

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

DEL HEDGEPATH,

Plaintiff/Counterclaim Defendant,

vs.

DERRICK KAUFFMAN,

Defendant/Counterclaim Plaintiff.

Case No. 1916-CV01507
Division 26

DERRICK KAUFFMAN *on behalf of
himself and all others similarly situated,*

Counterclaim Plaintiff,

vs.

**DEL HEDGEPATH
(dba Del Properties),**

Counterclaim Defendant.

**COUNTERCLAIM PLAINTIFF’S AMENDED MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT & MEMORANDUM IN SUPPORT**

Settlement of a class action requires judicial approval, which typically consists of three stages: 1) preliminary approval, 2) dissemination of notice to the Class, and 3) a fairness hearing to determine whether the settlement should be granted as fair, reasonable, and adequate for the Class. Counterclaim Plaintiff is taking the first step in the process by seeking preliminary approval of the proposed settlement. Counterclaim Plaintiff moves this Court for an Order (1) granting preliminary approval of the proposed class action settlement; (2) appointing Counterclaim Plaintiff as Representative Plaintiff and Counterclaim Plaintiff’s attorneys as Class Counsel for the expanded Settlement Class; (3) approving the parties’ proposed notice of settlement; (4)

directing that notice be given to Class members in the propose form and manner; and (5) setting procedures for people who fall within the Class to exclude themselves and for Class members to comment on the proposed settlement.¹ The Final Fairness Hearing to determine whether the settlement should be granted final approval and Class Counsel should be awarded their attorneys' fees and expenses is currently scheduled for August 2, 2024 at 2:00 p.m.²

As discussed more fully below, the settlement achieves Counterclaim Plaintiff's litigation objectives and meets the requirements under Missouri law for preliminary approval. It was reached after extended arms-length negotiations between the parties. And it provides important compensation and injunctive relief to members of the classes. A copy of the Settlement Agreement is attached hereto as **Exhibit 1**. The forms of Notice are attached to **Exhibit 1** as **Exhibits A, B, and C**.

I. SUMMARY OF THE LITIGATION

a. Factual background

Counterclaim Defendant Del Hedgepath d/b/a Del Properties ("Hedgepath") owns and/or manages multiple residential properties in Kansas City, Missouri.

With each of these properties and each tenancy, Hedgepath uses a lease identical in all relevant respects, and with each tenancy has engaged in identical alleged predatory leasing practices with each member of each class. The alleged predatory practices include an unconscionable lease provision that: (1) penalized tenants for terminating the lease prior to the expiration of one year but gave Hedgepath absolute right to terminate at any time, for any reason without cause and without penalty, with thirty days' notice; and (2) assessed tenants a

¹ The Court's Order of October 25, 2023, established a timeframe in which the people within the Class can exclude themselves or otherwise object as 45 days after the notices are mailed.

² See Order dated April 1, 2024.

nonrefundable floor cleaning. In addition, with each tenant of each property, Hedgepath allegedly never provided any proof of the required written notice of a final walk-through or receipts of carpet cleaning (with only one notable exception). The tenants subjected to these alleged predatory leasing practices have been certified as Class B (unconscionability) and Class C (security deposits), respectively.

Class A (habitability) is limited to the tenants of one Hedgepath property, Normandy Apartments at 501 W. 11th Street, which was the locus of an alleged insidious and unremitting bed bug infestation. The infestation was throughout the premises, and was well known to Hedgepath and his agents; in fact, by October 23, 2018, Hedgepath's staff had reported and recorded bed bugs in at least the following nineteen units: 102, 103, 108, 208, 209 ("bad"), 211, 212 ("very bad"), 301, 311, 312, 315, 402, 405, 408, 409 ("Bad"), 416 ("Bad"), 503 ("Bad BB"), 512, 515. Because it is in the nature of bedbugs to migrate between units (as shown above by adjacent units being infested), their presence in a multi-unit residential property subjects each tenant to bedbugs and the likelihood of bug infestation.

Counterclaim Plaintiff and Class Representative Derrick Kauffman ("Kauffman") leased a unit from Hedgepath at the Normandy Apartments on October 9, 2018, for which he paid a security deposit (\$350) and a non-refundable floor care fee (\$85.00). Within weeks of signing the lease, Kauffman began suffering bed bug bites, and as Hedgepath refused to address the infestation, Kauffman vacated the premises and informed Hedgepath on October 25, 2018. After Kauffman prevailed on his suit against Hedgepath for the return of his security deposit, Hedgepath commenced an improper rent and possession action against Kauffman and appealed the security deposit judgment. Hedgepath never provided written notice to Kauffman of the date and time when

the apartment would be inspected and retained the security deposit and floor care fee without providing a receipt for carpet cleaning.

b. Procedural Background

After Hedgepath filed a petition to collect unpaid rent against Kauffman, Kauffman filed his answer and counterclaim for (1) violations of the Missouri Merchandising Practices Act for lack of habitability and (2) unconscionability; and (3) set off on February 21, 2019. Kauffman sought to amend the counterclaim on October 11, 2021, to better define the subclasses, and to add claims for (4) violations of the Missouri Merchandising Practices Act for deceptive collection of fees; and (5) unlawful withholding of security deposits. This Court granted leave to amend the counterclaim except as to Count I, and directed Kauffman to recast the Amended Counterclaim which, after further motion practice and this Court's Order, Kauffman filed on July 18, 2022. On December 5, 2022, this Court granted certification of the three subclasses which was amended on January 6, 2023, and on March 23, 2023, the Second Amended Order was filed.

The Second Amended Order defined the following three subclasses:

Class A (Count I): "All Missouri tenants who resided at 501 W. 11th St., Kansas City, Missouri from February 2014 through February 2019."

Class B (Counts II-IV): "All Missouri tenants sued by Del Properties pursuant to a residential lease from February 2014 to the present who terminated their residential lease agreement prior to the term of the lease."

Class C (Counts II, V, VI): "All Missouri tenants from whom Del Hedgepath collected a security deposit in the past five years pursuant to a residential lease."

On April 21, 2023, Kauffman sought to amend the Amended Counterclaim and to modify the definitions of Classes B and C. On August 4, 2023, this Court granted the motion in part,

allowing Kauffman to expand the definitions to include the range of names under which Hedgepath operates, denied the request to change the dates and denied the request to modify the certification order.

On August 25, 2023, Kauffman filed the Second Amended Class Action Counterclaim, and on September 4, 2023, Hedgepath moved to dismiss it. Kauffman resisted. On September 22, 2023, the parties reached a settlement agreement in mediation that included revising the definitions in the Class Certification Order. On October 25, 2023, this Court denied all outstanding motions based on it. Pursuant to the Settlement Agreement, the Parties have agreed to the following class definitions for purposes of the settlement classes:

Class A (Count I): All Missouri tenants who resided at 501 W. 11th St., Kansas City, Missouri from January 1, 2014 through January 1, 2024.

Class B (Counts II-IV): All Missouri tenants sued by Hedgepath³ pursuant to a residential lease from January 1, 2014 through January 1, 2024, who terminated their lease prior to the original end date of the lease. Membership in this Class does not depend on which name Hedgepath used in interacting with the class member.

Class C (Counts II, V, VI): All Missouri tenants from whom Hedgepath⁴ collected a security deposit pursuant to a residential lease from January 1, 2014 through January 1, 2024. Membership in this Class does not depend on which name Hedgepath used in interacting with the class member.

Hedgepath, throughout the case, vigorously disputed all of Kauffman's claims and fought to limit membership in the classes to buildings he owned and to exclude the residential properties he managed. He further denied any wrongdoing or liability in administering pest control to the

³ Pursuant to the settlement agreement, "Hedgepath" is defined to include Del Hedgepath, Del Properties, Del Hedgepath d/b/a Del Properties, as well as The Alps Apartment LLC, 4301 Main LLC, 220 Admiral, LLC, Congress Lofts, LLC, The Loretto, LLC, and the Normal School Lofts LLC. **Exhibit 1** at ¶ 1.10.

⁴ *Id.*

Normandy Apartments. He disputed that the lease terms were unconscionable or that his failure to provide written notices of a walkthrough at the end of the tenancy or failure to provide actual receipts for the carpet cleaning violated the security deposit law.

The court files and records in this case demonstrate that this case has been diligently and aggressively litigated. The factual record has been developed through extensive discovery and investigation. Counterclaim Plaintiff obtained and reviewed thousands of pages of documents, deposed Hedgepath twice, along with six of his staff members, and a third party exterminator. Additionally, records were sought and reviewed from Hedgepath's pesticide supplier. The named class representative and his father were deposed by Hedgepath. The experts produced by both sides were also deposed. The parties entered settlement negotiations with sufficient information to evaluate the merits of their positions—the strengths and weakness of their case—and the risks of continued litigation.

II. THE PROPOSED SETTLEMENT

Negotiations were conducted at arms-length between the parties after substantial evidence had been amassed. The parties mediated with Thomas Bender on June 27, 2023 and after several exchanges, a final terms sheet was signed on or about September 22, 2023. The proposed settlement was a result of hard bargaining and compromises by both sides. The Plaintiff believes the settlement is fair, reasonable and in the best interests of the classes. The \$1.85 million common fund and the injunctive relief will benefit all the members of the class and future tenants of Hedgepath.

a. Proposed Class Action Settlement

Pursuant to the settlement, the Parties have agreed that the following class definitions will govern the settlement, subject to Court approval:

Class A:

All Missouri tenants who resided at 501 W. 11th St., Kansas City, Missouri from January 1, 2014 through January 1, 2024.

Class B:

All Missouri tenants sued by Hedgepath⁵ pursuant to a residential lease from January 1, 2014 through January 1, 2024, who terminated their lease prior to the original end date of the lease. Membership in this Class does not depend on which name Hedgepath used in interacting with the class member.

Class C:

All Missouri tenants from whom Hedgepath collected a security deposit pursuant to a residential lease from January 1, 2014 through January 1, 2024. Membership in this Class does not depend on which name Hedgepath used in interacting with the class member.

As explained below, the Settlement Classes easily meet the requirements for certification pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure.

b. Settlement Benefits

The settlement provides for monetary damages for current and former tenants and injunctive relief for current and future tenants.

Under the settlement agreement, Hedgepath will establish a common fund for the classes of \$1,850,000.00. After attorneys' fees and costs, in an amount to be approved by the Court, and a service award of \$10,000 to Class Representative Kauffman, to be approved by the Court, the Class members will receive the remainder of the common fund, which will be distributed as set forth in the Settlement Agreement. Members do not need to submit claim forms, rather checks will be distributed based on the class lists. If a check is returned, the Administrator will take steps to locate the class member and re-send the check. If the Common Fund retains a positive balance,

⁵ Pursuant to the settlement agreement, "Hedgepath" is defined to include Del Hedgepath, Del Properties, Del Hedgepath d/b/a Del Properties, as well as The Alps Apartment LLC, 4301 Main LLC, 220 Admiral, LLC, Congress Lofts, LLC, The Loretto, LLC, and the Normal School Lofts LLC. **Exhibit 1** at ¶ 1.10.

the Members who received payments will be eligible for a second, supplementary distribution. Any amounts remaining after the supplementary distributions will be donated to the Neighborhood Legal Support of Kansas City, Inc.⁶

The injunctive relief in the proposed settlement requires Hedgepath, for a period of two years, to: (1) provide professional pest control by a qualified company; and (2) refrain from including language in tenants' leases or enforcing such provisions in existing leases that: (i) place the duty or cost of pest control on the tenant; (ii) withholds a portion of the security deposit for floor cleaning costs that are not based on actual document expenses incurred for a unit; (iii) requires tenants to pay attorneys' fees and court costs regardless of the outcome of the lawsuit; and (iv) requires a tenant to pay a "filing fee" not assessed by Order of the Court.

c. Settlement Notice and Administrative Costs

In addition to the Common Fund, Hedgepath will pay the Cost of Settlement Notice and Cost of Claims Administration up to the amount of \$100,000. To the extent the Costs of the Settlement Notice and Administration exceeds that amount, the costs will be deducted from the Common Fund. If amounts remain after funding the Costs of the Settlement Notice and Administration the excess is returned to Hedgepath.

d. Attorneys' Fees and Expenses

Counterclaim Plaintiff will file a motion for an award of attorneys' fees and reimbursements of expenses in advance of the final fairness hearing. The Court will determine the amount of fees and expenses awarded, and the amount awarded will come from the Common Fund. Counterclaim Plaintiff's attorneys intend to request one-third of the Common Fund as compensation for attorneys' fees.

⁶ Neighborhood Legal Support of Kansas City, Inc. is a non-profit law firm, providing legal assistance and other support to empower urban core neighborhoods in Kansas City to grow stronger.

III. CERTIFICATION OF THESE CLASSES FOR SETTLEMENT PURPOSES IS PROPER.

The Court must also consider whether the settlement class can meet the requirements of Rule 52.08(a) and (b)(3). *Byrd*, 956 S.W.2d at 383. In that regard, the trial court should review "whether it appeared that plaintiffs' counsel was adequate, the named plaintiffs were adequate representatives of the class, there is no apparent conflict of interest between the representatives and the class or among the class, the settlement on its face appears to be fair and to have been the result of arms-length negotiations, it appears that the named plaintiffs' claims are typical of those of the class, and that it appears that common issues will predominate." *Id.* As the proposed settlement class herein meets these standards, it should be preliminarily approved.

a. Elements of Rule 52.08(a)

Missouri has adopted four express prerequisites which must be met before a class may be certified and one implied requirement. These five prerequisites are generally referred to as (1) Numerosity; (2) Ascertainability; (3) Commonality; (4) Typicality; and (5) Adequacy. Mo. Sup. Ct. R. 52.08(a); *Dale v. Daimler-Chrysler Corp.*, 204 S.W.3d 151, 177-78 (Mo. App. W.D. 2006). This Court has previously found these issues existed for substantially similar classes in this matter—the proposed settlement classes have expanded the class period and further clarified what current and former tenants are included in the class definitions. For the Court's convenience, Counterclaim Plaintiff will briefly revisit each of these elements.

i. Numerosity

Numerosity exists when "the class is so numerous that joinder of all members is impracticable." Rule 52.08(a)(1). Missouri Courts have held that joinder is "impracticable" when it would be inefficient, costly, time-consuming, and confusing. *Daimler-Chrysler*, 204 S.W.3d, at 167. Rule 52.08(a)(1) does not require that joinder be impossible, only that it be "impracticable."

Id. The determination whether joinder is impracticable must be made on a case- by-case basis. *Id.* While numerosity “imposes no absolute limitations,” “the reality is that a per se numerosity threshold seems to exist somewhere south of 150 proposed class members.” *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 608 (D. Kan. 2014); *Anderson Living Trust v. WPX Energy Prod., LLC*, 306 F.R.D. 312, 436 (D.N.M. 2015) (citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (holding that “100 to 150 members ... is within the range that generally satisfies the numerosity requirement.”)).

Here, Class A consists of approximately 430 persons, Class B consists of approximately 22 persons, and Class C consists of approximately 2,354 persons. These proposed settlement classes easily satisfy numerosity.

ii. Ascertainability

Ascertainability tests the definition of the class itself and is ultimately a question of whether class members can be identified by reference to objective criteria. *McKeage v. TMBC, LLC*, 847 F.3d 992, 998-99 (8th Cir. 2017); *see also Daimler-Chrysler*, 204 S.W.3d, at 178. The goal of the ascertainability requirement is to ensure that the members of a proposed class “can be identified at the commencement of the action.” *Daimler-Chrysler*, 204 S.W.3d, at 178 (citing *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 368, 387 (Mo. App. E.D. 2005)). Ascertainability therefore requires that the class not be defined by subjective criteria or by criteria that requires an analysis of the merits of the case. *Daimler-Chrysler*, 204 S.W.3d, at 178 (citing *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 403 (Tex. 2000)).

As a general rule, the class is ascertainable if the class would still exist (*i.e.*, be bound by a judgment) even if the defendant were to win at trial. *Id.*, at 179-80; *see also Hagen v. City of*

Winnemucca, 108 F.R.D. 61, 63 (D. Nevada 1985); *Dafforn v. Rousseau Assocs., Inc.*, Case No. F 75-74, 1976 WL 1358, 1976-2 Trade Cases P 61, at 219 (N.D. Ind. July 27, 1976).

Here, the classes are defined in a purely objective manner: Membership in Class A turns on whether the person leased an apartment at Normandy, membership in Class B turns on whether the individual was sued by Hedgepath, and membership in Class C turns on whether the individual paid a security deposit to Hedgepath. Those are all objective questions which do not require resolution of any disputed merits issue. Identifying the class members is also administratively feasible, as it requires only records in Hedgepath's possession. Indeed, the members of the settlement classes have already been identified by Hedgepath.

iii. Commonality

Commonality requires that there be “questions of law or fact common to the class.” Rule 52.08(a)(2). However, courts have interpreted this requirement as being satisfied so long as there is at least one question of law or fact which is common to the class. *Elesa v. U.S. Engineering Co.*, 463 S.W.3d 409, 419 (Mo. App. W.D. 2015) (“[E]ven a single [common] question will do.” (bracket-replaced text in original)). Further, they have explained that the commonality requirement “is written in the disjunctive, and hence, the common question may be one of fact *or* law and need not be one of each.” *Elesa*, 463 S.W.3d, at 418 (emphasis in original). Ultimately, the bar for establishing commonality is very low, because the “fundamental question is whether the group aspiring the class status is seeking to remedy a common legal grievance.” *Elesa*, 436 S.W.3d, at 418-19 (quoting *Daimler-Chrysler*, 204 S.W.3d, at 164). “If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.” *Id.* (citing *Craft*, 190 S.W.3d, at 382) (emphasis in original).

The members of Class A share these common questions:

1. Whether the members were subjected to bed bugs;
2. Whether bed bugs make an apartment uninhabitable; and
3. Whether Hedgepath adequately and/or properly responded to the infestations.

The members of Class B share these common questions:

1. Whether Hedgepath took advantage of an unequal bargaining position to obtain contract terms that allowed Hedgepath to terminate the lease upon one month's notice for any reason but held tenants liable for all rent through the duration of the tenancy;
2. Whether Hedgepath took advantage of an unequal bargaining position to obtain contract terms that required the tenant to pay Hedgepath's attorneys' fees in any legal action regarding the apartment, regardless of the outcome of the action; and
3. Whether Hedgepath engaged in an unconscionable practice by demanding a tenant who terminated their lease early due to bed bugs pay a "break lease" fee.

The members of Class C share these common questions:

1. Whether Hedgepath provided written notice to tenants of the date and time of the move-out inspection prior to the inspection and prior to the determination of how much security deposit to withhold;
2. Whether Hedgepath's failure to provide the move-out inspection notice entitles class members to twice the amount of their security deposit;
3. Whether Hedgepath is entitled to charge a floor cleaning fee when he does not have the carpet(s) cleaned; and
4. Whether Hedgepath is entitled to charge a floor cleaning fee when he does not provide the tenant with a receipt.

iv. Typicality

Typicality is "fairly easily met so long as other class members have claims similar to the named plaintiff. Factual variations in the individual claims will not normally preclude class certification if the *claim arises from the same event or course of conduct as the class claims*, and gives rise to the same legal or remedial theory." *Daimler-Chrysler*, 204 S.W.3d, at 169 (citing *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 457 (W.D. Mo. 2004)) (italics in original, bold and underline

added). Courts have explained that “[t]he typicality requirement ... is designed to screen out class actions involving legal or factual positions of the representative class which are markedly different from those of other class members.” *Daimler-Chrysler*, 204 S.W.3d, at 169 (emphasis added) (citing *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 77 (D.N.J. 1993)).

Carpe and *Liberty Lincoln* show that typicality “is satisfied, even where there is variance in the underlying facts of the representative’s claim and the putative class members’ claims, as long as the claim arises from the same event or course of conduct of the defendant as the class claims, the underlying facts are not markedly different, and the conduct and facts give rise to the same legal or remedial theory.” *Daimler-Chrysler*, 204 S.W.3d, at 169. Because this is a settlement class, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 (“[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.”).

Kauffman’s claims are typical of Class A because he leased an apartment from Hedgepath in the Normandy complex. He also suffered a bed bug infestation of which he was not informed prior to leasing his apartment.

Kauffman’s claims are typical of Class B because Hedgepath sued him when he terminated his lease early. Hedgepath also forced Kauffman to sign a “Break Lease” agreement to leave his bed bug infested apartment and then turned around and sued Kauffman for rent owed. As his lease permits Hedgepath to charge and collect attorneys’ fees regardless of the outcome, Kauffman faces the same liability as the putative class members.

Kauffman’s claims are typical of Class C because he paid Hedgepath a security deposit when he leased his apartment at Normandy. When Kauffman moved out, neither he nor his co-

signer were provided written notice of when the move-out inspection would be. Further, Hedgepath did not provide Kauffman receipts for the actual cost of the floor care costs. Despite this, Hedgepath retained Kauffman's security deposit in full.

Accordingly, as Kauffman's claims arise from the same events and course of conduct of Hedgepath as the remainder of the class, they are typical.

v. Adequacy

The adequacy prerequisite exists to ensure that the absent members of the proposed Classes will be fairly and adequately represented. *Daimler-Chrysler*, 204 S.W.3d, at 172 (citing *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977)). Specifically, Rule 52.08(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class," and "applies both to the named class representatives and to class counsel." Rule 52.08(a)(4); *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004).

Kauffman will be (and has been) an exemplary class representative. He understands his duties and will consider the interests of the absent class members. Kauffman sat for a deposition in this case and will continue to actively participate in this litigation. Nothing in the records indicates that Kauffman has any conflict of interest with any putative class member. Similarly, as the Court previously held, class counsel are also adequate given their experience and commitment to the proposed classes.

b. Elements of Rule 52.08(b)(3)

Once all five 52.08(a) prerequisites have been met, a case can be certified for class treatment as one of four types of class actions, which are outlined in Rule 52.08(b). Those four class types are: (A) The Conflicting Standards Class in Rule 52.08(b)(1); (B) The Limited Fund

Class in 52.08(b)(1); (C) The Injunctive Relief Class in Rule 52.08(b)(2); and (D) the Opt-Out Class in Rule 52.08(b)(3).

Counterclaim Plaintiff seeks to certify this case as an Opt-Out Class. An Opt-Out Class may be maintained when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Rule 52.08(b)(3). These two elements are commonly referred to as “Superiority” and “Predominance.”

i. Predominance

Predominance does not require every single question of law or fact to be common to all class members. *Daimler-Chrysler*, 204 S.W.3d, at 175. In fact, predominance can be found in cases where there is only *one* common question of law or fact. *Id.* Further, that *one* question of law or fact need not even be the dispositive question. *Id.* Fundamentally, predominance requires that “the group aspiring to class status [must be] seeking to remedy a common legal grievance.” *Id.*

“[I]t matters not that there may be a multitude of individual questions of fact that would have to be result for the putative class members to recover ... The question is whether ... there is at least one **significant** fact question or issue, dispositive or not, that is common ...” *Daimler-Chrysler*, 204 S.W.3d, at 176 (emphasis added). Missouri Courts have routinely held that, as to predominance, the question “is not whether the plaintiff can make a submissible case or prevail at trial, but whether the requirements for class certification have been satisfied.” *Id.*

Predominance can exist even if the amount of actual damages and/or each class member’s share of any punitive damage award may be individualized. *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. banc 2012) (“[P]redominance is not precluded when there needs to be an inquiry as to individual damages.”); *Clark*, 106 S.W.3d, at 488; *Elsa*, 463 S.W.3d, at 422-23;

Craft, 190 S.W.3d, at 386-87 (Mo. App. E.D. 2006) (citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 233 (7th Cir. 1983)). Courts have routinely held that “[a]lthough the amount of damages suffered is generally an individual matter, this issue should not preclude a finding of predominance.” *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig*, 122 F.R.D. 251, 254 (C.D. Cal. 1988) (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)); *see also R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 (Fla. 3d DCA 1996) (basic issues of liability common to class members predominate over individual damages issues); *S. Carolina Nat’l Bank v. Stone*, 139 F.R.D. 325, 331 (D.S.C. 1991) (“[C]ourts uniformly hold that class actions may be appropriate even though there are differences in the amount of damages suffered by the individual class members.”).

Kauffman has already laid out several common questions, *supra*. While each of those questions is common, any one would—standing alone—be enough to find predominance satisfied. Kauffman has also laid out a great deal of evidence for his claims, evidence that is common to the classes.

ii. Superiority

When a class comes before the court for settlement, the requirements of superiority are relaxed, especially the manageability requirement. *See Amchem*, 521 U.S. at 620 (“[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.”). Even the Supreme Court of the United States has recognized that concerns of fairness and efficiency make a class action superior to hundreds of separate, individual trials:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem

by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc., 521 U.S., at 617.

Denial of class certification due to manageability concerns is disfavored. *Elsa v. U.S. Eng'g Co.*, 463 S.W.3d 409, 423 (Mo. App. W.D. 2015); *Craft*, 190 S.W.3d, at 386-87. This case does not present any manageability difficulties and will be easily structured such that the common issues would be resolved without having to impanel the hundreds of juries which would be the only alternative. Further, and because Kauffman seeks certification of opt-out Classes, any Class member who wishes to control the prosecution of their claims will have the right and ability to do so; which stands in stark contrast to the mandatory classes found in Rule 52.08(b)(1) and (b)(2). Kauffman is not aware of any other pending litigation with these same claims, and he has no reason to believe that there would be the need for numerous follow-up mini-trials.

Ultimately, a class action must first be “unwieldy...before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.” *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). It is difficult to say that this proposed *settlement* class is “unwieldy.”

IV. THE PROPOSED SETTLEMENT AGREEMENT SHOULD BE PRELIMINARILY APPROVED AS FAIR, REASONABLE, AND ADEQUATE.

a. The Class Action Settlement Approval Process

A class action cannot be settled without court approval. Rule 52.08(e). This Court's role as gatekeeper, and “in reviewing the proposed settlement before preliminarily approving it and sending out notice to the class,” is set forth in *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 382 (Mo. App. 1997). The Court conducts “a preliminary examination of the record before it and make[s] a preliminary determination as to whether it appears that a settlement class should be

tentatively certified." *Id.* at 383. The standard of review at this preliminary stage "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *Id.*

The Court factors considered are: "(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of Plaintiffs' counsel, class representatives and absent class members." *Id.* at 378 n.6; *see also Ring v. Metropolitan St. Louis Sewer Dist.*, 41 S.W.3d 487, 492 (Mo. App. 2000) (reciting *Byrd* factors and stating: "The most important consideration in determining if a settlement is fair, reasonable, and adequate is the strength of the plaintiffs' case on the merits balanced against the offered settlement.").

b. Preliminary Approval of the Settlement Is Appropriate

i. The settlement is entitled to a preliminary assumption of fairness because it was reached as a result of good-faith, arms-length negotiations.

This settlement is the product of arm's-length negotiations that took place after four years of contentious litigation, and, therefore, is entitled to a preliminary presumption of fairness. *See In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery."). Moreover, the settlement reached was based on a mediator's proposal.

ii. The *Byrd* factors are met.

1. There is no fraud or collusion.

As noted, the settlement was the product of mediation, done at arm's length and between experienced class action counsel. Absent settlement, this matter would have to have been decided in a jury trial before this Court. Moreover, as the court is well-aware, the settlement was preceded by highly contentious litigation and a significant amount of discovery and motion practice.

The settlement provides significant relief to Class members, including monetary compensation and injunctive relief.

2. This was a lengthy case.

This case is time-intensive and lengthy. This matter has been pending since 2019. Several issues were presented to the Court, including discovery motions, dispositive motions, and Rule 52.08 certification, and it was even briefly paused for a failed petition for interlocutory review. Thus, this factor favors preliminary approval.

3. Settlement occurred only after extensive discovery and Class Certification.

Settlement was entered with full knowledge by both sides of the merits of each party's case, as well as the risks of trial. As described in detail above, this case was not settled until after significant motion practice, multiple depositions, extensive document production, expert witness reports, and class certification.

This factor thus favors preliminary approval. *See, e.g., Ring*, 41 S. W.3d at 493 (noting with approval that "Plaintiffs' Counsel had engaged in a substantial amount of discovery and was familiar with the issues and complexity of this case"); *In re BankAmerica*, 210 F.R.D. at 702 (recognizing that hard-fought litigation and substantial discovery allows the parties to make "an informed assessment of its merits and the probable future course of the litigation" to base an intelligent assessment of the settlement proposal).

4. The settlement affords significant relief.

The settlement offers immediate and significant relief to tenants who allegedly were: (1) subjected to uninhabitable conditions; (2) subjected to unconscionable rental practices; and (3) deprived of their rights afforded to tenants by the Missouri security deposit law. The settlement terms are the type of relief Counterclaim Plaintiff hoped to obtain at trial, assuming he prevailed, including compensatory relief and injunctive relief. On balance, the benefits provided by the settlement easily fall within the range of possible recoveries.

Class A compensates tenants for the bed bug infestation in the Normandy Apartments at 501 W. 11th Street, as set forth in Count I of the Second Amended Counterclaims. Class A members will share approximately \$600,000.00 or 49.57% of the Common Fund after attorneys' fees, expenses, and the service award. Hedgepath has identified 400 individuals as eligible Class A members.⁷ If the membership remains at 400, each class member will receive approximately \$1,630 pro-rated by the number of days lived there for the first year, with an additional approximately \$815 pro-rated by days for the second year, and an exponentially decreasing amount for the third year onwards. Class A members who signed a lease in 2023 and are current tenants of the Normandy receive the benefit of the injunctive relief that requires Hedgepath to provide professional pest control by a qualified company, and they will receive a monetary sum based on the number of days they lived there in 2023.

Class B was brought under claims of deceptive collection of fees for carpet/floor cleaning and unconscionable lease terms and practices including taking advantage of an unequal bargaining position which allowed Hedgepath to terminate the lease upon one month's notice for any reason but held tenants liable for all rent throughout the duration of the tenancy. These alleged violations

⁷ The class list provided by Hedgepath contained multiple duplicates.

of the MMPA were described in Counts II and III of the Class Counterclaim. Members of Class B will collectively receive \$22,000.00, or 1.82%, from the Common Fund after attorneys' fees and the service award. If the membership remains at 22, each member will receive approximately \$1,000.00.

Class C was proposed relative to the allegations of MMPA-violative deceptive fees contained in Count II, as well as allegations of violations of the Missouri Security Deposit Law for failure to provide the tenant with written notice of a walkthrough at the end of the tenancy lease and for failure to provide any receipts of the carpet cleaning to the tenant within thirty days of the end of the tenancy, which were described in Counts V and VI of the Amended Class Action Counterclaim.

Class C members will receive \$588,397 or 48.61% of the Common Fund after attorneys' fees and the service award. Hedgepath identified 2,377 individuals as eligible Class C Members.⁸ Class C will be subdivided by past tenants and current tenants of a property owned or managed by Hedgepath. If the membership in Class C remains as represented by Hedgepath, the tenants will receive the following amounts: (1) The 1,942 Members of Class C who no longer live in a property owned or managed by Hedgepath will receive approximately \$297; (2) The Members of Class C who currently reside in one of the buildings owned or managed by Hedgepath have not had their Security Deposit wrongfully withheld from them. Hedgepath has not failed to provide receipts for carpet cleaning or failed to provide notice of a walkthrough to these members, as their tenancy has not ended. However, they paid a sum for "floor care," that was deceptively collected. To compensate current Class C members for the interest they may lose because of Hedgepath holding on to their floor care fee, Current Class C members will receive approximately \$25.00.

⁸ The list of class members provided by Hedgepath contained multiple duplications and concurrent tenancies in different apartment complexes for the same tenant.

5. Counterclaim Plaintiff's Counsel support the settlement.

Counterclaim Plaintiff's Counsel are seasoned class action attorneys. Given their comprehensive knowledge of the facts relating to the respective claims and defenses, they have made an intelligent assessment of the settlement proposal and have determined the settlement is fair, reasonable and adequate. "Although the Court is not bound by the counsel's opinion, their opinion nevertheless is entitled to great weight." *In re BankAmerica*, 210 F.R.D. at 702. Likewise, the named Counterclaim Plaintiff in the litigation has approved the settlement. Therefore, this factor favors preliminary approval.

Thus, all fairness factors weigh in favor of preliminary approval.

V. NOTICE AND FINAL FAIRNESS HEARING

The language for the Notices to be sent to Classes A, B, and C, have been negotiated and agreed to by the parties, and are attached hereto as **Exhibits A, B, and C**.

a. The Proposed Method of Notice Satisfies Due Process

The parties have agreed that the Claims Administrator will mail and/or email notices, set up a website, and use its best efforts to find any Class members whose original mailing and/or email is returned and re-send the Notice. The class members for all three classes have already been identified from Hedgepath's records during the course of this litigation and settlement negotiations. This method satisfies due process. Further, Class Counsel are continuing to dedicate resources to the class administration process so that all class members that wish to participate will have the necessary support to do so. Class Counsel have also participated in class cases with extremely high participation rates for class members, including *Nakamura v. Wells Fargo* (settlement class, 93% participation rate).⁹

⁹ **Exhibit 2** at ¶ 3.

b. The Proposed Notices are Accurate and Informative

The proposed notice is fair, complete and neutral. The content of the Notice describes the proposed Class(es); explains the material terms of the settlement; discloses Class Counsel's forthcoming application for attorneys' fees and reimbursement of expenses; gives notice of the time and place of the final-approval hearing; sets forth procedures and deadlines for opting out of the Class and submitting comments and objections; summarizes the proceedings to date; and clarifies that the settlement is not an admission of liability by Defendant, and that the Court has not ruled on the merits.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, Counterclaim Plaintiff respectfully request that the Court: (1) grant preliminary approval of the proposed class action settlement; (2) appoint Counterclaim Plaintiff as Representative Plaintiff and Counterclaim Plaintiff's attorneys as Class Counsel for the expanded Settlement Class; (3) approve the proposed forms and methods of giving Class members notice of the proposed settlement; (4) direct that notice be given to Class members in the proposed forms and manners; and (5) set procedures for people who fall within the Class definition to exclude themselves and for Class members to comment or object on the proposed settlement.

Respectfully submitted,

/s/ Jenilee V. Zentrich

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was filed with the Court's e-Filing system on June 13, 2024, and thereby served upon all attorneys of record.

/s/ Jenilee V. Zentrich