Proposed Class is Easily Managed

The difficulties likely to be encountered in the management of a class action in the present case are minimal. With respect to the liability issue(s), "[c]onsiderable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts."[73] Common questions need only predominate - they need not be unanimous.[74] Common questions sufficiently predominate if their

[69] *See* Exs. M & AC.

[70] *See Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1027 (11th Cir. 1996) ("if the [] schemes are illegal under the law of [Defendant's] home state, then the schemes' illegality need not be examined under the laws of any other state.").

[71] *Ingersoll v. Klein*, 46 Ill.2d 42, 48 (Ill. 1970).

[72] *See Fry v. UAL Corp*., 136 F.R.D. 626, 631 (N.D. Ill. 1991) (corporate headquarters located in Illinois and misrepresentations originated from Illinois sufficient to find Illinois had most significant contacts); *see also Lapham-Hickey Steel Corp. v Protection Mut. Ins. Co.*, 166 Ill.2d 520, 526-27 (1995) ("Absent an express choice of law, insurance policy provisions are generally 'governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to a valid contract, the place of performance, or other place bearing a rational relationship to the general contract.'")

[73] *Saltzman*, 257 F.R.D. at 484 (citing *Fournigault v. Independence One Mortg. Corp.*, 234 F.R.D. 641, 646 (N.D. Ill. 2006) (citations omitted); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("The text of Rule 23(b)(3) itself contemplates that such individual questions will be present.").

[74] *Kleiner v. First National Bank*, 751 F.2d 1193 (11th Cir. 1985); *Wolfson v. Artisans Savings Bank*, 83 F.R.D. 547 (D. Del. 1979) (class action maintainable even though individual questions needed to be litigated).

resolution would "provide a definite signal of the beginning of the end."[75] Additionally, the Supreme Court has held that "[p]redominance is a test readily met in certain cases alleging *consumer* or securities *fraud* or violations of the antitrust laws.... Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement."[76] Finally, "[u]nder Rule 23, district courts are permitted to 'devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues.'"[77]

Regarding the notification and distribution of benefits to class members, this should not be difficult because CMIC has demonstrated that it still has records regarding claims it adjusted going back to the start of the proposed class period.[78] Further, it is well established that variations in damages do not bar the certification of a class regarding liability.[79] Given the amounts involved and

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[75] *Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 478 (N.D. Ill. 1992) (quoting *In re Tetracycline Cases*, 107 F.R.D. 719, 733 (W.D. Mo. 1985); *Mertens v. Abbott Labs*, 99 F.R.D. 38, 41 (D.N.H. 1983)).

[76] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (emphasis added); *see also American Airlines v. Wolens*, 513 U.S. 219, 223 (1995) "contract law is not at its core 'diverse, nonuniform, and confusing.'").

[77] *Pella Corp. v. Saltzman*, 606 F.3d at 396 (citations omitted).

[78] CMIC's claims file record retention schedule provides that CMIC retains these files for a period of at least ten years "after the terms of the claim settlement have been met." (*See* Ex. AD.) However, even if every last member of the class cannot be identified and sent individual notice at this point, notice to these members can be accomplished by alternate means. Fed. R. Civ. P. 23(c)(2)(B) ("the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.")

[79] *See Saltzman*, 257 F.R.D. at 479; *accord De La Fuente*, 713 F.2d at 233 ("It is very common for Rule 23(b)(3) class actions to involve differing damage awards for different class members."); *see also Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 176 (E.D. Pa. 1979) ("the 'overwhelming weight of authority' holds that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate.") (quoting 5 H. Newberg, Newberg on Class Actions § 8824(b), at 879 (1977)).

Class treatment of the damages issue is also appropriate here because the evidence regarding CMIC's illegal gains is likely going to be in the aggregate. Even if CMIC's illegal gains must be calculated for each claim, the expense of an expert calculating the illegal gain on each claim is likely to be significant, and could possibly dwarf what is recovered on smaller claims. One of the purposes of class actions is the "[d]isgorgement of illegal gains from wrongdoers." *Gammon v. GC Services Ltd. Partnership*, 162 F.R.D. 313, 321 (N.D. Ill. 1995) (quoting H. NEWBERG, CLASS ACTIONS § 4.36). Given this fact, this court, consistent with other federal courts' practices, should allow for claimants to submit the total amount of their claim and receive their pro rata share of the total settlement/judgment.

the Plaintiffs' proposed solution for determining the amount each class member would receive,[80] the management of this action is likely to present fewer difficulties than many other types of cases that are routinely certified, such as those for securities fraud, defective medical devices, and employment discrimination.

The special efficacy of the consumer class action is well-established in this district and is applicable to this case:

> A class action permits a large group of claimants to have their claims adjudicated in a single lawsuit. This is particularly important where, as here, a large number of small and medium sized claimants may be involved. In light of the awesome costs of discovery and trial, many of them would not be able to secure relief if class certification were denied . . . .[81]

This finding is not limited to cases where attorney's fees are unavailable:

> Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action . . . The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form.[82]

The Plaintiffs will now demonstrate that not only are each of their claims suitable for class treatment, but that class treatment is superior.

III. Plaintiffs' Class Claims Should Be Certified Under Fed. R. Civ. P. 23(b)(3)

Plaintiffs begin by noting that all of Plaintiffs' proposed class claims arise out of form contracts that do not materially differ.[83] CMIC issues a few standard policies to their insureds that

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[80] Even if this Court does not accept Plaintiffs' proposal for the allocation of any recovery, this case will still be easily managed, and possible issues with determining damages do not bar certification at this juncture. (*See* footnote 55, *supra*.)

[81] *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727, 732 (N.D. Ill. 1977) (citations omitted).

[82] *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628-29 (E.D. Pa. 1994) (action under RESPA where fee shifting applied).

[83] CMIC implicitly agrees because Plaintiffs had to specifically request copies of all of its policies and endorsements. If there were material variations preventing class certification, CMIC would have voluntarily produced these documents. Further, Plaintiffs' review of the policies and CMIC's "expert" did

are the same in all material respects. Each policy issued by CMIC promises to either provide the putative class member with an amount equivalent to the pre-loss value of their covered property, or the cost of purchasing or replacing their covered property with new property. Further, none of the insurance policies allowed for CMIC to institute uniform claims practices, policies, and procedures that directed adjusters to systematically underpay claims by *inter alia*: ignoring obvious damage; refusing to adjust estimates based on bids received after CMIC wrote its estimate; misstating the property lost or destroyed on estimates for purposes of understating the replacement cost; depreciating the property by artificially inflated amounts resulting from CMIC's refusal to consider the factors set forth in CMIC's standard insurance policy; and/or estimating and subsequently paying a significantly lower amount for demolition based on a low-ball estimate of the quantity and/or type of labor required for demolition.[84] Finally, CMIC extensively calibrates its adjusters to ensure consistent claims handling between adjusters and across all the states CMIC operates in.[85]

A. Illinois Substantive Law Should Apply to All Class Member's Claims

The putative class's claims should also be adjudicated using Illinois substantive law. The Supreme Court in *Phillips Petroleum Co. v. Shutts* held "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or

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not find any material differences in the handful of homeowner, condominium, or renters policies issued by CMIC when it comes to the definition of replacement cost or actual cash value.

[84] With respect to allowing for inadequate labor, an example from just one room of Plaintiffs' home illustrates the problem. Rather than use the remove and replace function in Xactimate for the drywall, CMIC only used Xactimate's calculated unit price to replace the drywall. CMIC then estimated an arbitrary amount of labor to complete the demolition. In just one room, CMIC saved $94.24 over using Xactimate's pricing. With respect to labor rates, to the extent CMIC estimated roof removal costs, it used a general demolition labor rate rather than the labor rate for a roofer. Based on CMIC's claim sample set, the roofer labor rate is on average [redacted] than the general demolition labor rate. Using the average roof and average difference between labor rates, CMIC's use of the wrong labor rate saves [redacted] on the average roof estimate, not counting the effect the wrong labor rate has on the steep and high roof removal surcharges.

[85] *See* Ex. AD. CMIC also has annual property adjuster training and incremental updates via department newsletters and training materials such as "Real Time Topics" online training. Adjusters were expected to view all of these training materials. (*See* Ex. N [Keck Dep. Tr.], at 76:24-77:3.)

significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[86] The Supreme Court continued that "[w]hen considering fairness in this context, an important element is the expectation of the parties."[87] Accordingly, it is not unreasonable or contrary to the expectations of the parties to apply Illinois' substantive law given that CMIC is headquartered in Illinois, and includes this fact in *inter alia* its: advertising, insurance policies, and claim processing letters.[88] Not only are CMIC's claims practices, policies, and procedures established and controlled from Bloomington, Illinois; but the standards which govern CMIC's conduct are controlled largely by uniform statutes and/or regulations promulgated by among others the National Association of Insurance Commissioners.[89] Even if CMIC convinces this Court that it cannot apply Illinois law to every class member's claim, *and* that there are significant variations in the law governing the putative class's tortious interference;[90] Courts have held that certification of a nineteen state class is appropriate at least with respect to Plaintiffs' breach of contract claims.[91]

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[86] 472 U.S. 797, 818-19 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

[87] *Id*. at 822.

[88] *See* Exs. AF, I, AC & AG.

[89] *See Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74-75 (E.D. NY 2004) (certifying class which included 47 states because "class members have signed substantively identical or similar form agreements with Nationwide; and (2) Nationwide's practice of taking "betterment" deductions is a common course of conduct that has affected all putative class members." The *Steinberg* court further held that certification was appropriate because "plaintiff's breach of contract claim involves the general principles of contract interpretation that do not differ materially from one jurisdiction to the next." *Id*. at 75.

[90] It must be remembered that variations in the amount of damages do not prevent class certification. (*See* footnote 55, *supra*.) If this Court deems there to be significant issues regarding the amount of damages based on a particular class member's state, this issue can be resolved through creating subclasses and informing the trier of fact of the number of individuals and/or the value of the claims in each subclass.

[91] *See Sparano v Southland Corp.,* No. 94 C 2098, 1996 WL 681273 at *1 (N.D. Ill. Nov. 21 1996) ("Generally, claims arising out of form contracts are particularly appropriate for class action treatment. *Demitropolous v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1418 (N.D. Ill. 1996)"; *Haroco, Inc. v. American National Bank & Trust Co.*, 121 F.R.D. 664, 668 (N.D. Ill. 1988) ("[s]ince plaintiffs' claims arise from allegations of common practice and rights derived from form contracts, the case appears to present the classic case for treatment as a class action"); *Indianer v. Franklin Life Ins. Co.*, 113 F.R.D. 595, 607 (S.D.

The identification of the class members, and the computation of the relief to be afforded each class member, can be accomplished by a ministerial examination of CMIC's files. In any event, "[w]hether and to what extent the class members sustained damages is not an issue at the class certification stage."[92] Additionally, "a motion for class certification is not the appropriate vehicle by which to resolve choice of law issues" and the Court is free to create subclasses or modify its certification order if it determines that choice of law issues make one class unmanageable.[93]

B. There Are No Variations in State Law that Prevent Certification of a Nineteen State Class for Breach of Contract

The Supreme Court has addressed the issue of variations in contract law across the nation and held that "contract law is not at its core 'diverse, nonuniform, and confusing.'"[94] Just as in *Steinberg*, the Plaintiffs' "breach of contract claim involves the general principles of contract interpretation that do not differ materially from one jurisdiction to the next."[95] The Court in *Steinberg* accepted the plaintiff's analysis of the law of all fifty states regarding how to determine whether an ambiguity exists in a contract and the rules of construction if an ambiguity is found.[96] The *Steinberg* court found that despite four methods for determining if a contract is ambiguous, and three different methods for construing an ambiguous contract, Steinberg's forty-seven state breach

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Fla. 1986) ("claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such").

[92] *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 784 (N.D. Ill. 1984), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Liberty Alliance for the Blind v. Califano*, 668 F.2d 333 (3rd Cir. 1977) (class relief not barred even though need existed for calculations of individual benefits).

[93] *See Steinberg*, 224 F.R.D. at 78 (citing *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 141 (2nd Cir. 2001).

[94] *American Airlines v. Wolens*, 513 U.S. 219, 223 (1995).

[95] *Steinberg*, 224 F.R.D. at 75.

[96] *Id.*, 77-78.

of contract class action was manageable.[97]

As for the issues in this case, those issues are not much different than the issue in *Steinberg*, and this Court should certify a class on Plaintiffs' breach of contract claims regarding CMIC's failure to pay ACV or replacement cost owed under its insurance policies.[98] Even if CMIC's contracts are ambiguous, there is no way CMIC can get from a reasonable interpretation of "actual cash value" or "replacement cost" to the amounts CMIC paid claimants including the Plaintiffs. Finally, CMIC's failure to consider all of the factors set forth in its insurance policies is indisputable. However, even if this failure by CMIC did not occur, CMIC admitted that if its replacement cost determination is incorrect, then its actual cash value is necessarily going to be incorrect.[99] Given that Plaintiffs' breach of contract claims focus largely on CMIC's consistent misuse of its estimating software across all of the class members' claims, this Court should certify a class for Counts I, II and IV.

C. § 155 Claims Are Perfectly Suited for Class Treatment

Class certification of a claim under § 155 of the insurance code is perfectly suited for class treatment because there is no right to a jury, and as demonstrated above, the Plaintiffs will necessarily prove CMIC violated § 155 as part of proving CMIC breached its contract.

Turning to what constitutes a violation of § 155,"'bad faith' has been held to be the semantic equivalent of 'vexatious and unreasonable' conduct."[100]

> Examples of conduct found to support a finding of bad faith include: *failure to adequately investigate a claim or denial of the claim without adequate supporting*

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[97] *See id*.

[98] There is far less variation in products (insurance policies) than in *Saltzman*, a case found suitable for class certification by the district court and affirmed by the Seventh Circuit. *See Saltzman v. Pella Corp*., No. 046 C 4481, 2007 WL 844883 at *1 (N.D. Ill. March 20, 2007).

[99] *See* Ex. O [Bieber Dep. Tr.], at 314:18-315:15.

[100] *Emerson v. American Bankers Ins. Co.*, 223 Ill. App.3d 929, 936 (5th Dist. 1992).

> *evidence; failure to evaluate a claim objectively; interpreting policy provisions in an unreasonable manner; unreasonably low settlement offers*; reliance on misrepresentations in the insurance application which are very minor, or where the insurer's agent knowingly filled out the application falsely; and *abusive or coercive practices designed to compel compromise of a claim*. *See* Annot., 33 A.L.R. 4th 579 (1982); *see also* Note, No Faith in Bad Faith, 41 Hastings L.J. 201, 205-06 (1989), citing S. Ashley, Bad Faith Liability sec. 212 (1987).[101]

Given that Plaintiffs' class claims involve CMIC: (1) assigning replacement cost values to property that were unreasonably low and rejecting bids that were not within range of this artificially low amount; (2) assuming that all property of a given type depreciates at the same rate; and (3) failing to evaluate the actual condition of property and just assuming average condition for all property; certification of Plaintiffs' § 155 claim (Count VII) is proper.

D. § 155 Applies to Misconduct in the Processing of Insurance Claims of an Illinois Domiciled and Headquartered Insurer Who Designed and Controlled the Claims Process from Illinois

While there is no precedent regarding the applicability of § 155 to non-Illinois claimants, well-established precedent regarding whether a transaction occurred within Illinois for purposes of applying Illinois law provides that § 155 applies to all of the class member's claims. In *Martin v. Heinhold Commodities*, the Illinois Supreme Court following the United States Supreme Court's decision in *Shutts* announced the standard for applying Illinois substantive law to all class members of a multistate class action.[102] In *Martin* the Court looked at five factors to determine if the forum state had "significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class" such that application of Illinois law would not be "arbitrary or unfair." Those five factors were: (1) where payments related the contract were sent; (2) where complaints were to be directed; (3) the choice of law in the agreement; (4) the forum selection clause in the agreement; and

[101] *Id*. (emphasis added).

[102] 117 Ill.2d 67, 82 (Ill. 1987); *Shutts*, 472 U.S. at 821-22.

(5) where the agreement became effective.[103] While some of the factors considered in *Martin* are not present in the insurance policies at issue (*i.e.*, choice of law and forum selection clause), the facts of this case are such that application of Illinois law is proper under *Martin*.

With respect to the *Martin* factors, CMIC executed the contracts in Illinois and its headquartered in Illinois.[104] The majority of CMIC's claims offices and personnel are located in Illinois.[105] Claimants who complain about the handling of their claim are routed to claims management in Bloomington, Illinois.[106] Finally, payments are directed to Illinois.[107] Given the foregoing, the Supreme Court's decision in *Martin* provides that Illinois law can and should be applied to all of the class members' claims including the claim under § 155. In the event this Court disagrees, then the Plaintiffs ask this Court to certify the following subclass[108] for the § 155 claim:

> *All policyholders of Defendant Country Mutual or its subsidiaries who at the time their insurance claim(s) were accepted and/or paid, were residents of Illinois or the insured property was located in Illinois, and those payments were based on Defendant Country Mutual Insurance Company's employees or agents use of estimating guidelines and practices that were established or designed by Defendant Country Mutual Insurance Company.*

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[103] *See Martin*, 117 Ill.2d at 83.

[104] *See* Ex. I, at 38 [Country Mutual-000134].

[105] *See* Ex. AH.

[106] *See* Ex. AC [collecting some of the state specific endorsements that modify Exhibit I for each state CMIC does business in. The endorsements demonstrate that in each state the policy directs the policyholders to direct complaints to CMIC's Bloomington, Illinois offices].

[107] *See* Ex. AI.

[108] *Suchanek*, 764 F.3d at 757 (quoting *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 826 n.15 (7th Cir. 2012) (in circumstances "involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth.")

IV. Trial Plan

If a trial is necessary, Plaintiffs propose to try this matter without bifurcation. As explained above, Plaintiffs plan to prove all elements of liability and damages via CMIC's documents with one exception (*i.e.*, bids CMIC did not include in claim files). Further class damages should be calculated and awarded in the aggregate, and then divided between the claimants on a pro rata basis. If the Court finds that individualized proof related to damages is necessary – and that the proof cannot be offered via submission of a form – then a damages phase would occur. This practice has been followed numerous times in this district.[109]

CONCLUSION

This Court should grant Plaintiffs' motion for class certification. As demonstrated above, the misconduct challenged by the Plaintiffs is part of CMIC's systemic effort to underpay claims. CMIC even admits that it does not follow its contractual obligations when it comes to calculating the actual cash value. Based on the data produced by CMIC, the average class member's underpayment is not likely to exceed seven thousand dollars. Given the overwhelming number of common questions, the relatively low individual claim value, and CMIC's litigation practices designed to deter claimants from pursuing their claims on an individual bases; this case is ideally suited for class certification, and class certification is required to prevent CMIC from continuing to reap windfall profits at the expense of its insureds. Finally, Plaintiffs have proposed a class and a damages model that makes the management of the class fairly easy. Therefore, Plaintiffs' Motion for Class Certification should be granted and the following class certified for all four class claims

[109] *Sparano v Southland Corp*., No. 94 C 2098, 1996 WL 681273 at *2 (N.D. Ill. Nov. 21, 1996) ("it is well established that individual issues of reliance do not thwart class actions of common law fraud claims. *Arenson v. Whitehall Convalescent and Nursing Home Inc.*, 164 F.R.D. 659, 666 (N.D. Ill. 1996). Rather, the issue of individual reliance may be reserved for determination of damages. *Barkman v. Wabash, Inc.*, 674 F. Supp. 623, 635 (N.D. Ill. 1987).); *accord Heastie*, 125 F.R.D. at 675 (N.D. Ill. 1989) ("The necessity of answering individual questions [of damages and reliance] after answering common questions will not prevent a class action.") (citations omitted).

(Counts I, II, IV & VII):

> *All policyholders of Defendant Country Mutual or its subsidiaries who at any point between January 12, 2008 and the present, had their insurance claim(s) accepted and paid, and those payments were based on Defendant Country Mutual Insurance Company's employees or agents use of estimating guidelines and practices that were established or designed by Defendant Country Mutual Insurance Company.*

Finally, Chad Hansen and Melissa Hansen should be appointed as class representatives and their attorney, David Piell, should be appointed as class counsel.

Respectfully submitted,

/s/ David J. Piell

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