THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-000182
Circuit Court Case No. 2016-CP-10-04062

Donald Stanley and Sean Reiter,
Individually and as Class Representatives, Respondents,

v.

Southern States Police Benevolent Association, Inc. Appellant.

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STATEMENT OF THE CASE

The "Statement of the Case" set forth by Defendant Southern States Police Benevolent Association, Inc. ("Defendant" or "PBA") from Pages 1 to 8 of its brief is primarily composed of a "Statement of Facts" that not only recites contested matters, in direct opposition to the dictates of Rule 208(b)(1)(C), SCACR, but relies primarily on deposition testimony from the Plaintiffs and Class Representatives, Donald Stanley and Sean Reiter, that was not part of the record before the lower court and, therefore, should not be considered on appeal. Rule 210(c), SCACR ("The Record [on Appeal] shall not, however, include matter which was not presented to the lower court or tribunal."); *Ravan v. Greenville Cty.*, 315 S.C. 447, 434 S.E.2d 296, 304 (Ct.App. 1993) ("Secondly, the matters raised by the landowners are completely outside the record and may not form the basis for a reversal.").[1] Those entire depositions were only introduced by the Defendant after the trial court's ruling as part of a motion to reconsider. Material filed with Defendant's motion to reconsider is not properly considered by the trial court or the Court of Appeals. Rule 60(b)(2), SCRCP (motion for relief from order can only be based on "newly discovered evidence"); *Spreeuw v. Barker*, 385 S.C. 45, 682 S.E.2d 843, 852 (Ct.App. 2009) (Appellate court

[1] Plaintiffs have filed a motion to strike all portions of Defendant's appellate briefs and designation of matter to be included in the record on appeal that were not presented at the trial court level.

considering father's challenge to child support award could not consider financial document appearing only as an attachment to father's postjudgment motion to alter or amend judgment.).

Defendant does set forth a subsection entitled "Proceedings in the Case" from Page 7 to 8, which is more accurately considered the "Statement of the Case." Plaintiffs accept the recitation contained in Defendant's "Proceedings in the Case" but would note that the Record should include the additional memoranda referenced herein.

In addition, it is important to note that the trial court has denied both Defendant's Motion to Dismiss and Defendant's Motion for Summary Judgment. Plaintiffs will not repeat the substantive arguments successfully made against those motions, but would instead refer the Court to Plaintiffs' Memoranda in Opposition to the Motion to Dismiss (R. pp. 914-963) and Motion for Summary Judgment (R. pp. 1129-1175) and in Support of Plaintiffs' Motion to Strike (R. pp. 381-431; R. pp. 1020-1054), which contain exhaustive arguments on the substantive issues.

FACTS

I. THE PARTIES AND THE LEGAL DEFENSE BENEFIT PLAN

Plaintiff Stanley is a Lieutenant with the Charleston County Sheriff's Department and is a member in good standing of the PBA and has been such for over 21 years. Amended Complaint, ¶ 9 (R. p. 46). Plaintiff Reiter was at all times relevant a law enforcement officer with the Charleston County Sherriff's Department and/or the City of North Charleston. Amended Complaint, ¶ 10 (R. p. 46).

Defendant Southern States Police Benevolent Association, Inc. ("PBA") is a corporation organized and existing under the laws of the State of Georgia. The PBA invites police officers in the States of Georgia, South Carolina, North Carolina, Virginia, West Virginia, Kansas, Arkansas, Tennessee and Louisiana to become "members" of the PBA. Members of the PBA pay monthly

"dues" of $23.50 to the PBA in exchange for a "Legal Defense Benefit Plan" (sometimes referred to as the "Plan"). Amended Complaint, ¶ 5 (R. p. 46); Legal Defense Benefit Plan "Policy 00-16" (Exhibit No. 2 to Plaintiff's Supplement to Motion for Class Certification) (R. pp. 455-462).

The Plan promises to provide a legal defense and cover related costs to an officer member who is accused of a crime while performing his or her official duties as police officers. Amended Complaint, ¶ 4 (R. p. 45). The Plan's terms are outlined in the Legal Defense Benefit Plan "Policy 00-16" (hereinafter the "Policy") (R. pp. 455-462). The Policy was not provided to the members of the PBA, and its terms were not known by the members. The Policy included exclusions, such as an exclusion for intentional acts, that were not disclosed to members of the PBA.

The Plan is the primary reason for Defendant's existence and is the sole reason officers join the PBA and pay dues. Plaintiffs have testified that it is the only reason that they and others join the PBA. Reiter Deposition, p. 80, l. 24 – p. 81, l. 7 (R. p. 284-285); p. 82, ll. 9 – 15 (R. p. 285). Similarly, Defendant's own employees have testified that members join the PBA for the legal coverage provided by the Plan, that PBA's funds are spent providing a legal defense to its members, and that the PBA offers to pool the risk faced by its members in exchange for monthly dues, i.e. operating as an insurer. Deposition of Jack Roberts, PBA's former president (Exhibit G to Plaintiffs' Reply Memorandum in Support of Motion to Strike), p. 18, l. 19 – p. 19, l. 8 (R. p. 1030, line 19 – p. 1031, line 8); p. 22, l. 23 – p. 24, l. 19 (R. p. 1034, line 23 – p. 1035, line 19). *See also* Plaintiffs' Reply Memorandum in Support of Motion to Strike, Pages 2-4 (R. pp. 1021-1023).

The Legal Defense Benefit Plan is actually a policy of insurance which the PBA is not licensed to sell in any of the States in which it transacts business. Amended Complaint, ¶ 8 (R. p. 46); Plaintiffs' Motion to Strike Answer and Motion to Dismiss,[2] Page 8-13 (R. pp. 388-393).

The PBA currently has approximately 42,000 members spread over nine States, each of whom pays approximately $23.50 per month to participate in the PBA's Legal Defense Benefit Plan. Amended Complaint, ¶ 13 (R. pp. 46-47); Deposition of Dale Preiser, Page 23 (R. p. 430), (Exhibit F to Plaintiffs' Motion to Strike Defendant's Answer); Deposition of Jack Roberts, Pages 20-21 (R. p. 1032, line 24 – p. 1033, line 8). This amounts to the collection of approximately $11,844,000 in premiums every year.

Only about 10% of the dues collected by the PBA go to the legal defense of its members under the Plan. The majority of PBA's funds goes to pay its officers, board members, and employees. Of that approximately $12 million in premiums every year, PBA paid its officers, employees, and board members over $4,200,000 in 2016. Defendant's Responses to Plaintiffs' Second Set of Interrogatories, Interrogatory 7 (R. p. 1252). Also in 2016, Defendant collected $618,117 in dues from South Carolina members alone, but only paid out $66,106 in attorneys' fees. The remainder, constituting 90% of the dues collected, was spent on Defendant's employees, officers, and board members. Defendant's Responses to Plaintiffs' Second Set of Interrogatories, Interrogatory 7 (R. p. 1252).

Defendant PBA's primary contact with its members is its website and newsletters. Website, Exhibits I, J, and K to Plaintiffs' Reply Memorandum (R. pp. 1043-1054). The website does not disclose the terms of the Plan, the Policy, or its hidden limitations. In addition, Defendant

[2] As an unauthorized insurer, Defendant cannot file any pleading in any court action. S.C. Code § 38-25-550(a).

PBA provides its members with a "wallet card" that does not disclose the terms or the Plan or its limitations. Wallet Card (Exhibit B to Plaintiffs' Motion to Strike) (R. pp. 404-405).

As stated by Plaintiff Reiter:

> Q What's wrong with this [wallet card]?
> MR. RICHTER: Object to the form.
> A (Continuing) This would certainly lead one to believe that as long as these four stipulations are met, you're going to get an attorney. And clearly, there is the chance that that may not happen, despite the fact that these four things are met.
> Q All right. Because the PBA denied the attorney to Michael Slager?
> A Because the option for them to deny anybody's claim exists.
> Q Right.
> A That's the problem. Not just Mike, the fact that it could happen to anybody, anytime they make a phone call.

Reiter Deposition, p. 59, l. 14 – p. 60, l. 1 (R. p. 279).

II. DEFENDANT PBA IS AN UNLICENSED INSURANCE COMPANY.

The instant lawsuit claims that the Legal Defense Benefit Plan is a policy of insurance. Because the PBA lacks licensure to sell its policies of insurance, it has sold unauthorized insurance policies to its members who are entitled to a refund of "member dues" or premiums paid, together with additional relief as set forth herein. Amended Complaint, ¶ 16 (R. p. 47).

In selling the Plan, the Defendant never revealed that it lacked proper licensure and authority to sell insurance. To the contrary, the PBA gave every indication that it was authorized to sell the Plan, and that the Plan was the best way possible for each and every member to protect themselves and their families from the potential financial devastation associated with being accused of a crime and being forced to retain the services of a lawyer. Amended Complaint, ¶ 26 (R. p. 49).

All the evidence as pled in the Amended Complaint plainly shows that the PBA is engaged in the business of offering insurance. The Legal Defense Benefit Plan is governed by a document that the PBA calls "Policy 00-16." Policy (R. pp. 455-462). Defendant never revealed the

existence of the Policy nor the terms of the Policy to its members.

The Policy looks like a standard insurance policy and contains the terms one would find in a standard insurance policy, including a section titled "Coverage and Eligibility," a section titled "Benefit Administration," which sets out a claims procedure, and a section titled "Limitations, Restrictions, and Exemptions," which sets forth several exclusions from coverage that were not disclosed to its members. Among those undisclosed exclusions, the Policy purports to exclude coverage for intentional acts:

> Southern States PBA reserves the right to withhold approval of any benefits and to withdraw approval of any benefits if it is determined at any time that the member has committed an intentional, deliberate and/or illegal act, either civilly or criminally.

Policy, Section 4(D), Limitations, Restrictions and Exemptions (R. p. 460).

For all intents and purposes, the Policy acts as an insurance policy. The Policy provides a member with indemnity protection against a known future contingency. The Policy allows a member to protect against the expense of a future contingency that would likely be too expensive to cover without the benefit of the Plan. The Policy includes exclusions from coverage. The membership "dues" are actually premiums. Amended Complaint, ¶¶ 32-37 (R. p. 52).

In prior litigation, The Honorable David C. Norton recognized that the Defendant is operating as an insurer that is not subject to any oversight. *Slager v. S. States Police Benevolent Ass'n, Inc.*, No. 2:15-CV-04536-DCN, 2016 WL 4123700, at *1 n. 1 (D.S.C. Aug. 3, 2016)[3]

[3] The Court may take judicial notice at any stage of the proceedings. Rule 201(f), SCRE. The Court may take judicial notice of documents that are a matter of public record, the authenticity of which cannot reasonably be questioned, including pleadings or orders from a related matter. Rule 201(b), SCRE; *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 n. 2 (2014); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004).

(hereinafter "Norton Order") (Exhibit C to Plaintiff's Memorandum in Opposition to Motion Dismiss) (R. p. 953 n. 1):

> It seems a might curious that an insurer, who issues a policy that supposedly covers a criminal accusation on the one hand, can withdraw benefits if a member 'has committed an intentional, deliberate and/or illegal act . . . criminally.' But this is a question for another day.

Plaintiff has presented extensive factual legal authority to support Judge Norton's supposition that Defendant PBA offers insurance, and the Plan is an insurance policy. *See* Plaintiffs' Memorandum in Opposition to Motion to Dismiss, Pages 8-12 (R. pp. 921-925); Plaintiffs' Motion to Strike Defendant's Answer and Motion to Dismiss, Pages 8-13 (R. pp. 388-393); Plaintiffs' Reply Memorandum in Support of Motion to Strike, Pages 1-8 (R. pp. 1020-1027).

III. DEFENDANT PBA HAS OPERATED AS AN ILLEGAL AND UNLICENSED INSURER AND BENEFIT PLAN FOR DECADES.

The PBA engages in an elaborate scheme to evade the regulatory oversight of the various insurance commissions from the States in which it transacts business by referring to its insurance policy as a "benefit plan" and by referring to the premiums paid by its insureds as "member dues." Amended Complaint, ¶ 38 (R. pp. 52-53). At the time this case was filed, the PBA had never asked for nor received an opinion letter from any of the insurance commissions from the various States in which it sells insurance.

After the filing of this lawsuit, the PBA wrote to the South Carolina Department of Consumer Affairs seeking an opinion as to whether or not the PBA was a Prepaid Legal Services Company subject to regulation under S.C. Code § 37-16-10, *et seq.* November 7, 2016 Hamm Letter (Exhibit No. 4 to Plaintiff's Supplement in Support of Motion for Class Certification) (R. pp. 465-467). The Department of Consumer Affairs concluded that PBA was a Prepaid Legal

Services Company. March 31, 2017 Lybarker Letter (Exhibit No 1. to Plaintiff's Supplement in Support of Motion for Class Certification) (R. pp. 452-454).

Thus, at the very least, Defendant has been operating as an unlicensed prepaid legal benefit plan for years. Only after the filing of this lawsuit and after receiving an opinion from the Department of Consumer Affairs, the PBA finally became registered as a Prepaid Legal Services Company in June of 2017. Prior to that date, the PBA did not operate in compliance with the South Carolina statutes governing Prepaid Legal Services Companies. Indeed, there is no evidence that Defendant has come into compliance with those statutes, which require that the provider allow the insured to choose their out attorneys.[4]

In addition to not registering, the PBA did not pay the required bond, S.C. Code § 37-16-20, did not properly appoint its sales representatives, S.C. Code § 37-16-30, did not obtain approval for its contracts offering prepaid legal services, S.C. Code § 37-16-50, and did not offer members the right to select the attorney of his or her choice, S.C. Code § 37-16-50. Further, the PBA's repeated and systemic use of false, misleading, unfair and deceptive acts and practices is a violation of the Consumer Protection Code. S.C. Code § 37-16-80.

IV. EVIDENCE OF HARM ARISING FROM PBA'S LACK OF REGULATORY OVERSIGHT

If there is any doubt about the need for Defendant PBA to be subject to oversight, the Court need look no further than how it treated its member Michael Slager. Mr. Slager was a member of the PBA and had purchased and paid for the coverage under the Plan for several years, paying the $23.50 monthly premium. Norton Order, Page 1 (R. p. 951).

[4] Other states have concluded that Defendant is an insurer, and Defendant registered as an insurance company in North Carolina.

On April 4, 2015, Slager was involved in an officer-related shooting that resulted in the death of Walter Scott. At the time of the incident, Slager consulted his wallet card issued by the PBA and called the PBA emergency line to report the shooting to obtain legal representation pursuant to the Plan. Norton Order, Page 1 (R. p. 951).

The PBA assigned attorney David Aylor to represent Slager, and Aylor was present when Slager gave a statement about the incident to the South Carolina State Law Enforcement Division ("SLED"). On April 7, 2015, Slager was arrested, and, on the same day, Aylor withdrew from representation. Slager contacted the PBA seeking a replacement lawyer, but in a letter dated April 8, 2015, the PBA informed Slager it would no longer "provide [him] representation in this matter due to the intentional violation of [the] policy/law exclusion." This decision was apparently made by PBA counsel Dale Preiser based solely on his interpretation of the undisclosed Policy and its undisclosed exclusions after a mere day of consideration and without consulting Slager. Norton Order, Page 1-2 (R. pp. 951-952).

The Slager incident is not the only matter in which the PBA appeared to lack an appropriate claims procedure. Plaintiff Reiter also testified that at times the PBA would base its decision on whether to provide coverage or not based on a vote by the local chapter, something that happened at least twice to Reiter's knowledge. Reiter Deposition, p. 55, l. 13 – p. 56, l. 3 (R. p. 278). Indeed, it would appear that Mr. Reiter knows more about how insurance claims should be handled than the PBA does:

> Q You don't think the local chapter should have a voice in [deciding to provide coverage for members]?
> A It should be automatic. It shouldn't be anyone other than an adjuster. Someone files a claim, I need representation, you're in good standing, yes. It shouldn't be up to the four or five guys to decide that who don't have any training.

Reiter Deposition, p. 55, l. 22 – p. 56, l. 3 (R. p. 278).

Finally, Plaintiffs intend to determine how a purportedly "non-profit benevolent association" created "to improve the working conditions, reduce the hazards of law enforcement, and enhance the professionalism of law enforcement," Defendant's Appellate Brief, Page 1, spends as little as 10% on its members, with the remainder of the $12,000,000 it collects every year going to its employees, officers, and board members. Defendant's Responses to Plaintiffs' Second Set of Interrogatories, Interrogatory 7 (R. p. 1252).

V. THE ALLEGATIONS OF THE COMPLAINT

Plaintiffs have alleged causes of action against the PBA for breach of contract, negligence, breach of fiduciary duty, unjust enrichment, fraud in the inducement, negligent misrepresentation, and injunctive relief. In addition to alleging that the PBA has operated as an insurer without appropriate authority or oversight, Plaintiff has also alleged that PBA has violated other common law duties, including:

1. the duty to maintain sufficient reserves, capital, and surplus;

2. the duty to maintain adequate records and be subject to supervision and regular audits by appropriate state authorities;

3. the duty to prepare and submit reports to state authorities to demonstrate adherence to reserve, capital, and surplus requirements;

4. the duty to handle and account for premiums paid by insureds;

5. the duty to renew policies and not cancel policies in bad faith;

6. the duty to conduct its business in a fair and honest manner;

7. the duty to act in good faith in the solicitation, sell, negotiation and issuance of policies;

8. the duty to act in good faith and in the best interests of the class members in the handling and adjustment of claims made against those policies; and

9. the duty to comply with other laws, statutes and regulations enacted for the benefit of insureds as discovery may show. Amended Complaint, ¶ 81 (R. pp. 58-59).

These duties arise out of the common law, not just South Carolina's insurance statutes.

A. PLAINTIFFS HAVE STANDING

Plaintiffs are not only suing Defendant for operating as an illegal and unlicensed insurer or prepaid legal benefit plan, but also for acting as insure but negligently and willfully failing to comply with standards required of insurers and benefit plans under the common law.

Defendant PBA claims that Plaintiffs have no standing to bring this action or challenge the PBA's authority to operate an insurance company without State authority or supervision. In fact, Plaintiffs do have such authority. Chapter 25 of South Carolina's Insurance Code governs the unauthorized transaction of insurance business in South Carolina. S.C. Code Ann. § 38-25-10, *et seq.* The Chapter implicitly authorizes the pursuit of claims against entities that are engaged in the unauthorized transaction of the insurance business. S.C. Code Ann. § 38-25-510, *et seq.* Although the primary subject of the section is how service is obtained against out-of-state unauthorized insurers, the section plainly contemplates lawsuits by individuals against such unauthorized insurers. Otherwise, there would simply be no need for the section. *See Ross v. American Income Life Ins. Co.*, 232 S.C. 433, 102 S.E.2d 743, 746-47 (1958); *Hodge v. Reserve Life Ins. Co.*, 229 S.C. 326, 92 S.E.2d 849 (1956) (considering an action for the fraud and deceit in the solicitation of the policy, not "for breach of the conditions of the policy or for loss occurring thereunder.").

However, Plaintiffs' claims do not solely hinge on this issue of whether they can sue under Chapter 25. The protections afforded by the insurance code to Defendant do not grant Defendant immunity from all tort and contractual claims. Defendant remains obligated to comply with its contractual and common law duties to its members. Plaintiffs have adequately pled causes of action against the PBA for breach of contract, negligence, and other torts. An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 644 S.E.2d 43, 46 (2007); *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650, 656–57 (2006).

Plaintiffs are members of the PBA and, therefore, have a relationship with the PBA that creates duties flowing from the PBA to the Plaintiffs. Some of those duties are set out in the Policy. Policy. The common law of South Carolina creates additional duties owed by the PBA to the Plaintiffs. Plaintiffs have pled several different theories that create duties flowing from the PBA to Plaintiffs that have been breached.

These legal duties that flow from the parties' relationships and agreements have led other courts to approve complaints against entities that provide insurance or similar services without the appropriate licensing and authority. *See, e.g., Olukoya v. American Ass'n of Cab Companies, Inc.*, 219 Ga.App. 508, 465 S.E.2d 715 (1995) (illegal attempt to sell insurance could constitute an element of a RICO claim); *American Ass'n of Cab Companies, Inc. v. Parham*, 291 Ga.App. 33, 661 S.E.2d 161, 167 (2008) (self-insured cab companies' misrepresentations of their financial condition proximately caused plaintiff harm by compromising his ability to satisfy a judgment against them).

The various duties that Defendant owes to all class members, and the legal support for same, are set out in extensive detail in Plaintiffs' various memoranda filed in the lower court,

where Plaintiffs successfully argued against both a Motion to Dismiss and Motion for Summary Judgment. Plaintiffs' Memorandum in Opposition to Motion to Dismiss, Pages 16-22 (R. p. 929-935); Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, Pages 12-15 (R. pp. 1140-1143). These duties are owed regardless of whether or not Plaintiffs can bring a claim under the statutes requiring Defendant to be licensed as an insurer.

B. DAMAGES

Plaintiffs have suffered and alleged damages, namely the payment of premiums to the PBA, and have alleged causes of action to return those premiums. *See Ross,* 102 S.E.2d at 746-47; *Hodge*, 92 S.E.2d at 849 (considering an action for the fraud and deceit in the solicitation of the policy, not "for breach of the conditions of the policy or for loss occurring thereunder.").

In addition, Plaintiffs have alleged damages related to the PBA's failure to comply with the laws and standards expected of insurance companies in South Carolina. As an example, these damages include the PBA's failure to maintain appropriate reserves, which put the Plaintiffs at risk of not receiving the benefit that they have paid for over the years. Similarly, due to the PBA's failures, Plaintiffs have no way of insuring that the PBA will comply with standards applicable to insurers related to transparency, handling of claims in good faith, or cancelling policies in good faith.

C. INJUNCTIVE RELIEF

Plaintiffs have also pled a claim for the equitable remedy of injunctive relief. Plaintiffs are seeking injunctive relief to stop Defendant from offering insurance policies without being properly licensed. As stated in the Amended Complaint:

> 127. Based on the foregoing, Plaintiff, on behalf of himself and the entire class, hereby seeks preliminary and permanent injunctive relief to bar Defendant PBA from operating as an insurer without proper authority and license, including barring Defendant PBA from soliciting, marketing, selling, and issuing insurance

contracts and adjusting claims unless Defendant obtains proper authority and licensing from the states in which it is operating.

Amended Complaint, Paragraph 127 (R. p. 64).

Notably, Plaintiffs are **not** seeking to enjoin Defendant from operating at all, and nothing in the Amended Complaint indicates that. Plaintiffs are simply seeking to have Defendant comply with the appropriate regulations and common law duties that are applicable. Obviously, such an effort impacts the entire class.

LEGAL ARGUMENT

I. THE TRIAL COURT'S DECISION TO GRANT CLASS CERTIFICATION IS NOT REVIEWABLE ON APPEAL.

This Court's acceptance of the current appeal is based solely on the trial court's bar on communications with class members. Trial Court Order Certifying Plaintiff Class ("Certification Order"), Page 12 (R. p. 15). In its appellate brief, Defendant makes a cursory argument that the trial court cited no legal support for this ban. Defendant presents no law or fact that supports is position that 1) the communication ban was not proper, or 2) the ban supports a review of the entire unreviewable order. It is clear that the only point of this issue is to try to cobble together an appellate review of an unreviewable order. Defendant's effort should be rejected on several grounds.

A. CLASS CERTIFICATION ORDERS ARE NOT APPEALABLE.

Defendant has appealed an order that did nothing more than certify a plaintiff class, appoint class counsel, and bar communications by all parties with class members regarding the litigation:

> IT IS THEREFORE ORDERED THAT:
>
> a. the Court certifies this matter as a class action and certifies the following class of plaintiffs:
>
> All residents of South Carolina who participated in the Defendant's

> Legal Defense Benefit Plan by paying "member dues" to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.
>
> Excluded from the class are Defendant's current and former executive and local board members or executive level officers, employees, and persons that timely and properly exclude themselves from the class. Based on the-foregoing, the Court certifies the class.
>
> b. Counsel for the Plaintiffs are appointed as class counsel for the Plaintiff class.
>
> c. Any notices required by the law and the South Carolina Rules of Civil Procedure shall be given to the class in a form and manner to be determined by the Court upon application by Plaintiffs or Defendants. In the interim, no party shall communicate with the class members regarding this class action and the allegations contained herein.
>
> IT IS SO ORDERED.

Certification Order, Page 12 (R. p. 15).

The trial court made no legal or factual findings other than those required to determine whether a class should be certified. The trial court did not explicitly or impliedly rule on any substantive issues in the case, did not strike any pleadings, did not grant any injunctions, and did not foreclose any substantive arguments that could be made by Defendant.

"The general rule is established by this Court is that class certification orders are not immediately appealable." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, 85 (2008). As noted by the Court in *Salmonsen,* the South Carolina legislature has determined that class certification orders are not appealable. *Id.* at 85-87. Although the Court in *Salmonsen* ultimately accepted the appeal in that case, it repeatedly noted that it was to consider the trial court decision to create an "opt-in" notification procedure, which presented an unusual and special situation that affected a mode of trial and "created a class action anomaly," which a class certification order, standing alone, does not do. *Id.* at 87. Needless to say, no such situation exists in this matter.

B. DEFENDANT DID NOT OBJECT TO THE COMMUNICATION BAN AT THE TRIAL COURT LEVEL, AND IT IS THEREFORE NOT SUBJECT TO REVIEW ON APPEAL.

The Defendant never raised this issue or contested this ban before the trial court. Defendant's original opposition to the motion to certify did not mention it. Defendant's 25-page long Motion to Reconsider did not object to or ask for reconsideration of the communication ban. Thus, the trial court never had an opportunity to address any objections Defendant had to the ban. As such, the issue was clearly not preserved for an appeal.

C. THE COURT HAS CLEAR AUTHORITY UNDER RULE 23(D), SCRCP, TO CONTROL COMMUNICATIONS WITH CLASS MEMBERS.

From a substantive standpoint, the trial court clearly has authority to control class communications in conjunction with the certification of a class pursuant to Rule 23(d), SCRCP, which reads in relevant part:

> **Orders in the Conduct of Actions.** In the conduct of actions to which this rule applies, the court may made appropriate orders: . . . (2) The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended. It may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class.

Courts in South Carolina and throughout the country[5] have recognized that, once a class is certified, communications with class members regarding the lawsuit can be controlled and approved by the court. In South Carolina, this was recognized by the Supreme Court in *Eldridge v. City of Greenwood,* 308 S.C. 125, 417 S.E.2d 532, 534 (1992). The trial court in *Eldridge* had barred the plaintiff from contacting *potential* class members, while allowing the defendant to contact *potential* class members. The order was not part of a class certification, but rather an order

[5] As Defendant has recognized, South Carolina courts look to interpretations of Federal Rule of Civil Procedure 23 for guidance on class certification issues. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 330, 404 S.E.2d 200, 201 (1991).

that *preceded* class certification and undoubtedly presented an uneven playing field for the plaintiff seeking certification. The Supreme Court deemed this unilateral ban on communications to be in the nature of an injunction **because it was issued prior to class certification, and thus Rule 23(d) could not support the ban.**

The real relevance of *Eldridge* to this case is that, once a class is certified, the trial court has broad discretion to control communications with class members:

> Orders which severely limit plaintiff/appellant's contact with potential members of the class are authorized only under the general grant of power in Rule 23(d)(2). The specific grants of power in Rule 23(d), SCRCP are directed towards notifying the absent parties of the pending litigation.

Eldridge, 417 S.E.2d at 534.

In compliance with its broad discretion under Rule 23, the trial court's Certification Order in this matter included a blanket ban on communications with class members of an already certified class. Just as *Eldridge* noted, once a class is certified, communications with the class may be authorized by the court under the powers granted by Rule 23(d), SCRCP, which vests the trial court with the right to oversee all notices given to the class. Without the ban included in the Certification Order, Defendant would be free to provide notices to the class without court supervision and without notice to the Plaintiffs, who are now class representatives.

In addition to the opinion in *Eldridge*, the trial court's right under Rule 23 to "maintain continual control over class action proceedings, including the method of class notification" was also recognized in *Salmonsen*, 661 S.E.2d at 88. In fact, upon an analysis of the language of Rule 23, the South Carolina Supreme Court determined that the South Carolina class action rule "provides a trial court with broader discretion to make decisions regarding class notification procedures than the federal rule." *Id.* *See also* H. Lightsy & J. Flanagan, *South Carolina Civil*

Procedure 192-93 (2d ed. 1996) ("The court has inherent power to manage the class action and enter any appropriate order.").

Based on the foregoing, Plaintiffs would ask that the Court of Appeals approve the ban on class communications regarding the litigation.[6]

D. THE COURT SHOULD LIMIT ITS RULING TO THE BAN ON COMMUNICATIONS AND ALLOW THE TRIAL COURT TO ADDRESS ANY OTHER CLASS CERTIFICATION ISSUES THAT THE DEFENDANT MAY WISH TO RAISE.

In *Salmonsen*, the Supreme Court accepted an appeal of a class certification order to review a single issue that impacted the class, namely the appropriateness of certifying an "opt-in" class. Importantly, the Supreme Court pointedly decided to "confine our analysis to a review of Judge Young's decision establishing an 'opt-in' notice procedure for putative class members." *Salmonson*, 661 S.E.2d at 88. The Supreme Court correctly decided that it would not review the original decision to certify the class. The Supreme Court recognized that an analysis of the class certification issues was properly left with the trial court. *Id.* at 91 ("Based on the foregoing, we dismiss the appeals of Judge Dennis's class certification orders as interlocutory.").

By the same token, this Court should limit its review in this matter only to the ban on class communications. This is the only decision that is even remotely reviewable on appeal. All the other issues raised by Defendant are appropriate for determination at the trial court level, as is made clear by Rule 23, SCRCP, which places with the trial court the right to review and determine if class certification is appropriate. Rule 23 also gives the trial court broad discretion to control the conduct of a certified class action, including communications with the class members, orders

[6] It is worth repeating that this ban is imposed on *all* parties and *only includes communications regarding the litigation.* The ban does not prevent Defendant from communicating with its members about any other matters.

to protect the interests of the class, notice of settlements, and to address the very class inadequacies that Defendant raises for the first time on appeal:

> Whenever the representation appears to the court inadequate fairly to protect the interests of absent persons who may be bound by the judgment, the court may at any time impose additional conditions on the representative parties, or order an amendment of the pleadings, eliminating therefrom all reference to the representation of the abasent persons, and in that even the court shall order entry of the judgment in such form as to affect only the parties to the action and those adequately represented.

Rule 23(d)(3), SCRCP.

Based on the requirements of Rule 23, SCRCP, Plaintiffs would urge the Court of Appeals to limit its review of this Certification Order solely to the trial court's ban on party communications regarding the litigation and allow the trial court to address any other issues raised by Defendant regarding commonality, typicality, adequacy, or any other issues governed by Rule 23. Not only is this required by Rule 23, but the trial court is clearly in a better position to rule on these issues as a matter of first impression. Indeed, this is why South Carolina courts have long recognized that class certification orders are generally not appealable.

II. MOST OF THE ARGUMENTS MADE BY DEFENDANT ON APPEAL WERE NOT RAISED BEFORE THE TRIAL COURT AND, THEREFORE, ARE NOT PRESERVED FOR APPEAL.

Most of issues raised by Defendant on appeal were not raised at the trial court level nor ruled on by the trial court and, therefore, are not preserved for appeal. Rather, Defendant made the unusual choice of opposing class certification by reiterating substantive arguments on damages and standing. Indeed, the majority of Defendant's Appellate Brief is, once again, directed toward Defendant's substantive defenses.

Class certification is concerned only with the elements set forth in Rule 23(a), SCRCP, namely numerosity, commonality, typicality, adequacy, and amount in controversy. Defendant's

Memorandum in Opposition to Class Certification exhaustively recited the law governing those elements of class certification, but failed to point out how the proposed and certified class did not meet those elements. Rather, Defendant's argument consistently evolved into a reiteration of the substantive issues that had already been raised and rejected twice by the trial court, namely the positions that 1) Plaintiffs have not suffered any damages, and 2) Plaintiffs have no standing.

It is well-settled that "[a] court may not look to the merits when determining whether to certify a class." *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16, 21 (1998); *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 687 S.E.2d 321, 324 (2009). Despite this clear law, a review of Defendant's Memoranda and oral arguments show that its counsel was intent to defeating class certification by re-arguing that Plaintiffs suffered no damages and had no standing.

In its initial Memorandum in Opposition to Class Certification, Defendant made, at most, two arguments that actually addressed class certification issues, as opposed to a reiteration of its substantive arguments. To wit, Defendant argued 1) that Plaintiffs could not rely on the pleadings of their Amended Complaint to meet their burden of proof, and 2) Plaintiffs' claims were not typical because some class members may not want the relief sought by Plaintiffs. (R. pp. 1179-1199)

Just like Defendant's Memorandum, the overwhelming majority of argument presented at the October 22, 2018 hearing addressed Defendant's substantive defenses of no damages and no standing. (R. pp. 125-157) Defense counsel made passing reference that Plaintiffs had not met their burden of proof and were seeking damages that some other members might object to, but those were the only "arguments" made in opposition to class certification. These were the only class certification issues raised by Defendant, the only class certification issues addressed by the trial court, and the only class certification issues that should be considered on appeal.

Defendant did not argue, and the trial court did not rule on, the following issues, all of which Defendant has now raised for the first time on appeal:[7]

1. that the trial court did not have the power to bar communications concerning the litigation;

2. that the trial court improperly certified an injunctive relief class;

3. that the reliance and damage elements of any claim defeats commonality;

4. that Defendant's pled affirmative defenses defeat commonality; and

5. that Plaintiffs are not adequate representatives because they do not fall within the class.[8]

None of these arguments were made before the trial or ruled on by the trial court. The law is clear that such arguments cannot be made for the first time on appeal:

> [A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap,* 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler,* 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

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[7] Issues raised in Defendant's Motion to Reconsider for the first time are not preserved for review if those issues were not raised during the initial arguments. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not."). Defendant recognized that no previously raised issues could be argued on a Motion to Reconsider. Defendant's Motion to Reconsider, Page 7 (R. p. 474).

[8] This issue was not raised even in Defendant's Motion to Reconsider, filed after the class certification Order was entered.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772, 779–80 (2004).

Similarly, an argument before the trial court must be "sufficiently specific to inform the trial court of the point being urged." *Wilder*, 497 S.E.2d at 733. Defendant has not met the standard set by *Wilder*. Both Defendant's Brief and oral argument were almost completely devoted to substantive defenses, which had already been rejected by the trial court on a motion to dismiss and a motion for summary judgment. Defendant made vague, non-specific references to a purported general failure of proof by Plaintiffs, but did not identify any specific area were the proof was lacking. In addition, Defendant made a vague, unsupported allegations that some members of the class would not support the lawsuit, which somehow defeats class statutes (it does not). These few vague arguments do not suffice to preserve the issues raised on appeal.

Based on Defendant's failure to preserve the issues, Plaintiffs would ask that this Court only address, at most, those arguments that were raised and actually ruled on at the trial court level, namely 1) whether Plaintiff can rely on the its pleadings to support class certification and 2) whether class certification can be defeated based on Defendant's speculation that class members may be opposed to the relief sought.

III. THE TRIAL COURT PROPERLY CERTIFIED A CLASS IN THIS MATTER.

A. STANDARD OF REVIEW

It is within a trial court's discretion whether a class should be certified. *King*, 687 S.E.2d at 324. Therefore, a court's decision whether or not to certify a class is reviewed under an abuse of discretion standard. *Tilley*, 508 S.E.2d at 16. Of course, it is well-settled that neither the trial court nor the reviewing appellate court can look to the merits of the action when determining whether to certify a class. *Id.*

An abuse of discretion only occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485, 495 (2016).

B. GENERAL LAW GOVERNING CLASS CERTIFICATION

Rule 23(a) of the South Carolina Rules of Civil Procedure governs certification of classes:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds
> (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 or defenses of the representative parties are typical of the claims or defenses of the class,
> (4) the representative parties will fairly and adequately protect the interests of the class, and
> (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP.

"The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23." *Grazia v. SC State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197, 204 (2010) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 701, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979)). Class actions are favored in South Carolina, and South Carolina's Rule 23 is significantly more expansive than Federal Rule 23:

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 523 S.E.2d 781, 784 (1999).

Moreover, the South Carolina Supreme Court has affirmed the certification of a class of insurance policyholders to protect the interests of those policyholders in the insurance reserves held by a fraternal benefit association, much like Defendant in this case. *Ex parte Rowley*, 200 S.C. 174, 20 S.E.2d 383, 387-88 (1942) ("The interests and claims of the policyholders sought to be protected and preserved in this action are principally against the reserve funds of the association and it seems to us that all the policyholders form a most appropriate class for application of the statute.").

C. INITIAL CLASS DETERMINATIONS CAN BE BASED ON THE ALLEGATION OF THE COMPLAINT.

The trial court is required to determine if an action should proceed as a class action "as soon as practicable, after the commencement of an action." Rule 23, SCRCP. Although the burden of proof is on the movant, *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799, 801 (1990), this burden can be met by an examination of the pleadings, not a full-blown evidentiary hearing with testimony and affidavits, as Defendant has suggested. In other words, applying "a rigorous analysis," *Gardner*, 577 S.E.2d at 200, does not mean conducting an evidentiary hearing, it simply means that the trial court must carefully consider each element required for certification, which the trial court plainly did in its 12-page Order.

For instance, with regards to commonality, the party seeking class certification "must **articulate** the existence of significant common, legal, or factual issues which bind the proposed class together." *Gardner*, 577 S.E.2d at 200 (emphasis added; internal quotation marks omitted).

A review of the opinions in South Carolina addressing class certification shows that the courts initially reach the class certification determination based largely, if not exclusively, on the pleadings. *Waller*, 388 S.E.2d at 801 (quoting language in complaint in determining adequacy); *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402, 409 (Ct.App. 2000) ("[T]he

sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it."); *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154, 159 (Ct.App. 1986) ("We think the amended complaint sufficiently defines the alleged class, at least for the present."); *Knowles v. Standard Sav. & Loan Ass'n*, 271 S.C. 217, 246 S.E.2d 879, 880 (1978) ("The allegations in this complaint clearly state facts sufficient for the purpose of demurrer to constitute a class action."). None of these cases imply that a full-blown evidentiary hearing is required. Of course, if a party opposed to certification finds evidence that supports decertification, that party can move to decertify the class at a later date. Rule 23(d)(3), SCRCP.

As a practical matter, it is difficult to fathom what type of factual testimony would assist the trial court in determining the existence of commonality or typicality. Indeed, commonality is based on the existence of common issues of fact and law. It does not require proof of those facts, just an understanding that there are questions of fact common to the entire class. Such a determination can clearly be reached by a review of the complaint and a consideration of whether the proposed class is bound by common questions of fact and questions of law.

Treatises on class actions are generally in agreement that the initial class determination should be made on the well-pled allegations of the complaint. *See* 2 H. Newberg, *Newberg on Class Actions*, § 7.20 (3d Ed. 1992) (cited with approval in *McGann*, 340 S.E.2d at 159). Allegations of class facts usually constitute a prima facie showing of entitlement to maintain a class action. *Id.* Once a plaintiff has demonstrated a preliminary showing that the legal requirements of Rule 23 have been met, the burden of proof is upon the defendant to demonstrate otherwise. *Newberg*, § 7.22 at 7.74-75. If the facts as alleged by the plaintiff do not materialize, the Court has the ability to later decertify the class. *Id.*

Defendant cannot oppose the class simply by repeatedly claiming that there is some bit of evidence that is lacking without specifying how there has been an evidentiary failure. Plaintiffs have properly pled a class, and the trial court properly exercised its discretion in certifying the class. If some piece of evidence arises that mitigates against class certification, Defendant can move to decertify the class. What is very clear is that the determination of any such effort must begin at the trial court level, not on appeal. At the trial court level, Plaintiffs can conduct any discovery deemed necessary to address Defendant's objections, something that cannot be done when issues are raised for the first time on appeal, as Defendant has done.

In any case, the law is clear that a full-blown evidentiary hearing is not required for class certification, and the trial court can and did conduct a detailed examination based on mostly (although not exclusively) on the pleadings. The trial court cannot address issues that were not raised by Defendant, and certification is definitely not the stage to reach determinations on substantive law. Accordingly, the trial court did not apply any improper standards in assessing class certification.

D. CLASS CERTIFICATION IS AN APPOPRIATE PROCEDURE TO PROTECT THE INTERESTS OF MEMBERS OF A FRATERNAL BENEFIT ASSOCIATION OFFERING INSURANCE POLICIES TO ITS MEMBERS.

In addition to its six causes of action based in tort, Plaintiffs seek injunctive relief, namely a declaration that Defendant is operating as an unlicensed insurance company (as suggested by The Honorable David C. Norton, Norton Order, n. 1 (R. p. 953)), and Defendant should be enjoined from operating without the proper licensure, authority and oversight. Defendant devotes a substantial portion of its appellate brief arguing that Plaintiffs are not entitled to injunctive relief. Again, this is a substantive issue that is not relevant at the class certification phase. *Tilley*, 508

S.E.2d at 21. In any case, the trial court has already twice rejected Defendant's substantive arguments that Plaintiffs cannot seek the relief outlined in Plaintiffs' Amended Complaint.

In addition, as argued above, the trial court's ban on both parties communicating with the class regarding the lawsuit is part of the court's discretionary rights granted under Rule 23(d), SCRCP, not a grant of injunctive relief.

Defendant steadfastly refuses to address the issue at hand: Is class action status an appropriate mechanism to pursue claims for all members of a fraternal organization, which issues insurance policies to those members? The South Carolina Supreme Court has found in the past that such complaints are properly handled on a class action basis. In *Ex parte Rowley*, 20 S.E.2d at 387-88, the Supreme Court affirmed the certification of a class of insurance policyholders to protect the interests of those policyholders in the insurance reserves held by a fraternal benefit association, much like Defendant in this case. Specifically, the Court held:

> The interests and claims of the policyholders sought to be protected and preserved in this action are principally against the reserve funds of the association and it seems to us that all the policyholders form a most appropriate class for application of the statute.

Id. See also Powell v. Gary, 200 S.C. 154, 20 S.E.2d 391 (1942) (class action is appropriate mechanism to enjoin use of funds held by fraternal benefit association).

Additional opinions have recognized that a class action is an appropriate procedure to pursue a common fund, such as reserves held by a putative insurance company. S*ee Benjamin v. S.C. Nat. Bank of Charleston,* 269 S.C. 250, 237 S.E.2d 72, 73 (1977). Even Plaintiff Stanley has recognized that this lawsuit is about protecting a common fund created for all members of the PBA. Stanley Deposition, p. 37, ll. 18-24 (R. p. 171) ("as a member, we pay dues to support not only myself, but other members"); p. 71, ll. 14-19 (R. p. 179) ("all our dues are paid in – it's not

just support for me, it's support, you know, for every other member. Basically what I pay wouldn't pay for covering me, legally, just by myself. I mean it takes a pool.").

Looking outside of South Carolina, many courts have found that a class action is an appropriate procedure to bring claims alleging an insurance company's business practices deceived, misled or defrauded its policyholders. *See, e.g., Bhasker v. Kemper Casualty Insurance Co.*, 361 F.Supp.3d 1045, 1148-49 (D.N.M. 2019); *Bowen v. Farmers Insurance Co.*, 111 N.E.3d 643, 650-54 (Ct.App. Ohio 2018) (rejecting many of the same arguments that Defendant has put forth in this matter); *Fortis Ins. Co. v. Kahn*, 299 Ga.App. 319, 683 S.E.2d 4, 7-10 (2009) (common questions of law and fact predominated in insured's action against insurer alleging illegal and fraudulent scheme to defraud customers, and reliance could be determined on class-wide basis).

In short, whether the Plaintiff Class Members are viewed as members of a benevolent association, policyholders of an insurer, or participants in legal benefits plan, a class action is an appropriate procedural tool to pursue claims, including injunctive relief, on behalf of all members or policyholders to protect a common fund, force the organization to comply with appropriate rules and standards, and stop fraudulent or illegal behavior.

E. THE ACTION SATISFIES THE NUMEROSITY REQUIREMENT.

Under Rule 23(a)(1) the proposed class must be so numerous that joinder of all individual members as parties would be impractical. The proposed class herein clearly satisfies this requirement. Defendant has over 42,000 members. It is estimated that there are at least several thousand members who are residents of South Carolina. At the hearing on class certification, the Plaintiffs presented the trial court judge with Defendant's Responses to Plaintiffs' Second Set of Interrogatories. October 22, 2018 Hearing Transcript, Pages 13-14 (R. p. 117, line 20 - p. 118, line 8); Defendant's Responses to Plaintiffs' Second Set of Interrogatories (R. pp. 1242-1252). As

explained by Plaintiffs' counsel, Defendant had over 2,300 members in South Carolina in 2015 and collected over $500,000 in dues from its members in 2015. This plainly satisfies the numerosity requirement. Clearly, the joinder of over 2,000 members would be impractical.

"There is no requirement . . . at the pleading stage of the case either the exact number of persons comprising the class be specified or the class members be identified." *McGann*, 340 S.E.2d at 159. The minimum number required for class certification has been held to be between 20 and 40. *See Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th Cir. 1969) (40 class members sufficient); *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160, 162, *amended*, 132 F.R.D. 165 (D.S.C. 1990) (180 Plaintiffs in one subdivision satisfied numerosity requirement); *Damerson v. Sinai Hosp. of Baltimore*, 595 F.Supp. 1401, 1408 (D.Md. 1984) (a class with as few as 25 to 30 members raises a presumption that joinder would be impractical). The trial court has wide discretion on the issue of numerosity, and a class with over 2,000 members clearly satisfies the requirement of numerosity.

F. THERE ARE QUESTIONS OF LAW AND FACT COMMON TO THE CLASS.

1. GENERAL LAW GOVERNING COMMONALITY

Rule 23(a) next requires that "there are questions of law or fact common to the class." Rule 23(a)(2), SCRCP. "In practical terms this means the party must *articulate* the existence of 'significant common, legal, or factual issues' which bind the proposed class together." *Gardner*, 577 S.E.2d at 200 (*quoting Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D.Ohio 1991); emphasis added).

Commonality can be met by the existence of a single important common issue:

> It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a

> single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.

McGann, 340 S.E.2d at 158 (quoting Lightsey & Flanagan, *South Carolina Civil Procedure* at 19); *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

Relatedly, South Carolina Rule 23 does not include a requirement that common issues predominate over individualized issues, as is required by Federal Rule 23. *See section below.*

"It is enough for a lawsuit to raise questions that are substantially related to the resolution of the case and that link the class members together, even though the individuals themselves are not identically situated." *Ganesh, L.L.C. v. Computer Learning Ctrs, Inc.*, 183 F.R.D. 487, 489 (E.D.Va. 1998). Thus, factual differences among the Class members' claims will not preclude certification if the claims share the same legal theory. *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1275 (4th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

The commonality test has been characterized as a "low hurdle" that is "easily surmounted," *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 206 n.8 (S.D.N.Y. 1995), where all that is required is the existence of "some common question of law or fact," *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 F.R.D. 48, 51 (S.D.N.Y. 1987).

Courts also look favorably upon class action treatment where, as here, standardized conduct is directed uniformly to all of the class members. *Mitchell-Tracey v. United General Title Insurance*, 237 F.R.D. 551, 557 (D.Md. 2006); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 559 (E.D.Va. 2000) ("[C]ourts have consistently found a common nucleus of operative facts when the defendants are alleged to have directed standardized conduct toward the putative class members, or where the class claims arise out of standard documents.") (internal quotations omitted); *see also Blackie v. Barrack*, 524 F.2d 891, 902-905 (9th Cir. 1975) (holding that common

questions of law and fact abound where alleged claim involves uniform written documents like news releases). Additionally, "[t]he existence of routine and standardized practices giving rise to numerous claims weigh in favor of finding commonality, as well as typicality." *Mitchell-Tracey*, 237 F.R.D. at 557; *see also Williams v. Empire Funding Corp.*, 183 F.R.D. 428 (E.D.Pa. 1998) (finding commonality among class members for claims involving standardized contracts and sales and referral practices).

2. DEFENDANT HAS ADMITTED THAT THIS CASE "BOILS DOWN TO" TWO QUESTIONS OF LAW THAT ARE COMMON TO THE ENTIRE CLASS.

This action involves issues common to each member of the class because the relationship between members of the PBA and the PBA is governed by the same documents governing the same policy for which each member paid the same amount. The members were all damaged in the same manner, in that they all paid dues to an unauthorized, unsupervised insurance company that has operated illegally for decades. Each member's damages will be calculated in the same way, based on the amount of dues paid for the services received. Members were all subjected to the same sales pitches, received the same newsletters, and received the same unauthorized services from Defendant. Of key importance, the terms of the Plan, including its limitations, were not revealed to the members, and none of the members have ever been allowed to choose their own attorney.

Defendant has literally admitted that the core legal issues in this matter are common to the entire class. As Defendant has stated:

> In their Motion Plaintiffs have set forth a variety of common questions that may apply to the purported class. However, **this case boils down to two common questions of law: 1) whether the PBA was selling insurance without a license, and, 2) whether Plaintiffs were damaged by that action.** . . . Plaintiffs focus their arguments on the first question and a sundry of minor factual issues, but ignore

the crux of the common question of law – whether the alleged violation of law has actually resulted in damage.

Defendant's Memorandum in Opposition to Motion for Class Certification, Pages 8-9 (R. pp. 1183-1184) (emphasis added).

Plaintiffs agree with Defendant that this case boils down to at least two common questions of law: whether Defendant is an insurer, and whether class members can recover damages. And as Defendant has repeatedly recognized, these two questions are determinative class-wide, bind the entire class, and plainly prevail over any individualized issues that might exist. Because commonality is met "where the class shares a determinative issue," *Gardner*, 577 S.E.2d at 200-01, having two over-arching determinative issues satisfies the commonality requirement.

In addition, Defendant has made at least five more substantive arguments that are common and determinative legal issues that bind the entire class:

1) whether Defendant is acting as an unregistered and unlicensed insurance company in South Carolina;

2) whether Defendant is acting as an unregistered and unlicensed prepaid legal benefit in South Carolina;

3) whether proposed class Plaintiffs have standing to bring a cause of action in this matter;

4) whether Plaintiffs have suffered cognizable damages; and

5) whether Plaintiffs are entitled to injunctive or declaratory relief.

There are of course several additional legal issues that impact the entire class, including:

1) whether Defendant, as an unauthorized insurer, has the right to file an answer in this matter pursuant to S.C. Code § 38-25-550(a);

2) whether Defendant has maintained sufficient reserves;

3) whether Defendant has created and followed appropriate insurer standards and acted in good faith in:

a. the solicitation, sale, negotiation and issuance of policies;

b. the amount it has charged its members;

c. handling and accounting for premiums Defendant has collected; and

d. appointing its members' attorneys under the Legal Defense Benefit Plan from a limited panel in contradiction to South Carolina law governing prepaid benefit plans.

Thus, Defendant has admitted that this case "boils down to" a few common legal issues that bind the class. Having these core common issues clearly satisfies South Carolina's commonality requirement. Defendant apparently recognized this at the trial court level and limited its arguments against certification to the substantive issues, namely arguing the members did not suffer any cognizable damages. Defendant has largely continued this tactic in its Appellate Brief. The heart of its argument in opposition to commonality is nothing more than a recitation its substantive argument as to why there is no legally cognizable claim against Defendant for operating an unlicensed business for decades. Defendant's Brief, Pages 19-30.[9]

First, Defendant ignores the fact that all of these substantive arguments have already been made and rejected twice, in Defendant's Motion to Dismiss and its Motion for Summary Judgment.

[9] With regards to Plaintiff's breach of fiduciary duty claim, Defendant argues that it owes no fiduciary duty to its own members. Defendant's Appellate Brief, Pages 19-20. Next, Defendant argues that Plaintiffs cannot sue for fraud in the inducement or negligence misrepresentation because Defendant made no misrepresentations to Plaintiffs. Defendant's Appellate Brief, Pages 20-23. Defendant argues that it has not breached its implied covenant of good faith and fair dealing because it did what it was supposed to do and any breach has been cured. Defendant's Appellate Brief, Pages 24-25. Defendant then lists several defenses that purportedly block Plaintiffs' claims. Defendant's Appellate Brief, Pages 28-30.

Plaintiffs have already successfully defended all of the causes of action it brought twice, and Plaintiffs' successful arguments are set out in exhaustive detail in Plaintiffs' Memorandum in Opposition to Motion to Dismiss, Pages 16-26 (R. pp. 929-939), and Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, Pages 6-17 (R. pp. 1134-1145). If the Court has any doubts about the substance of Plaintiffs' claims, those arguments can be reviewed in full in those Memoranda, although such a review is not necessary for class certification.

In truth, Defendant's substantive arguments provide strong support for commonality and class certification. Each one of the substantive arguments put forth by Defendant are defenses to the claims of all members of the class. If Defendant owes no duties to Named Plaintiffs Stanley and Reiter, then Defendant owes no duties to the entire class. If Defendant made no misrepresentations to Plaintiffs Stanley and Reiter in its operations, then there are no misrepresentations to the class. If Stanley and Reiter suffered no legally cognizable damages from Defendant's unauthorized operations, then neither did the entire class. If Stanley and Reiter do not have standing to challenge Defendant's unauthorized status, then neither does anyone in the entire class. In short, these are all arguments in support of commonality and class certification.

Based on the foregoing, there is no basis to question the trial court's broad discretion in finding commonality in this matter.

3. SOUTH CAROLINA'S RULE 23 DOES NOT INCLUDE A PREDOMINANCE REQUIREMENT, ONLY THAT THERE ARE QUESTIONS OF LAW OR FACT COMMON TO THE CLASS.

Buried in its lengthy arguments on the substantive issues, Defendant does manage to actually argue that there are two individualized issues: reliance and damages. As an initial matter, as set forth above, these were not arguments made to the trial court and, therefore, are not preserved for appellate review. Although Defendant certainly raised the issue of damages in its brief, it was

in the context of the legal argument that the class members have no cognizable damages, which again is a common issue that binds the class, not in the context that damages are individualized issues that predominate over common issues. A close review of both Defendant's Brief and defense counsel's argument at the hearing both show that Defendant never raised these issues at the trial court level.

Second, Defendant's identification of purportedly individualized issues is not relevant to class certification under South Carolina's Rule 23. Rule 23(a) simply requires that Plaintiffs show "there are questions of law or fact common to the class." Rule 23(a)(2), SCRCP. Commonality in South Carolina begins and ends with the identification of common issues. South Carolina's Rule 23 does not contain any requirement that common issues predominate over individualized issues. The "predominance requirement" is found in the Rule 23(b) of the Federal Rules of Procedure, which requires that common issues predominate over individualized issues:

> (3) 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.

Rule 23(b), FRCP.[10]

Section (b) of Federal Rule 23 has not been adopted by South Carolina and is not incorporated into South Carolina Rule 23. Thus, South Carolina has not adopted a "predominance" requirement, and Defendant has not cited to a single South Carolina case that has adopted the "predominance" requirement. Indeed, all of the cases cited by Defendant in support of its

[10] More precisely, Federal Rule 23(b) lists three types of a class actions, and the party seeking class certification in Federal Court must satisfy one of these three types of class action requirements. One of the requirements found in Federal Rule 23(b) is "the questions of law or fact common to class members predominate over any questions affecting only individual members . . ." South Carolina Rule 23 does not contain this requirement is recognized as reaching more broadly than the Federal Rule because of this omission.

argument that reliance and damages destroy commonality are Federal Court cases interpreting Federal Rule 23.

So, while federal case law interpreting other requirements under Federal Rule 23 that are identical to South Carolina Rule 23 are persuasive, federal cases law interpreting the predominance requirement are not relevant to South Carolina Rule 23 or commonality inquiries. *Littlefield,* 523 S.E.2d at 784 ("By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.").

Since Defendant has admitted that there are several central questions of law common to the entire class, commonality is satisfied. Defendant's effort to identify individualized issues does not alter this conclusion because there is no predominance requirement in South Carolina.

4. EVEN IF THE COURT WERE TO CONSIDER DEFENDANT'S UNPRESERVED AND IRRELEVANT ARGUMENTS ON RELIANCE AND DAMAGES, THOSE ISSUES DO NOT PREDOMINATE OVER THE COMMON ISSUES.

Nevertheless, even if the Court were to consider Defendant's unpreserved and irrelevant arguments that there are individualized issues, the purportedly individualized issues do not predominate over the myriad of common legal and factual issues.

a. Reliance is not an individualized inquiry.

With regards to reliance, Plaintiffs have pled two causes action, fraud in the inducement and negligent misrepresentation, that include reliance as an element. Plaintiffs pled a claim for fraud in the inducement because the South Carolina Supreme Court long ago recognized that South Carolina residents who have paid premiums to unauthorized insurers are entitled to pursue a cause of action for fraudulent inducement. *Ross*, 102 S.E.2d at 746-47. In *Ross*, the Supreme Court considered and approved both and "fraud and deceit" claim and a claim for fraudulent inducement against an unauthorized insurer, not arising out of any particular claim, loss, or cancellation. *See*

also Hodge, 92 S.E.2d 849 (considering an action for the fraud and deceit in the solicitation of the policy, not "for breach of the conditions of the policy or for loss occurring thereunder."). The case was allowed to proceed even though the "only" damages suffered by the second plaintiff were the payment of premiums. This is precisely what Plaintiffs have pled in this matter.

In this context, the reliance issue is common to the entire class. The class members were induced to pay membership dues to an illegal, unauthorized insurer. The inducement is the implication that the insurer was operating properly, legally, and with appropriate oversight to insure that it can comply with its obligations to the members. In such a situation, the members' right of reliance is identical. The members of PBA, like the members or insureds of any fraternal organization, are relying on a course of conduct by the organization that is identical for all involved. At no point did the PBA disclose that it was not licensed. At no point did the PBA disclose that there was a secret Policy with secret exclusions that governed the benefits provided to the members. At no point did the PBA disclose that it could unilaterally withdraw those benefits based on the unilateral decision of one person without any claim examination requirements. Any issue of reliance in this case will be a universal determination that will impact all class members equally. As such, the reliance issue does not destroy the class, particularly where all parties agree that the more important core issues of damages and standing are common to the entire class.

Indeed, a number of courts have granted class certification for claims requiring proof of individualized reliance, where such proof is based on a common course of conduct, such as operating illegally without a license. *See, e.g., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 724-25 (11th Cir. 1987) (finding individual issues of reliance do not predominate where plaintiffs allege a common course of conduct of misrepresentations through affirmative acts and omissions); *In re Southeast Hotel Props.*, 151 F.R.D. 597, 605 (W.D.N.C. 1993) (finding common questions

of fact relating to an alleged common course of conduct by all defendants predominate over issues of individual reliance); *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 102 (M.D.N.C. 1993) ("[T]he question of whether Defendants . . . made material misrepresentations, and if so, whether they were made intentionally or recklessly or negligently are common to the entire class and predominate over individual issues of reliance."); *In re MDC Holdings Sec. Litig.*, 754 F.Supp. 785, 806-07 (S.D.Cal. 1990) (certifying Securities Exchange Act Section 18 claim, which requires proof of individual reliance, as class action where plaintiffs "alleged a common course of action based on the same misrepresentations").

b. Damages are not an individualized issue.

Defendant's other argument that addresses commonality is that class members' varying damages would destroy commonality. Again, this was an argument that was not made before the trial court and is irrelevant in any case because South Carolina Rule 23 does not require a predominance inquiry on the commonality issue.

Setting aside those objections, Defendant has misconstrued Plaintiffs' damage claims. Plaintiffs are seeking the return of some or all of the dues that the class members paid to Defendant. These dues are all the same. Each class member has paid $23.50 per month. The overwhelming majority of those payments went to salaries and other expenses of Defendant, not to the attorneys retained to represent the members. Defendant's Responses to Plaintiffs' Second Set of Interrogatories (showing less than 15% of dues went to attorneys) (R. p. 1252). Any damages would be based on these payments, likely some percentage of the payments returned to the members. Thus, there is no difference in the damages suffered by each member.

Defendant claims that damages would be different for those members that received representation under the Plan. First, there is no legal basis for reducing damages in this manner

unless Defendant is required to return all dues that were paid. If only a portion of the dues are returned to the class members, the dues kept by Defendant would properly be viewed as an appropriate dues amount given the coverage provided.

Second, even if there was some need to calculate the benefits received under the Plan by each member, that could easily be done. Defendant would simply have to provide in discovery the amounts that it paid for each member's representation. There is no indication that this would be impossible or even difficult. In other words, the damage calculation, even if mitigation were required, would be a simply, noncontroversial exercise once the legal issues (which would be class-wide legal issues) were decided.

Federal courts interpreting the Federal Rule 23 predominance requirement have routinely held that the need for individualized proof of damages alone will *not* defeat class certification. *Gunnells v. Healthplan Services,* 348 F.3d 417 (4th Cir. 2002). *See also Central Wesleyan*, 6 F.3d at 189; *Hill v. W. Elec. Co., Inc.,* 672 F.2d 381, 387 (4th Cir.1982) ("Bifurcation of ... class action proceedings for hearings on ... damages is now commonplace."); *Chisolm.,* 184 F.R.D. at, 566 (collecting cases). Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification.

In fact, the advisory committee's notes to Rule 23 explicitly envisions class actions with such individualized damage determinations. *Gunnells*, 348 F.3d at 428 ("Fed.R.Civ.P. 23 advisory committee's note (1966 Amendment, subdivision (c)(4)) (noting that Rule 23(c)(4) permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with 'the members of the class ... thereafter ... required to come in individually and prove the amounts of their respective claims.'"); *see also* 5 *Moore's Federal Practice* § 23.23[2]

(1997) ("[T]he necessity of making an individualized determination of damages for each class member generally does not defeat commonality."). "In actions for money damages under Rule 23(b)(3), courts usually require individual proof of the amount of damages each member incurred." *Id.* at § 23.46[2][a] (1997). Even when such individualized inquiries are necessary, if "common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied." *Id.*

The common questions of law and fact admitted to by Defendant overwhelmingly predominate over any differing circumstances of individual claims because the central issues involve the Defendants' materially uniform conduct, policies, procedures, and forms, and claims asserted in this case require no proof of individual reliance or causation. All Plaintiffs suffered the same type of damage in the same way. Because of Defendants' common course of conduct as to the Class members, Plaintiffs will establish Defendant's liability for all Class members to the extent they can prove it for their individual claims.

In short, Defendant's potential liability does not vary from class member to class member. Defendant has admitted that the most important issues are common and determinative to the whole class. This is the essence of commonality, and the trial court was well within its discretion in finding commonality.

G. PLAINTIFFS' CLAIMS ARE TYPICAL OF THE CLAIMS OF THE CLASS.

To establish the typicality requirement, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP. Only three reported South Carolina opinions even reference typicality. *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 778 S.E.2d 902, 910 (2015); *King*, 687 S.E.2d 321; *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765, 774 (Ct.App. 2011). The limited discussion of the typicality

requirement in these cases shows that the factor is rarely an issue, so long as the court determines that the claims asserted by the named Plaintiffs coincide factually with the claims of the other class members.

Even looking at the more stringent federal law, the typicality element is easily satisfied. The representative party's claims are "typical" if they arise from the same conduct that gives rise to the claims of the class members and if the claims of the claimants are based on the same legal theories. *Central Wesleyan College,* 243 F.R.D. at 637; *see also* 1 H. Newberg, *Newberg on Class Actions* § 13 at 167.

The test focuses on similarity of legal and remedial theories of claims of named and unnamed plaintiffs. *Bates*, 132 F.R.D. 160. The test does not focus on the imagined animosity of other class members that Defendant attempts to conjure.

The analysis of the typicality requirement coincides with the court's determination of the commonality issue. The claim of a plaintiff is to be considered "typical" of the claims of the class members if the claim arises from the same event, facts or conduct which has given rise to the claims on behalf of the other class members. As stated by Judge Sol Blatt Jr.:

> The typicality test does not require that the representatives have identical claims which other members of the class might present. The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs. The plaintiffs' claims for damages stem from effects of the defendants' activities on the plaintiffs' property and their health, now, in the past and in the future. Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality. These named plaintiffs have presented evidence indicating that they have suffered a wide variety of harm which persons similarly situated may have also suffered.

Bates, 132 F.R.D. at 163.

Plaintiffs' claims are not only similar to but also typical of the claims of all class members. Each member is a dues paying member of Defendant. Each member was covered by Defendant's

Legal Defense Benefit Plan. Each member has an interest in the resolution of the common questions of fact and law set forth above. Since there is no significant difference between the claims of the Plaintiffs and the other class members, typicality is satisfied.

Defendant has not identified any way in which the Plaintiffs are factually different from the other class members. Instead, Defendant's entire argument is devoted to speculation that some members of the class might be opposed to the litigation and relief sought. This is not an appropriate area of inquiry for typicality under South Carolina Rule 23.

Defendant also deploys a commonly used but entirely irrelevant tactic to attack typicality. Defense counsel sought the named Plaintiffs' opinions on various legal positions contained in the Amended Complaint, even though Plaintiffs' did not draft the Amended Complaint and have no legal training at all. Defendant then twists this testimony into absurd conclusions, such as arguing Plaintiffs' want to "shut down" the PBA.

The class representative's "lack of knowledge" of legal contentions is a game frequently played by attorneys opposing class certification and should be soundly rejected, as suggested by the Fourth Circuit Court of Appeals in *Gunnells*, a case cited throughout Defendant's Appellate Brief:

> The lack of knowledge contention is particularly meritless. It is hornbook law, as the district court recognized, that "[i]n a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative." J.A. 1256 (quoting 32B Am.Jur.2d *Federal Courts* § 1888 (1996) (footnotes omitted)); *see also Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir.2000) ("The Supreme Court in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370–74, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966) expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance.").

Gunnells, 348 F.3d at 430.

Similarly, it should hardly be surprising that Plaintiffs Stanley and Reiter have no knowledge regarding the misrepresentations of the Defendant. Of course, if Stanley and Reiter were aware of Defendant's being unlicensed and administering the Plan pursuant to an undisclosed Policy and undisclosed exclusions, then there would be no misrepresentation and no fraud. The very essence of such claims is that the defendant has not revealed the truth to the plaintiffs. The truth only comes out following "a great deal of investigation and discovery by counsel." *Id.*

Defendant opposes the relatively low hurdle of typicality by claiming that Plaintiffs are seeking to "shut down" the PBA. One of Plaintiffs' seven causes of actions seeks injunctive relief barring PBA from operating in South Carolina without appropriate licensing. As stated in the Amended Complaint:

> 127. Based on the foregoing, Plaintiff, on behalf of himself and the entire class, hereby seeks preliminary and permanent injunctive relief to bar Defendant PBA from operating as an insurer without proper authority and license, including barring Defendant PBA from soliciting, marketing, selling, and issuing insurance contracts and adjusting claims unless Defendant obtains proper authority and licensing from the states in which it is operating.

Amended Complaint, Paragraph 127 (R. p. 64). Again, Plaintiffs are **not** seeking to enjoin Defendant from operating at all, but rather seeking to force Defendant to comply with the applicable law.

And, again, Plaintiff Reiter repeatedly made clear that Plaintiffs simply seek to bring the Defendant in compliance with the law. Reiter Deposition, p. 45, ll. 7-15 (R. p. 276); p. 78, l. 4 – p. 79, l. 12 (R. p. 284); Stanley Deposition, p. 106, l. 14 – p. 107, l. 15 (R. p. 188) (stating he just wanted PBA to follow the law and comply with insurance regulations).

Of course, even if Plaintiffs' injunctive relief has been rendered moot by the actions of the Department of Consumer Affairs, Plaintiffs' damage claims for years of Defendants' illegal operations would still remain.[11]

Defendant also suggests that Plaintiffs have to come forward with some proof that all members support this action to satisfy the adequacy element. Nothing in South Carolina law supports this drastic demand, which would make it essentially impossible to ever have a certified class. Defendant overlooks the fact that members can opt-out of the class, which should resolve any objections a PBA member might have to the litigation.

Moreover, Mr. Reiter testified that his opinion that Slager should have been defended was shared by others at a PBA chapter meeting. Reiter Deposition, p. 49, l. 20 – p. 50, l. 12 (R. p. 277). It is telling that Defendant has not provided any proof that PBA members are opposed to this litigation. Defendant is simply asking the Court to assume this opposition. Such imagined opposition should not overcome the trial court's discretion in determining that Plaintiffs Stanley and Reiter have claims typical of the entire class.

Based on the foregoing, the trial court was well within its discretion in finding that Named Plaintiffs' claims were typical of other class members' claims.

H. PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.

Rule 23(a) also requires that the Named Plaintiffs be able to fairly and adequately represent and protect the interests of all class members in proceeding with prosecution of the matter as a

[11] Defendant devotes a great deal of its brief attacking Plaintiffs' injunctive relief claim, but does not contest the amount in controversy requirement of Rule 23, SCRCP. Thus, even if Plaintiffs lose the injunctive relief claim, they still need only satisfy the numerosity, commonality, typicality, and adequacy elements. Thus, Plaintiffs' injunctive relief claim is entirely unnecessary to sustain the certified class.

class action. In determining whether Plaintiffs are adequate class representatives, the court should look at two criteria – 1) the representative must have common interests with the unnamed members of the class; and 2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel. *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983), *cited with approval in Waller*, 388 S.E.2d 799. "The adequacy of plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary." *S.C. Nat. Bank v. Stone*, 139 F.R.D. 325, 330–31 (D.S.C. 1991). Furthermore, Courts generally hold that the employment of competent counsel assures vigorous prosecution. *Id.* at 331.

Plaintiffs' claims are identical to the claims of the other proposed class members. Plaintiffs have no interests that are antagonistic to the class. There is no indication or evidence that the Plaintiffs or their attorneys would not be adequate representatives of the class. Plaintiffs have, therefore, satisfied the element adequacy.

Further, Defendants presented no evidence in its Memorandum in Opposition to Class Certification or at the hearing on class certification to overcome the presumption of adequacy. Indeed, Defendants made no arguments on the adequacy issue other than reiterating its false and unsupported claims that Plaintiffs are seeking to shut down PBA and that other members are somehow antagonistic to the litigation. Again, Plaintiffs are not seeking to take away the benefits provided to class members, but instead seeking to force Defendant to abide by the appropriate standards of insurance companies and benefit plans to **protect the other class members' benefits, not take them away**. Reiter Deposition, p. 45, ll. 7-15 (R. p. 276); p. 78, l. 4 – p. 79, l. 12 (R. p. 284); Stanley Deposition, p. 106, l. 14 – p. 107, l. 15 (R. p. 188) (stating he just wanted PBA to follow the law and comply with insurance regulations).

If there is any doubt about Mr. Stanley's and Mr. Reiter's adequacy as class representatives, the Court need look no further than their deposition testimony that they are pursuing this matter to make sure that the PBA does not mistreat its members and take away their coverage based on undisclosed exemptions just like the PBA did to Michael Slager. Stanley Deposition, p. 74, l. 3 – p. 76, l. 16 (R. p. 180) (expressing concern that the PBA could treat him and other members like Michael Slager and arbitrarily deny him coverage); Reiter Deposition, p. p. 43, ll. 2-14 (R. p. 275) ("I was damaged when Mike was damaged."); p. 59, l. 14 – p. 60, l. 1 (R. p. 279) ("That's the problem. Not just Mike, the fact that it could happen to anybody, anytime they make a phone call.").

Mr. Reiter further testified that the PBA needs to be regulated, not that he wants to shut it down. Reiter Deposition, p. 55, l. 9-12 (R. p. 278); p. 78, l. 4 – p. 79, l. 12 (R. p. 284). Indeed, Reiter specifically identified the problem that there was no oversight of the claims process, which should have been structured with oversight like a normal insurance company. Reiter Deposition, p. 57, ll. 1-14 (R. p. 279). *See also* Stanley Deposition, p. 106, l. 14 – p. 107, l. 15 (R. p. 188) (stating he just wanted PBA to follow the law and comply with insurance regulations).

Reiter also identified the misrepresentations made by Defendant, namely that PBA's "guarantee of coverage is a falsehood, because you may not get your coverage." Reiter Deposition, p. 60, ll. 12-23 (R. p. 279). Plaintiff Reiter later reiterated that he brought this suit because Defendant "made 44,000 separate promises that it will provide a legal defense if an officer needs one." Reiter Deposition, p. 79, l. 13-20 (R. p. 284). Similarly, Plaintiff Stanley testified that the PBA had broken its word when it dropped coverage for Slager. Stanley Deposition, p. 77, ll. 21-25 (R. p. 181).

Put simply, Plaintiffs are not trying to "shut down" the PBA, but are fighting for regulatory

oversight, fair and appropriate coverage, and full disclosure of that disclosure, not to take away coverage. Certainly, there is no evidence that this effort makes them antagonistic to any other members of the class.

In addition, Defendant attacks the Named Plaintiffs' adequacy to represent the class on a number of grounds that were never raised at the trial court level. First, Defendant claims that the Named Plaintiffs are not members of the class. This issue was not raised before the trial court, so the issue was not preserved for appeal. This issue in particular is one that needs to be addressed at the trial court, which is well-equipped to deal with issues regarding class membership:

> In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses. Lightsey & Flanagan, *South Carolina Civil Procedure* at 196.

McGann, 340 S.E.2d at 159.

Since Defendant never raised this issue, the trial court did not have an opportunity to address it, and it cannot be addressed for the first time on appeal.

To be clear, the certified class description is:

> All residents of South Carolina who participated in the Defendant's Legal Defense Benefit Plan by paying member dues to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.

Both Plaintiffs Reiter and Stanley were members of PBA between 2013 and 2016. Stanley remains a member, and Reiter is no longer a member. Plaintiffs chose to have a representative of current members and a representative of former members as class representatives. This is the definition of the class, and both representatives meet it.

There is additional language in the Class Certification Order, placed there at Defendant's request, that excludes "current and former executive and local board members . . . that timely and properly exclude themselves from the class." Class Certification Order, Page 1 (R. p. 4). This is

not part of the class definition, and it only applies to those who exclude themselves. More importantly, any issues created by this exclusion could have been addressed at the trial court level, but Defendant never raised the issue.

CONCLUSION

As an initial matter, Plaintiffs would ask that the Court of Appeals simply remand this matter back to the trial court because there are no appealable issues present. The Court granted review based on the belief that injunctive relief had been granted, when in fact that trial court simply exercised its perogative to control class communications under Rule 23. The trial court did not grant any injunctive relief.

Similarly, the arguments made by Defendant on appeal that actually address class certification, as opposed to the underlying substantive issues, were never made before the trial court and cannot be raised for the first time on appeal.

Even if this Court were to ignore the lack of appealable issues and Defendant's failure to preserve relevantg class certification issues, the trial court plainly acted well within its discretion in certifying this class. Defendant's entire opposition to certification is a misguided attack on the underlying substantive issues. Defendant inexplicably fails to realize that these repeated arguments - that the all class members' claims are barred by a lack of standing and lack of cognizable damages - in fact supports class certification. Defendant has admitted repeatedly that these are the most important issues and that these issues govern all of the class members' claims. In short, Defendant has essentially admitted commonality, the most important and frequently discussed element of class certification.

Based on the foregoing, Plaintiffs would ask that this Court uphold the trial court's class certification and remand this matter to the trial court.

Respectfully submitted,

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Charleston, South Carolina
December 11, 2019

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-000182
Circuit Court Case No. 2016-CP-10-04062

Donald Stanley and Sean Reiter,
Individually and as Class Representatives, Respondents,

v.

Southern States Police Benevolent Association, Inc. Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 11, 2019

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