APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-3419

Michael G. Vogt

Plaintiff – Appellee

v.

State Farm Life Insurance Company

Defendant - Appellant

WASHINGTON LEGAL FOUNDATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; AMERICAN COUNCIL OF LIFE INSURERS

Amici on Behalf of Appellant(s)

Public Citizen

Amicus on Behalf of Appellee(s)

No. 18-3434

Michael G. Vogt

Plaintiff - Appellant

v.

State Farm Life Insurance Company

Defendants-Appellees.

Appeals from United States District Court
for the Western District of Missouri —
Jefferson City

Submitted: November 13, 2019
Filed: June 26, 2020

Before SHEPHERD, GRASZ, and KOBES, Circuit Judges.

SHEPHERD, Circuit Judge.

This case comes to us as a class action by over 25,000 life insurance policyholders who allege that State Farm Life Insurance Company (State Farm) impermissibly included non-listed factors in calculating Cost of Insurance (COI) fees assessed on life insurance policies. Following a jury trial, the jury returned a $34 million verdict in the class's favor. State Farm appeals, asserting that the district court committed various errors, including with respect to summary judgment, class certification, and evidentiary rulings. Michael Vogt, the named plaintiff, cross appeals, arguing that the district court erroneously denied the class prejudgment interest. Having jurisdiction under 28 U.S.C. § 1291, we affirm with respect to State Farm's appeal and reverse and remand with respect to Vogt's cross appeal.

I.

In 1999, then 54-year-old Vogt purchased a State Farm flexible premium adjustable whole life insurance policy. In contrast to a standard life insurance policy, this type of policy provides benefits in addition to the typical death benefits, which results in the policy including investment, savings, or interest-bearing components. The terms of the policy explicitly allowed State Farm to make monthly deductions from the policy for "(1) the cost of insurance, (2) the monthly charges for any riders, and (3) the monthly expense charge." Specifically as to the COI, the policy provides:

> **Monthly Cost of Insurance Rates.** These rates for each policy year are *based on the Insured's age on the policy anniversary, sex, and*

> *applicable rate class*. A rate class will be determined for the Initial Basic Amount and for each increase. The rates shown on page 4 are the maximum monthly cost of insurance rates for the Initial Basic Amount. Maximum monthly cost of insurance rates will be provided for each increase in the Basic Amount. We can charge rates lower than those shown. Such rates can be adjusted for projected changes in mortality but cannot exceed the maximum monthly cost of insurance rates. Such adjustments cannot be made more than once a calendar year.

R. Doc. 167-2, at 11 (emphasis added). These enumerated factors are so-called "mortality factors" because they relate to a policyholder's mortality risk, which allows the insurer to determine the projected mortality estimate of a policyholder based on his specific circumstances.

Vogt surrendered the policy in 2013. Dissatisfied with the COI fees, which increased throughout the time he held the policy, Vogt consulted an attorney and an actuarial expert, who determined that State Farm had been using non-enumerated factors unrelated to a policyholder's mortality risk to calculate the monthly COI fees. These "non-mortality factors" included taxes, profit assumptions, investment earnings, and capital and reserve requirements. Vogt asserts that, by including non-mortality factors in the COI rates, State Farm deducted from the monthly premium payments more than what the policy stated would be included in the COI fees. Vogt thereafter filed suit in 2016, asserting breach of contract and conversion claims against State Farm based on State

Farm's alleged use of unauthorized, non-mortality factors to calculate his COI fees, which it collected during the time that Vogt held the life insurance policy. State Farm then moved for summary judgment, arguing, in relevant part, that the policy language regarding the COI did not limit State Farm to calculating the COI based on the specified factors only. The district court denied State Farm's motion, concluding that no reasonable person would understand that State Farm would use non-listed factors to calculate the COI when the policy stated the COI would be "based on" enumerated factors. The district court determined that, at a minimum, the policy was ambiguous and should be construed against State Farm.

Vogt then sought to have a class certified composed of similarly situated policyholders. The proposed class members were individuals who obtained life insurance from State Farm between 1994 and 2004 under the same policy form as was used for Vogt. Over State Farm's objection, the district court certified a class of approximately 25,000 individuals who currently or previously owned a State Farm-issued life insurance policy of the same form in the State of Missouri.

The district court held a pretrial hearing, during which it invited Vogt to make an oral motion for summary judgment. As relevant, Vogt moved for summary judgment on issues of liability and State Farm's statute-of-limitations defense. The district court granted the motion in part, concluding that Vogt had established liability for breach of contract, leaving damages as the only issue to be tried to the jury, and concluding that as a matter of law, Vogt's claims were not time barred. The district court denied, however,

Vogt's motion for summary judgment on the conversion claim based on a genuine dispute as to an identifiable corpus converted from each class member, noting that "[w]ithout establishing the corpus that State Farm purportedly converted from each member of the class, Plaintiff cannot establish conversion." R. Doc. 335. In other rulings, the district court ordered that State Farm was precluded from referencing the maximum COI rates under the policy and presenting evidence that State Farm never exceeded this amount. The district court similarly precluded State Farm's actuarial expert from testifying about an actuarial memorandum that State Farm asserted was relevant to the question of whether it pooled mortality rates, a process by which all policyholders of the same age, sex, and rate class have their policy duration blended or "pooled" together, regardless of how long individual policyholders have actually held the policies. Finally, the district court allowed Vogt to introduce damages models to the jury, overruling State Farm's objection that the models had not been disclosed to State Farm until shortly before trial.

At the close of the evidence at trial, State Farm moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), which the district court denied. The jury returned an award of damages for the class in the amount of $34,333,495.81. State Farm moved to decertify the class, arguing that some class members did not suffer damages and that conflicts existed among the class members. The district court denied the motion. State Farm then filed a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and for a new trial under Federal Rule of Civil Procedure 59. In its motion for judgment as a matter of law, State Farm challenged Vogt's

damages models as unreliable, speculative, and invalid, arguing that they could not support the jury's verdict. In its motion for new trial, State Farm cited several erroneous evidentiary rulings warranting a new trial, the district court's granting of an oral motion for summary judgment, and the district court's jury instruction on the conversion claim. The district court denied both motions. The district court also denied Vogt's motion for an amended judgment insofar as it sought an award of prejudgment interest based on its finding that the parties had contractually agreed to an interest rate, but granted the motion insofar as it sought to add a class definition, to award postjudgment interest, and to approve allocation of damages. The district court then entered judgment, slightly reducing the jury award to $34,322,414.84 to reflect opt-outs received from class members after the commencement of the jury trial.

State Farm appeals and Vogt cross appeals. The parties agree that Missouri law applies in this diversity action.

II.

State Farm's central argument before the district court and again on appeal involves the interpretation of the clause in the insurance policy that allows State Farm to collect COI fees from policyholders. State Farm asserts that the grant of partial summary judgment, based upon the district court's conclusion that the policy language did not allow State Farm to formulate the COI based on factors in addition to those expressly listed in the policy, was erroneous. "We review de novo a district court's grant of summary judgment, viewing all facts and making all reasonable inferences in the light most favorable to the nonmoving party." Cent. Platte Nat. Res. Dist. v. U.S. Dep't of

Agric., 643 F.3d 1142, 1146 (8th Cir. 2011). With respect to the interpretation of the insurance policy, applying Missouri substantive law, "[w]e review the district court's interpretation of the [State Farm] policy de novo." Westchester Surplus Lines Ins. Co. v. Interstate Underground Warehouse & Storage, Inc., 946 F.3d 1008, 1010 (8th Cir. 2020).

"Under Missouri law, general rules of contract interpretation govern the interpretation of insurance policies. Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." Id. (citations and internal quotations marks omitted). The central issue in interpreting contract language is determining whether any ambiguity exists, which occurs "where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." Peters v. Emp'rs Mut. Cas. Co., 853 S.W.2d 300, 302 (Mo. 1993) (en banc). "Where insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer." Id. (citations omitted).

The focus of the dispute between the parties is whether the phrase "based on," as used in the COI provision stating that the "rates for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class," allowed State Farm to include other non-mortality factors in the calculation of the COI rates. State Farm argues that this provision allows it to include other factors, while Vogt asserts that it unambiguously does not. We conclude that, at the very least, the phrase is ambiguous, and must be construed in favor of Vogt.

The policy contains no definition for the phrase "based on," so we rely on the plain and ordinary meaning of the phrase. See CitiMortgage, Inc. v. Equity Bank, N.A., No. 4:15-CV-230-SPM, 2017 WL 5564532, at *3 (E.D. Mo. Nov. 20, 2017) (noting that policy did not define term and thus following general Missouri contract interpretation principle that "[t]he parties' intent is presumed to be expressed by the plain and ordinary meaning of the language of the contract" (quoting Chochorowski v. Home Depot U.S.A., 404 S.W.3d 220, 226 (Mo. 2013))). Looking at the language of the provision alone, we conclude that the phrase "based on" is at least ambiguous because a person of ordinary intelligence purchasing an insurance policy would not read the provision and understand that where the policy states that the COI fees will be calculated "based on" listed mortality factors that the insurer would also be free to incorporate other, unlisted factors into this calculation.

State Farm asserts that in examining this phrase, we should rely on Norem v. Lincoln Benefit Life Co., 737 F.3d 1145 (7th Cir. 2013), which held that the phrase "based on" in a life insurance contract did not imply exclusivity of factors. Specifically, the court explained that "neither the dictionary definitions nor the common understanding of the phrase 'based on' suggest that Lincoln Benefit is prohibited from considering factors beyond sex, issue age, policy year, and payment class when calculating its COI rates." Id. at 1150; see also Mai Nhia Thao v. Midland Nat'l Life Ins. Co., 549 F. App'x 534, 537 (7th Cir. 2013) ("Norem . . . holds that when the policy says that the monthly cost of insurance rate will be 'based on' specified factors, it does not mean that the rate will be based exclusively on those factors."). Relying on Norem, State

Farm urges us to conclude that the plain and ordinary meaning of "based on" does not imply exclusivity. But Norem acknowledges that other courts have reached the opposite conclusion. 737 F.3d at 1149 (noting that "[s]everal state and district courts have considered similar clauses in life insurance policies and reached divergent results" and citing same). That several courts have examined the issue in very similar circumstances and have reached differing conclusions supports the conclusion that the phrase is ambiguous.

State Farm also cites other cases where the court considered the meaning of the phrase "based on," but as those cases involve the phrase as used in the United States Sentencing Guidelines, we do not find them instructive in construing this insurance contract. See Appellant's Br. 33-34 (citing Koons v. United States, 138 S. Ct. 1783, 1788 (2018) and Hughes v. United States, 138 S. Ct. 1765, 1775, 1778 (2018)). Finally, State Farm asserts that, because it never charged in excess of the maximum rates stated in the contract for the COI, it cannot have breached the contract, regardless of the interpretation of the phrase "based on." We reject this contention. That State Farm did not violate the contract in another manner does nothing to prove that it did not violate the contract by including impermissible factors in calculating the COI. If State Farm wanted the freedom to collect a COI fee based on factors other than those enumerated in the policy, it could have drafted the policy language to unambiguously achieve this aim. See Krombach v. Mayflower Ins. Co., 827 S.W.2d 208, 211 (Mo. 1992) (en banc) ("[A]s the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract.").

For the foregoing reasons, we conclude that the phrase "based on" in the COI provision is at least ambiguous and thus must be construed against State Farm. The district court did not err in construing the policy language in this manner and granting summary judgment to Vogt on issues of liability.

III.

State Farm also asserts that the district court erred by granting Vogt's oral motion for summary judgment on State Farm's statute-of-limitations defense. Again, we review a grant of summary judgment de novo, "viewing all facts and making all reasonable inferences in the light most favorable to the nonmoving party." Cent. Platte, 643 F.3d at 1146. Under Missouri law, claims for breach of contract, conversion, and declaratory judgment are subject to a five-year statute of limitations. Mo. Rev. Stat. § 516.120. The statute of limitations begins to run "when the damage resulting [from the wrong] is sustained and is capable of ascertainment[.]" Mo. Rev. Stat. § 516.100. This test is an objective one, providing that an injury is capable of ascertainment when the "evidence was such to place a reasonably prudent person on notice of a potentially actionable injury." Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 582 (Mo. 2006) (en banc) (quoting Bus. Men's Assurance Co. of Am. v. Graham, 984 S.W.2d 501, 507 (Mo. 1999) (en banc)).

State Farm contends that the statute of limitations began to run long before Vogt consulted an actuarial expert and an attorney because he was well aware of the rising COI fees, as evidenced by annual statements State Farm sent to Vogt, and his knowledge of rising COI fees put him on notice of potentially actionable overcharges. This contention is

without merit. Although a reasonably prudent person might have had some suspicions about the rising COI fees, this alone would be insufficient to put such a person on notice and trigger the running of the statute of limitations. See Mahanna v. U.S. Bank Nat.'l Ass'n, 747 F.3d 998, 1004 (8th Cir. 2014) ("Notice of a need to investigate triggers claim accrual but not every potential source of suspicion or insecurity gives rise to a duty to investigate.") (applying Missouri law). And as the enumerated factors in the COI provision are mortality factors, it could have reasonably been assumed that the rising COI fees were related to Vogt's increasing age and less favorable mortality outlook, rather than State Farm's inclusion of additional factors in the COI fees. Although, with the help of an attorney and an actuarial expert, Vogt was ultimately able to determine that the COI fees included non-enumerated factors, there is no evidence in the record that would have "place[d] a reasonably prudent person on notice of a potentially actionable injury" simply based on the rising COI fees and annual statements. Powel, 197 S.W.3d at 582 (quoting Bus. Men's Assurance, 984 S.W.2d at 507). The district court did not err in granting summary judgment to Vogt on State Farm's affirmative defense of limitations.

IV.

State Farm next asserts that the district court erred in certifying this suit as a class action, arguing that (1) numerous members of the class did not have standing due to a lack of damages caused by the COI overcharges; (2) intra-class conflicts existed; and (3) the district court impermissibly certified a fail-safe class. "We accord the district court broad discretion to decide whether certification is appropriate, and we will reverse only for abuse that of discretion." Day v.

Celadon Trucking Servs., Inc., 827 F.3d 817, 830 (8th Cir. 2016) (internal quotation marks omitted). "Moreover, a defendant bears a more onerous burden in challenging certification where . . . the initial certification decision was carefully considered and made after certification-related discovery." Id. at 832.

A.

As a threshold matter, Vogt argues that this Court lacks jurisdiction to review the class certification orders because State Farm did not specifically identify these orders in the Notice of Appeal, instead stating only that it was seeking to appeal "all previous rulings and orders that led up to and served as a predicate for that final judgment." "When determining whether an appeal from a particular district court action is properly taken, we construe the notice of appeal liberally and permit review where the intent of the appeal is obvious and the adverse party incurs no prejudice." Parkhill v. Minn. Mut. Life Ins. Co., 286 F.3d 1051, 1058 (8th Cir. 2002). "Ordinarily, a notice of appeal that specifies the final judgment in a case should be understood to bring up for review all of the previous rulings and orders that led up to and served as a predicate for that final judgment." Greer v. St. Louis Reg'l Med. Ctr., 258 F.3d 843, 846 (8th Cir. 2001). Vogt argues that the class certification orders did not serve as a predicate to the final judgment on the merits. We disagree. "[T]he class determination involved consideration of factors intertwined with the merits of the action," which we find sufficient to bring the district court's orders within those appealed by State Farm as part of the rulings and orders that "served as a predicate for final judgment." United States v. Bilsky, 664 F.2d 613, 616 (6th Cir. 1981).

B.

State Farm asserts that class certification was inappropriate because the class included members who did not suffer damages and thus do not have standing. See Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010) (explaining that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves"). State Farm's argument that some class members lack standing is premised on the assertion that some class members received a credit from State Farm during the period in which the alleged COI overcharges occurred and that this credit created a set-off that left the class members without any damages. In other words, even if the class members were improperly charged excessive COI fees, the credits they received from State Farm more than offset any amount of COI overcharges and left them with no net damages. Without any damages, State Farm argues, these class members have not suffered an injury and therefore do not have standing.

We find State Farm's argument unpersuasive, particularly in light of Stuart v. State Farm Fire and Casualty Co., 910 F.3d 371 (8th Cir. 2018), where we rejected a similar argument in a case also involving State Farm. In Stuart, we affirmed the district court's ruling certifying a class of State Farm homeowners' insurance policyholders, who alleged State Farm improperly withheld certain amounts when making payments under the policy. Id. at 373. State Farm argued that the class certification was improper because some class members could not demonstrate an injury because they had ultimately recouped the withheld payments. We rejected this argument, explaining that

> [a]lthough couched as disputes about standing, State Farm's arguments really go to the merits of plaintiffs' claims. Under plaintiffs' theory, all individuals who received an improperly-depreciated . . . payment suffered a legal injury—breach of contract—regardless of whether the . . . payment was more than, less than, or exactly the same as the ultimate cost of repairing or replacing their property. [A] party to a breached contract has a judicially cognizable interest for standing purposes, regardless of the merits of the breach alleged.

Id. at 377 (last alteration in original) (internal quotation marks omitted). State Farm's arguments here present precisely the same scenario: they challenge the merits of some class members' claims, but couch the argument as one challenging those class members' standing. For the same reasons we rejected this argument in Stuart, we also reject it here. This is consistent with the general understanding that a failure on the merits does not affect a class member's individual standing. 1 Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedures, Rules and Commentary, Rule 23 (2020) ("[If] it turns out that some members of the class are not entitled to relief, that represents a failure on the merits, not the lack of a justiciable claim.").

Further, as Stuart noted, "[w]hether some plaintiffs are unable to prove damages because they eventually recouped the withheld . . . [payments] is a merits question, and the district court has the power to amend the class definition at any time before judgment." 910 F.3d at 377. This is precisely the course the district court took, amending the class definition

following the jury trial to exclude those class members who suffered no damages. R. Doc. 404, at 2. The district court did not abuse its discretion in granting class certification.

C.

State Farm next asserts that intra-class conflicts should have precluded class certification. Specifically, State Farm argues that conflicts exist between current and former policyholders, and between those who have held policies for longer durations and those who have held policies for shorter durations. Federal Rule of Civil Procedure 23(a) requires that, for a class action to be certified, the class members share typicality and adequacy of representation. See also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997). "But perfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable. . . . [T]o forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole." Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012). State Farm asserts that the purported intra-class conflicts run afoul of these dictates. We disagree.

State Farm argues that a conflict exists between current and former policyholders, asserting that, if State Farm employed the COI rates that Vogt's expert presented in his damages model, class members would be charged more, not less, and current policyholders would be subject to higher charges, in conflict with former policyholders, who, by definition, would not be subject to increased charges. This purported conflict is entirely speculative and is insufficient to

render class certification inappropriate because it relies on nothing more than conjecture about how this lawsuit will affect State Farm's future dealings with current policyholders. See Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 180 (4th Cir. 2010) ("[A] conflict will not defeat the adequacy requirement if it is merely speculative or hypothetical, and in this case, the conflict rests on the uncertain prediction that this lawsuit will cause premiums to increase enough to adversely affect some members of the class." (internal quotation marks and citation omitted)). What will happen with current State Farm policyholders in the future rests on "uncertain predictions" that cannot serve as a basis to defeat class certification.

As to the purported conflict between policyholders of different durations, State Farm argues that class members who held policies for a longer duration were disadvantaged because Vogt's damages model attributed smaller mortality charges to those who held policies for shorter durations. State Farm argues that the policyholders who held the policy for a longer duration actually benefitted from the COI rates, which pooled all policyholders, regardless of the duration they held the policy. First, with respect to the purported conflict based on State Farm's pooling of mortality rates, as the district court noted in its order denying State Farm's motion to decertify the class, "State Farm's argument fails because the jury found that it did not pool its mortality rates." R. Doc. 402, at 6. Although time and again throughout this appeal State Farm reaffirms its reluctance to accept the jury's finding on this point, the fact remains that the jury concluded State Farm did not pool its mortality rates, and any argument premised on pooling must

fail. Second, even if there are slightly divergent theories that maximize damages for certain members of the class, "this slight divergence is greatly outweighed by shared interests in establishing [defendant's] liability." DiFelice v. U.S. Airways, Inc., 235 F.R.D. 70, 79 (E.D. Va. 2006); see also 1 Newberg on Class Actions § 3:62 (5th ed. 2019) ("Courts generally reject the argument that an intra-class conflict exists when divergent theories of liability would benefit different groups within the class. Courts have thus rejected challenges to the class representatives' adequacy that were based . . . on different class members desiring different methods of calculating damages[.]").

Because there are no class conflicts "so substantial as to overbalance the common interests of the class members as a whole," the district court did not err in certifying the class. Matamoros, 699 F.3d at 138.

D.

State Farm next argues that the class conflicts demonstrate that the district court impermissibly created a fail-safe class. A fail-safe class is one that "would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound." Orduno v. Pietrzak, 932 F.3d 710, 716 (8th Cir. 2019) (internal quotation marks omitted). State Farm argues that the district court's exclusion of 487 class members after the jury concluded they failed to prove damages demonstrates that the district court created a fail-safe class. Despite State Farm's argument and requests from amici briefs, we need not decide whether the creation of a fail-safe class is permissible because, quite simply, none is present here. State Farm's argument

that the district court excluded 487 class members only after they failed to prove damages is an inaccurate characterization of the record. The district court excluded these class members prior to trial and none of their claims were submitted to the jury. The post-trial statement of the district court in its order altering or amending the judgment served as nothing but clarification on this point.

We are satisfied that the district court defined the class in such a manner that it excluded those individuals who did not share the claim that State Farm's conduct deducted amounts for COI fees that included non-mortality factors, but included and bound all those who did share that claim, even if they ultimately were unsuccessful on that claim. Because all members of the class were bound by the judgment, regardless of whether they succeeded on their individual claims, the district court did not create a fail-safe class.

Based on the foregoing, we conclude that the district court did not abuse its discretion in certifying the class or in denying State Farm's motion to decertify the class.

V.

State Farm also argues that the district court's denial of State Farm's post-verdict motion for judgment as a matter of law was erroneous because Vogt's damages models were insufficient to sustain the jury's damages award. "We review *de novo* a district court's denial of a post-verdict motion for judgment as a matter of law, viewing the evidence in the light most favorable to the verdict. Judgment as a matter of law is only appropriate when no reasonable jury could have found for the nonmoving party." S. Wine & Spirits of

Nev. v. Mountain Valley Spring Co., 646 F.3d 526, 533 (8th Cir. 2011) (citation omitted). State Farm asserts Vogt's evidence of damages was impermissibly speculative and unreliable in that (1) it did not differentiate between policyholders who used tobacco products and those who did not; (2) it lacked evidence demonstrating that State Farm did not pool mortality rates; (3) it failed to account for several months in which the COI fee State Farm charged was less than Vogt's proposed COI rate that considered only enumerated mortality factors; and (4) it improperly included policyholders who received all the benefits to which they were entitled.

Vogt argues that State Farm waived this challenge by failing to raise any objections to Vogt's expert damages models prior to trial through a Daubert[1] motion or through objections at trial. We agree that because State Farm failed to file a Daubert motion or object at trial, it has waived any argument regarding the admissibility of the expert damages models. See, e.g., Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996) ("Although we recognize that evidence which is unreliable is necessarily insufficient, the appropriate time to raise Daubert challenges is at trial. By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise admissibility issues on appeal.").

However, we will consider State Farm's argument to the extent it challenges the sufficiency of the evidence.

Damages for breach of contract must be shown with reasonable certainty, and the plaintiff bears the

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[1] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

burden of providing a rational estimate of the damages "without resorting to speculation, but the specific amount of damages is committed to the discretion of the factfinder." Randy Kinder Excavating, Inc. v. J.A. Manning Constr. Co., Inc., 899 F.3d 511, 520 (8th Cir. 2018) (internal quotation marks omitted) (applying Missouri law). In a sufficiency of the evidence challenge, "[i]t is well settled that we will not reverse a jury's verdict for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict for the non-moving party." Ryther v. KARE 11, 108 F.3d 832, 836 (8th Cir. 1997).

As to State Farm's complaint that the damages models were insufficient because they did not differentiate between tobacco and non-tobacco users, there was no need for the damages models to take this mortality factor into account as this was not a mortality factor listed in the policy. If State Farm's stated mortality factors did not make any differentiation between those who used tobacco products and those who did not, there is no reason to believe that COI fees would be different as between tobacco and non-tobacco users. As to State Farm's argument that the damages models were insufficient because they operated under the assumption that State Farm did not pool mortality rates in spite of State Farm's presentation of undisputed evidence that they did pool mortality factors, this is nothing more than an attempt to unwind the factual findings of the jury, which concluded that State Farm did not pool its policies when calculating the COI rates. Because the jury concluded State Farm did not pool its policies, the damages models that represented this fact were sufficient to support the jury award.

State Farm further argues that the damages models were insufficient to support the verdict because they failed to account for several months in which the COI fee State Farm charged was actually less than a COI fee that considered only the enumerated mortality factors. We find this argument unpersuasive. At trial, State Farm presented an offset defense, arguing that State Farm was entitled to an offset for amounts from months where it charged a COI fee that was less than what a COI fee based on mortality factors would have included, and Vogt presented a damages model that accounted for State Farm's claimed amount of offsets. As the damages model the jury ultimately selected included State Farm's offset amounts, we are unpersuaded by State Farm's argument. Finally, with respect to State Farm's argument that the damages models were insufficient because they improperly included policyholders who received all the benefits to which they were entitled, we are similarly unpersuaded. State Farm specifically argues that, upon death and payment of death benefits, all benefits owing on account of a policyholder who selected a death benefit option would be paid: the face amount of the insurance, not any amount of the policy's account value. Thus, State Farm asserts that the policyholder's beneficiaries no longer have an interest in the account value. Instead, the policyholders' beneficiaries are entitled to only the death benefits under the term of the policy. Without an interest in the account value, State Farm argues, there can be no claim that a deceased policyholder's account value was wrongfully depleted by COI overcharges. However, we see no reason to limit damages merely because death benefits have been paid for a policyholder; that policyholder still suffered a depleted account value during his lifetime due to State Farm's overcharges of COI

fees. Vogt's damages models, which measure the lost account value for all policyholders during the period in which they held the policies, provide the most reasonable basis for measuring the harm that was incurred during the life of the policyholders.

State Farm's challenges to the sufficiency of the damages models, as a whole, miscast the evidence presented to the jury and the verdict reached by the jury. Mindful that we may reverse only where no reasonable juror could have reached a verdict in favor of Vogt, we reject State Farm's argument that the damages models were insufficient to support the jury award. The district court did not err in denying State Farm's motion for judgment as a matter of law based on the alleged insufficiency of the damages models as evidence of damages suffered by class members.

VI.

State Farm also takes aim at various evidentiary rulings of the district court, asserting that the district court (1) incorrectly allowed Vogt to introduce late-disclosed expert materials at trial; (2) erroneously excluded any evidence related to the maximum rates State Farm was permitted to charge under the terms of the policy; and (3) erroneously limited the testimony of State Farm's expert. State Farm further argues the cumulative effect of these rulings amounts to reversible error. State Farm raised these evidentiary issues in its motion for new trial, the denial of which we review for "a 'clear' abuse of discretion, with the key question being whether a new trial is necessary to prevent a miscarriage of justice." Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 462 (8th Cir. 2013). Similarly, we review a district court's evidentiary rulings for an abuse of discretion, and will reverse only if the evidentiary ruling "was a clear and prejudicial abuse

of discretion." United States v. Mahasin, 362 F.3d 1071, 1084 (8th Cir. 2004). This standard requires "a showing that those rulings had a substantial influence on the jury's verdict." McPheeters v. Black & Veatch Corp., 427 F.3d 1095, 1101 (8th Cir. 2005).

A.

State Farm first argues that the district court erroneously allowed Vogt to present three expert damages models at trial that were not timely disclosed. Vogt originally provided his expert materials to State Farm on January 30, 2018, and provided a supplement on February 5, 2018. State Farm does not dispute that these were properly and timely disclosed expert materials. But on May 16, 2018, after the February 15, 2018 deadline for plaintiff's rebuttal expert reports, Vogt provided State Farm with three damages models that had not been previously disclosed. State Farm asserts that these amount to new, untimely disclosed expert opinions that the district court erroneously allowed Vogt to present to the jury. Further, State Farm asserts that there is clear evidence that this prejudiced State Farm because the jury's verdict rejected the only damages model that had been timely disclosed, instead adopting a damages model from the late-disclosed materials. Under Federal Rule of Civil Procedure 26(a), the "failure to disclose [expert materials] in a timely manner is equivalent to a failure to disclose." Wegener v. Johnson, 527 F.3d 687, 692 (8th Cir. 2008) (quoting Trost v. Trek Bicycle Corp., 162 F.3d 1004, 1008 (8th Cir. 1998)). Where a party fails to make a timely disclosure, Federal Rule of Civil Procedure 37(c)(1) provides the district court with the authority to exclude the late-disclosed materials or to fashion a lesser penalty than total exclusion. See also Petrone v. Werner Enters, Inc., 940 F.3d 425, 435 (8th

Cir. 2019) ("Rule 37(c)(1) addresses what to do if a party fails to disclose information as required by Rule 26(a) and attempts to use that information on a motion, at a hearing, or at a trial." (emphasis omitted)).

Before considering whether the damages models violated Rule 26 and were thus subject to the sanctions of Rule 37, we must first consider whether the damages models were actually untimely disclosed expert materials or if they were merely summaries of voluminous data that were admissible under Federal Rule of Evidence 1006. Rule 1006 allows a party to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court," provided that the party seeking to introduce the summary "make[s] the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." "Summary evidence is properly admitted when (1) the charts fairly summarize voluminous trial evidence; (2) they assist the jury in understanding the testimony already introduced; and (3) the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary." United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005) (internal quotation marks omitted). Summary evidence also may "include assumptions and conclusions, but said assumptions and conclusions must be based upon evidence in the record." Id. (quoting United States v. Wainwright, 351 F.3d 816, 821 (8th Cir. 2003)).

In light of the fact that this case involves complicated and voluminous data about the COI fees charged to numerous policyholders over a significant period of time, the damages models are best characterized as summaries that Vogt introduced to better

aid the jury in understanding the evidence at trial. As the district court noted, the additional damages models utilized the same methodology and calculations as the previously disclosed expert materials, differing only insofar as they altered assumptions to apply the theories that State Farm's expert presented. The differences between the originally disclosed damages models and the three later-produced damages models are no more than different "assumptions and conclusions" that are "based upon evidence in the record." Id. (quoting Wainwright, 351 F.3d at 821). And the district court did not allow Vogt to introduce these models at trial without providing any recourse to State Farm. The district court allowed State Farm to conduct a telephonic deposition of Vogt's expert prior to trial, and gave State Farm the opportunity to both submit its own exhibit in response and have its expert comment on the calculations in the new models.

For the foregoing reasons, we conclude that the damages models were admissible as summaries of voluminous data, and the district court did not abuse its discretion by allowing Vogt to introduce these models to the jury. Because we conclude that these summaries were properly admissible under Rule 1006, we find Rule 26 inapplicable. The district court thus did not err in denying the motion for new trial on this basis.

B.

State Farm also asserts that the district court erroneously precluded State Farm from presenting evidence regarding the maximum COI rates under the policy and that State Farm never exceeded this rate, which State Farm argues was relevant to whether any class member sustained any damages from the COI fees. We see no error in the district court's exclusion

of this evidence, because it is irrelevant to the determination of whether class members were damaged by State Farm's breach of contract in using non-enumerated factors to assess COI fees.

Relevant evidence "has any tendency to make a fact more or less probable than it would be without the evidence" and involves a "fact [that] is of consequence in determining the action." Fed. R. Evid. 401. Evidence of the maximum COI rates that State Farm was allowed to charge under the policy fails under both guideposts. The jury was tasked only with resolving the issue of damages because the district court determined, via summary judgment, that Vogt had sufficiently demonstrated that State Farm had breached the contract with its policyholders by collecting COI fees based on non-enumerated factors. Whether State Farm charged COI fees below the maximum rate stated in the policy has nothing to do with the question of whether class members were damaged by State Farm's collection of COI fees based on impermissible factors under the policy. It thus does not make it more or less likely that class members sustained damages from the overcharges, and the maximum COI rates under the policy is not of consequence in determining damages sustained through COI overcharges. Further, even if this proof had some arguable relevance, the district court acted within its discretion in excluding this evidence because it would serve no purpose other than to confuse or mislead the jury into revisiting issues of liability that had already conclusively been determined. See Fed. R. Evid. 403; Am. Bank of St. Paul v. TD Bank, N.A., 713 F.3d 455, 467 (8th Cir. 2013) (finding no error where district court excluded evidence that was irrelevant and would tend to confuse the jury). The district court thus committed no

error in excluding evidence related to State Farm's maximum allowable COI rates charged under the policy and in denying the motion for new trial on this basis.

C.

State Farm next argues that the district court erroneously limited the testimony of its expert, preventing the expert from providing testimony about an actuarial memorandum from State Farm's New Jersey operations, that State Farm argues was relevant to whether State Farm pooled its mortality rates. The district court prohibited State Farm from questioning its expert on this memorandum because it concluded that the expert's opinions in his report did not discuss the memorandum. However, when Vogt's counsel questioned the expert on cross-examination about the memorandum, the district court allowed it. State Farm argues that this was in error because it gave the jury the false impression that it was State Farm, not Vogt, that did not want any testimony about the actuarial memorandum introduced into evidence. State Farm asserts that preventing it from eliciting this testimony on direct examination was prejudicial to State Farm's case, as a central question for the jury to consider in assessing the question of damages was whether State Farm pooled its mortality rates.

First, the district court was within its discretion to exclude this testimony because State Farm's expert did not offer any opinion on the New Jersey memorandum in his expert report. See Fed. R. Civ. P. 26(a)(2)(B)(i) (explaining that expert report is required to include "a complete statement of all opinions the witness will express and the basis and reasons for them"); Fed R. Civ. P. 37(c)(1) (providing for exclusion of untimely disclosed expert information). Second,

even if the district court's ruling were erroneous, State Farm suffered no prejudice from either the district court's original decision to exclude the testimony or the district court's allowance of questions to this effect on cross examination because, once Vogt's counsel opened the door in cross examination of State Farm's expert, State Farm could have questioned the expert about the memorandum on re-direct examination. State Farm could have both used the memorandum for probative purposes and cured any potential false impression about State Farm's desire to use the information. That State Farm did not avail itself of this opportunity does not create prejudice requiring reversal. See McPheeters, 427 F.3d at 1101 (providing standard for finding prejudice for erroneous evidentiary ruling). The district court did not err in limiting the expert's testimony, and in denying the motion for new trial on this basis.

D.

State Farm finally argues that, even if the alleged errors do not individually warrant reversal, the cumulative effect of the rulings does. But "[w]e will not reverse based upon the cumulative effect of errors unless there is substantial prejudice to the defendant, and we have declined to apply the doctrine when the evidentiary rulings are within the trial court's discretion." McPheeters, 427 F.3d at 1106 (quoting United States v. Gladfelter, 168 F.3d 1078, 1083 (8th Cir. 1999)). As we have found that all of the evidentiary rulings State Farm challenges were within the district court's discretion, we find no cumulative error requiring reversal.

VII.

State Farm next challenges the judgment in favor of Vogt on the conversion claim, arguing both that the conversion claim fails as a matter of law, and that the district court erroneously instructed the jury. State Farm renews arguments it raised in its motion for new trial, which the district court denied. Again, we review the denial of a motion for new trial for clear abuse of discretion. Hallmark Cards, 703 F.3d at 462.

Vogt asserted a conversion claim under Missouri law, and we review the district court's interpretation of state law de novo. St. Paul Fire & Marine Ins. Co. v. Schrum, 149 F.3d 878, 880 (8th Cir. 1998). State Farm presents two arguments as to why Vogt's conversion claim fails under Missouri law, each equally unavailing. First, State Farm argues that money cannot be the subject of a conversion claim, and therefore the money involved in COI overcharges cannot have been converted. But State Farm ignores that Missouri law recognizes an exception to the general rule that money cannot be converted: "[C]onversion does not ordinarily lie for money represented by a general debt. However, the rule is otherwise as to funds placed in the custody of another for a specific purpose and their diversion for other than such specified purpose subjects the holder to liability in conversion." Dillard v. Payne, 615 S.W.2d 53, 55 (Mo. 1981) (citations omitted). Here, policyholders submitted payments to State Farm with the intention that State Farm add those amounts to their account values. They did not authorize State Farm to deduct amounts from their accounts for COI fees based on factors other than those listed in the policy. Thus, State Farm's unauthorized deductions fall within the exception recognized under Missouri law.

Second, State Farm asserts that the conversion claim is barred by the economic loss doctrine, which Missouri law recognizes "bars recovery of purely pecuniary losses in tort where the injury results from a breach of a contractual duty." Dubinsky v. Mermart, LLC, 595 F.3d 812, 819 (8th Cir. 2010) (internal quotation marks omitted) (applying Missouri law). However, State Farm again ignores Missouri law that expressly limits this doctrine to warranty and negligence or strict liability claims. See, e.g., Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 130-31 (Mo. 2010) (en banc) ("Under Missouri law, remedies for economic loss sustained by reason of damage to or defects in products sold are limited to those under the warranty provisions of the UCC."); Sharp Bros. Contracting Co. v. Am. Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. banc 1986) (explaining that the economic loss doctrine precludes "recovery on a theory of strict liability in tort, as a matter of policy, where the only damage is to the product sold"). As the district court correctly noted in rejecting this argument, "Missouri courts have never extended the economic loss doctrine beyond the doctrine's traditional moorings as policing the boundaries between warranty and negligence[.]" R. Doc. 71, at 6. The district court thus did not err in its interpretation of Missouri law, and did not abuse its discretion in denying the motion for new trial on this basis.

As to State Farm's claim that the jury instructions erroneously stated the elements of conversion, "[w]e review a district court's formulation of jury instructions for an abuse of discretion and its interpretation of law *de novo*." United States v. Spotted Horse, 916 F.3d 686, 691 (8th Cir.) (quoting United States v. Farah,899 F.3d 608, 614 (8th Cir. 2018)), cert. denied,

140 S. Ct. 196 (2019). "We afford the district court broad discretion in choosing the form and language of the instructions, and our review is limited to a determination of whether the instructions, taken as a whole and viewed in the light of the evidence and applicable law, fairly and accurately submitted the issues to the jury." Slidell, Inc. v. Millennium Inorganic Chems., Inc., 460 F.3d 1047, 1054 (8th Cir. 2006).

The district court gave the following instruction to the jury:

> Your verdict must be for Plaintiffs on their claim for conversion if you believe:
>
> *First,* each Plaintiff was the owner of the Account Value.
>
> *Second*, State Farm took non-mortality factors into account when making deductions from the Account Value for the monthly Cost of Insurance rates.
>
> *Third*, one or more of the Plaintiffs was thereby damaged.
>
> *Fourth*, as a result, State Farm deprived any Plaintiff who was damaged of possession of the portion of the funds in the Account Value attributable to non-mortality factors.
>
> It has previously been determined that the first, second, and fourth elements are established as a matter of law. You must treat those elements as having been proved. Therefore, your verdict must be for Plaintiffs on their claim for conversion if you believe that one or more Plaintiffs suffered damages as a result of State Farm's use of non-mortality

> factors to set the monthly Cost of Insurance rates that Plaintiffs paid.

R. Doc. 356, at 20. State Farm argues that this instruction was an erroneous statement of the law because it absolved class members of the obligation to show a specific corpus from which funds were diverted, and instead allowed Vogt to prevail by proving only damages, which is not an element of conversion. See IOS Capital, LLC v. Allied Home Mortg. Capital Corp., 150 S.W.3d 148, 153 (Mo. Ct. App. 2004) ("The elements of a cause of action for conversion are: (1) the plaintiff was the owner of the property or entitled to possession of the property, (2) the defendant took possession of the property with the intent to exercise some control over it, and (3) the defendant thereby deprived the plaintiff of the right to possession of the property."). We are unpersuaded by this argument. The district court's inclusion of the word "damages" in the instruction did not replace the requirement of a specific, identifiable corpus with a mere showing of damages. Instead, the district court's inclusion of the phrase "damages" served to convey that a plaintiff must show the specific funds that were converted from his account in order to prevail on this claim. And, in granting in part Vogt's motion for summary judgment on the breach of contract claim, the district court determined that, as a matter of law, each plaintiff was entitled to possession of money deducted from the account value based on non-mortality factors; to the extent State Farm appropriated these funds, it was wrongful; and State Farm deprived each plaintiff of the right to possess the full account value. Thus, the district court's formulation of the conversion instruction served to isolate the remaining questions for the jury: whether State Farm had deducted amounts for

COI fees that were based on non-enumerated factors, and if so, in what amount. This instruction is consistent with the elements of conversion under Missouri law. Because the district court properly instructed the jury on the conversion claim, it did not err in denying State Farm's motion for new trial.

VIII.

On cross-appeal, Vogt asserts that the district court erred by denying prejudgment interest, arguing that a Missouri statute mandates prejudgment interest on liquidated claims for breach of contract, which is the type of claim the class pursued, and that the same statute applies to conversion claims. Vogt contends that the district court erroneously determined that the policy precluded the award of prejudgment interest at the statutory rate, and, at the very least, should have awarded prejudgment interest by utilizing the 4% rate included in the policy. "Whether the district court had authority to grant prejudgment interest is a question of state law which we review de novo." Transit Cas. Co. v. Selective Ins. Co. of Se., 137 F.3d 540, 546 (8th Cir. 1998). "In a diversity case, the question of prejudgment interest is a substantive one, controlled by state law[,]" here, Missouri law. Emmenegger v. Bull Moose Tube Co., 324 F.3d 616, 624 (8th Cir. 2003).

Under Mo. Rev. Stat. § 408.020,

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and

> retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

"Where an agreement is reached by the parties regarding the interest rate, even if the agreement is that no interest will be paid or established the interest rate to be zero percent, it will be enforced." G&G Mech. Constructors, Inc. v. Jeff City Indus., Inc., 549 S.W.3d 492, 496 (Mo. Ct. App. 2018). Section 408.020 also applies to conversion claims. Stromberg v. Moore, 170 S.W.3d 26, 32 (Mo. Ct. App. 2005).

The district court determined that the inclusion of an interest rate of 4% in the policy precluded an award of prejudgment interest at the statutory rate because the 4% represented the "other rate . . . agreed upon" in Mo. Rev. Stat. § 408.020. Specifically, the policy contains an "Interest" provision, which states:

> An interest rate of at least 4% a year will be applied to the account value. The rate applied to the amount of account value up to the amount of any loan may differ from the rate applied to the account value in excess of the amount of any loan. We will determine these rates at least once a year.

R. Doc. 167-2, at 11. Although this provision does not speak directly to prejudgment interest, we are satisfied that the parties agreed, by the terms of the contract, that the interest rate to be applied to all policyholder funds held by State Farm was to be 4%. See Manfield v. Auditorium Bar & Grill, Inc., 965 S.W.2d 262, 270 (Mo. Ct. App. 1998) ("If the legislature had intended for the statutory interest rate to apply

where, as here, there is an agreement as to the rate of interest to be charged, but no separate and specific agreement as to whether the same rate is to be charged after maturity or default, it could have simply said so. It did not."). In the face of this express agreement, a higher rate of interest is precluded.

Although we conclude the district court correctly denied Vogt's request for prejudgment interest at the statutory rate, Vogt is entitled to prejudgment interest at the 4% rate contained in the contract. State Farm asserts that Vogt has already been awarded this amount, because it was included in the damages model the jury ultimately selected at trial. Vogt counters that while the damages model included the contract rate on each class member's account value through the date each policy was surrendered or terminated, it does not include any prejudgment interest amount for the time following surrender or termination. We agree with Vogt that the policy holders are entitled to prejudgment interest at the contractual rate of 4% up until the date of judgment, not merely up until the date of termination or surrender. We further agree with Vogt that the damages model does not include the 4% interest rate beyond the date of termination or surrender of a given policy. Because the damages model does not include prejudgment interest for the entire time up until judgment, the district court erroneously denied Vogt's motion for an award of prejudgment interest. Accordingly, we reverse and remand to the district court for reconsideration of the motion, consistent with this analysis.

IX.

For the foregoing reasons, we affirm in part and reverse and remand in part. Vogt's motion to file a supplemental appendix is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 2:16-cv-04170-NKL

MICHAEL VOGT, on behalf of himself and all others similarly situated,

Plaintiff,

v.

STATE FARM LIFE INSURANCE COMPANY,

Defendant.

ORDER

Plaintiff Michael Vogt moves for an order certifying a class of "[a]ll persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri."[1] Doc. 145. For the reasons discussed below, the Court grants Plaintiff's motion.

[1] Excluded from the Class are: State Farm; any entity in which State Farm has a controlling interest; any of the officers, directors, or employees of State Farm; the legal representatives, heirs, successors, and assigns of State Farm; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family (collectively, the "Excluded Persons").

I. BACKGROUND

In 1999, Vogt purchased policy form 94030 (the "Policy"), a flexible premium adjustable whole life insurance policy, from State Farm. The Policy was a universal life insurance policy, a type of "permanent" life insurance that, unlike standard term insurance, is supposed to provide lifetime death benefit protection. Policy owners paid premiums that were deposited into their "Account Value," which accumulated interest at or above a minimum rate that the Policy guarantees.

Each month, State Farm was permitted to make a deduction from the Policy that included "(1) the cost of insurance, (2) the monthly charges for any riders, and (3) the monthly expense charge." The Policy remained in force so long as there was sufficient money in the Account Value to cover these monthly deductions.

The cost of insurance ("COI") charge was calculated using a monthly cost of insurance rate. The Policy provides that COI rates "for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class," and "can be adjusted for projected changes in mortality." Doc. 145-1, at 10. These factors are commonly used to determine mortality expectations for an insured or group of insureds. However, Plaintiff contends that State Farm in fact uses other, unauthorized factors, having nothing to do with mortality expectations, in determining the Policy's COI rates, and that State Farm thereby deducts COI charges from Account Values in amounts exceeding those authorized by the Policy. [redacted]

Doc. 150-3, at 3; Doc. 150-4, at 5.

The Policy sets the monthly expense charge at $5.00. However, Vogt contends that, by including unauthorized expenses in the Policy's COI rates, State Farm deducts more than $5.00 in expense charges, breaching the expense charge provision.

State Farm does not deny that it did not disclose to policy owners the assumptions underlying the current COI rates. Doc. 199 (Defendant's Reply in Support of Its Motion For Summary Judgment Motion, State Farm's Response to Plaintiff's Statement of Additional Facts), at XII, ¶ 27, and at XXII, ¶¶ 43-44. There is no dispute that a policyholder without knowledge, experience, or training likely would not be able to understand, without assistance, how State Farm determined whether to set COI rates below the maximum rates identified in the Policy, and how much such rates should be. *Id.*, at XXIII, ¶ 45.

The Policy is a fully integrated contract, and its language is materially the same for all members of the putative class. Doc. 145-1, at 11. Neither State Farm's nor the Policy-holder's obligations can be obviated by informal consent or waiver because "[o]nly an officer has the right to change th[e] [P]olicy," and "[n]o agent has the authority to change the [P]olicy or to waive any of its terms." *Id.* The allegedly unauthorized charges result from the uniform application of the Policy's terms. All policy owners are subject to the same set of COI rates, and all COI rates are calculated using the same undisclosed factors. *Id.*

Vogt brings four claims: two claims for breach of contract, specifically with regard to the COI charges (Count I) and the expense charges (Count II), a claim for conversion with respect to the Account Value (Count III), and a claim for declaratory relief relating

to the alleged breaches of the Policy provisions concerning COI and expense charges (Count IV). The class Vogt seeks to certify consists, with the exception of the Excluded Persons, of "[a]ll persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri."

The Court previously denied State Farm's motion for summary judgment. Doc. 218.

II. DISCUSSION

Under Federal Rule of Civil Procedure 23, a motion for class certification involves a two-part analysis. First, under Rule 23(a), the proposed class must satisfy the requirements of "numerosity, commonality, typicality, and fair and adequate representation." *Luiken v. Domino's Pizza, LLC,* 705 F.3d 370, 372 (8th Cir. 2013). Second, the proposed class must meet at least one of the three requirements of Rule 23(b). *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432 (2013).

The burden of showing that the class should be certified is on Vogt. *See Luiken,* 705 F.3d at 372. Vogt will meet this burden only if, "after a rigorous analysis," the Court is convinced that the Rule 23 requirements are satisfied. *Comcast,* 133 S. Ct. at 1432 (quotation marks and citation omitted). The Court has broad discretion in deciding whether class certification is appropriate. *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski,* 678 F.3d 640, 645 (8th Cir. 2012) (citation omitted).

A. Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that a class be sufficiently numerous to render joinder of all members impracticable. In assessing whether the numerosity requirement has been met, courts examine factors such as the number of persons in the proposed class, the nature of the action, the size of the individual claims, and the inconvenience of trying individual claims. *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 561 (8th Cir. 1982). State Farm does not contest that this requirement is satisfied.

[redacted] *See* Doc. 150-6, at 48-49 and 66-67. Thus, the proposed class members are sufficiently numerous.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A plaintiff must show that the claims "depend upon a common contention" that "is capable of class wide resolution," such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541 (2011). Commonality "'does not require that every question of law or fact be common to every member of the class . . . and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.'" *Downing v. Goldman Phipps PLLC*, No. 13-206 CDP, 2015 WL 4255342, at *4 (E.D. Mo. July 14, 2015) (quoting *Paxton,* 688 F.2d at 561).

Commonality is easily satisfied in most cases. *See Wineland v. Casey's General Stores, Inc.*, 267 F.R.D. 669, 674 (S.D. Iowa 2009) ("The burden imposed by [the commonality] requirement is light and easily met in most cases.") (citing *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 603 (D. Minn. 1999), and Newberg on Class Actions § 3:10 (4th ed.)).

Plaintiff's claims in this action—for breach of the COI provision, for breach of the expense charge provision, for conversion, and for a declaratory judgment—all turn on interpretation of the Policy, which is a standard form contract to which each putative class member was a party. The claims also turn on State Farm's determination of COI rates, which was uniform. Doc. 150-2, at ¶¶ 7(c), 7(e), 29-30, 33, 37; Doc. 150-1, at 166:7-22, 171:21-172:11. Thus, the following questions are common to each putative class member:

- Is State Farm limited to using only those factors disclosed in the Policy when determining COI rates?
- Did State Farm use only the factors disclosed in the Policy when determining COI rates?
- Does loading expenses into COI rates violate the Policy's cap of $5.00 per month on expense charges?
- Did State Farm convert the property of Policy owners by deducting COI charges in excess of those amounts authorized by the Policy?

- Is the class entitled to damages as a remedy for State Farm's breaches?[2]

State Farm nonetheless suggests that these questions would not result in a common answer because, even if Plaintiff's assertions are correct, several class members were not injured. First, plaintiff now acknowledges that [redacted] class members were uninjured. Second, when Plaintiff's expert's methodology is combined with the pooled mortality rate that State Farm purportedly employed, more than [redacted] members of the class, including Vogt himself, are shown to have been unharmed by State Farm's conduct. Third, State Farm argues, certain deceased policyholders were not harmed by any purported COI overcharges in the Account Value.

a. <u>Policyholders Who Were Not Injured</u>

Plaintiff acknowledges that, according to his expert, 487 of the holders of the Policy ("roughly 2% of the proposed class") were not injured by the COI rates that State Farm charged. Doc. 212, at 6. Plaintiffs argue that this is "no impediment to certification because these [redacted] policyholders can be identified and specifically removed from the class." *Id.* at 7. State Farm does not deny that the [redacted] policyholders may be identified and excluded from the class. *See* Doc. 217, at 5.

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[2] *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'").

In any event, the fact that potential class members undisputedly were uninjured by the conduct at issue does not prevent class certification. *See Tyson*, 136 S. Ct. at 1050 (finding that "the question of whether uninjured class members may recover" was not "yet fairly presented . . . because the damages award ha[d] not yet been disbursed" and the record did not "indicate how it will be disbursed"). Insofar as there is no dispute that a discrete group of class members were not injured by the alleged conduct at issue in this action, they may be excluded from the class.

b. Mortality Rates: Pooled or Based on Policy Age?

State Farm next argues that application of its purportedly pooled mortality rate, along with Plaintiff's expert's methodology for calculating COI rates on the basis of mortality only, would establish that some [redacted] of the more than [redacted] members of the class, including Vogt himself, were uninjured, and therefore the class should not be certified.

The mortality risk of people in the same age, sex, and rating class may not be identical because policy age can change an individual policyholder's mortality risk. The longer it has been since a Policy was issued, the greater the individual's mortality risk. This is because one who bought a Policy long ago is more likely to have developed health problems since the underwriting department approved him as a policyholder. State Farm's mortality tables reflect the difference in the mortality risk of holders of the Policy of the same age, sex, and rating class. The tables show, for example, that State Farm calculates "six different mortality rates . . . for 35-year-old men of the same rating class depending on the years elapsed since the Policy was issued." Doc. 173, at p. 3.

State Farm insists that, despite using mortality tables showing six different mortality rates for policyholders of the same age, sex, and rating class, [redacted] *Id.* [redacted] *See* Doc. 217, at 6 (citing Doc. 150.4 at 21).

Vogt argues that [redacted] Doc. 194, at 6 (citing Doc. 150-2 at Ex. B.7, at 5 and at Attachment 1). Accordingly, Vogt's damages calculation methodology does not use a pooled mortality rate, but instead uses six different mortality rates for people of the same age, sex, and rating class, depending on policy length.

The question of whether State Farm used a pooled mortality rate or multiple mortality rates for the same age, sex, and rating class to account for policy duration will have a common answer for all of the members of the proposed class. Although the inputs in the calculation used to determine damages (if State Farm is found liable) may change depending on whether the mortality assumptions used are pooled or not, the actual methodology for calculating damages will not change, regardless of how the issue is decided. If, as State Farm argues, the COI rate was properly calculated using a pooled mortality rate, then any class members who are found not to have been injured by State Farm's conduct can be identified and excluded from any damages award.[3] Thus, this question does not warrant denial of class certification.

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[3] State Farm's argument that Vogt's methodology does not correspond to the theory set forth in his complaint misses the mark.

c. Deceased Policyholders

State Farm also contends that deceased policyholders who elected for "Option 1," in which the Account Value is superseded by the death benefit, were not harmed by any purported COI overcharges in the Account Value because they did not receive the Account Value. Plaintiff argues, however, that, in order to prevent a policy from lapsing, holders were required to keep their Account Value sufficient to cover the monthly deduction, including the COI charge. Therefore, they may have had to pay premiums into the Policy to set off deductions. *See* Doc. 145-1, at 9 ("If, on any deduction date, the cash surrender value is not enough to cover the monthly deduction, the policy will stay in force until the end of the grace period. . . . A premium large enough to cover the monthly deductions for the grace period and any increase in the surrender charges must be paid before the end of the grace period; otherwise, this policy will lapse and terminate without value."). As such, the smaller the COI charge, the smaller the premiums required to prevent a lapse. Thus, even if a death benefit ultimately was

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Whether a pooled mortality assumption or multiple mortality assumptions are used for insureds of the same age, sex, and rating class, Plaintiff's methodology for calculating damages will remain the same—only the inputs will change. Thus, Plaintiff's methodology is not inconsistent with the Complaint.

Furthermore, as explained in the Court's order on State Farm's motion for summary judgment, "by referencing both the 'policy year' and the 'policy anniversary' in describing the monthly COI rates, the Policy incorporates the duration . . . as a factor affecting those rates." Doc. 218, at 12. Questions concerning policy duration therefore are fairly within the scope of this litigation concerning whether State Farm used appropriate factors to determine COI rates.

paid on a policy, the holder might well have been injured by unauthorized deductions from her Account Value. In short, even deceased policyholders may have been injured by potentially unauthorized deductions from the Account Value.

3. Typicality

The typicality requirement is met when the claims or defenses of the representative party are typical of those of the class. Fed. R. Civ. P. 23(a)(3). The requirement "is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.,* 64 F.3d 1171, 1174 (8th Cir. 1995). In determining typicality, courts consider whether the named plaintiff's claim "arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir. 1996).

Vogt's claims and the claims of the putative class members all arise from and relate to the interpretation and application of the Policy. Both the contractual language and State Farm's methodology for determining the COI rates were uniform for all class members. The requirement of typicality thus is satisfied.

4. Adequacy

Rule 23(a)(4) requires that the class representative and class counsel will "fairly and adequately protect the interests of the class." The adequacy requirement is met where: "1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and 2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints

will diverge." *Carpe v. Aquila, Inc.,* 224 F.R.D. 454, 458 (W.D. Mo. 2004) (internal quotes omitted). The requirement of adequacy "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625 (1997).

As a preliminary matter, as discussed above, the Policy terms and the methodology used to determine the COI rates that were charged were the same for every class member, so Vogt's interests are substantively identical to those of the other class members. *See Wal-Mart*, 564 U.S. at 349, n. 5 (noting that the two requirements of typicality and adequacy "tend to merge"). Moreover, Vogt estimates that he was overcharged by $3,182.62. His interest in the outcome of the case thus is sufficiently strong to ensure vigorous representation. He has participated in discovery, including by appearing for a deposition.

Furthermore, Vogt's attorneys in this litigation have extensive experience prosecuting class actions and cost-of-insurance cases and will vigorously represent the plaintiffs in this action. State Farm does not deny that Plaintiff's counsel is qualified to represent the class in this action.

State Farm argues that there is a conflict between Vogt and other members of the class because, while Vogt benefits from not using a pooled mortality rate, other members of the class may be disadvantaged by the use of a policy-duration-specific mortality rate. But whether State Farm used a pooled mortality rate is a matter in dispute. Plaintiff's position is that State Farm used the same mortality rates in formulating COI rates that Plaintiff's expert used, so using the Plaintiff's calculation, there is no conflict.

The issue is intertwined with the merits, and is not appropriately resolved upon a motion for class certification. It does not bar class certification.

The Court finds that the adequacy requirement is satisfied.

B. Rule 23(b)(3)

Vogt argues that the proposed class should be satisfied pursuant to Rule 23(b)(3), which requires that "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."

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. In other words, it "goes to the efficiency of a class action as an alternative to individual suits." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2016). The requirement is not satisfied if "individual questions . . . overwhelm the questions common to the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S. Ct. 1184, 1196 (2013). The Eighth Circuit articulates the test as follows:

> When determining whether common questions predominate, a court must conduct a limited preliminary inquiry, looking behind the pleadings, but that inquiry should be limited to determining whether, if the plaintiff's general allegations are true, common evidence could suffice to make out a prima facie case for

> the class. While limited in scope, this analysis should also be rigorous.

Luiken, LLC, 705 F.3d at 377 (internal quotation and citation omitted). This inquiry is "far more demanding" than that conducted to establish commonality under Rule 23(a). *Amchem*, 521 U.S. at 623-24.

The major portion of the evidence on the claims for breach of contract, conversion, and declaratory judgment is capable of consideration on a class wide basis. The terms of the Policy are the same for all class members. State Farm has not suggested that the determination of COI rates varied on a case-by-case basis. Thus, common questions predominate. *See Lafollette v. Liberty Mut. Fire Ins. Co.*, No. 14-04147-NKL, 2016 WL 4083478, at *12 (W.D. Mo. Aug. 1, 2016) ("[W]here standardized corporate policies constitute the very heart of the plaintiffs' claims, common issues will predominate because those policies would necessarily have to be reproven by every plaintiff.") (citation and quotation marks omitted)

State Farm nonetheless contends that the statute of limitations defense requires individualized determinations that make class certification impractical. According to State Farm, the Court should not assume that in the 22 years between when State Farm first issued the Policy and when Vogt filed this action, none of the class members became aware of the fact that COI rates were based on factors other than those specified in the Policy. But State Farm has "admit[ted] that the assumptions underlying the 'rates lower than those shown' [in the maximum COI table] are not disclosed to policyholders," and also has "[a]dmit[ted] that if policyholders without knowledge, experience or training wanted to understand how State Farm determined whether to set cost of insurance rates below the

maximum rates identified in the Policy, and, if so, how much lower than the maximum rates, such policyholders would likely require assistance." Doc. 199, at XXII-XXIII. Given these admissions, and the fact that State Farm has presented no evidence to suggest that the claims of any class member is time-barred, there is nothing to indicate that individual statute-of-limitations issues would predominate so as to make class certification impractical or inappropriate. *See Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-CV-04321-NKL, 2013 WL 3872181, at **11–12 (W.D. Mo. July 25, 2013) (rejecting defendants' argument that statute of limitations defense defeats predominance where defendants presented no evidence that plaintiffs had notice of the allegedly improper conduct), *aff'd in relevant part*, 852 F.3d 795 (8th Cir. 2017); *Schramm v. JPMorgan Chase Bank, N.A.*, 09–09442, 2011 WL 5034663, at *12 (C.D. Cal. Oct. 19, 2011) (holding that "speculation that some class members' claims may be [time-]barred on the basis of actual knowledge is not sufficient to defeat certification").

2. Superiority of a Class Action

The final requirement of Rule 23(b)(3) is that the class action form be superior to other methods of adjudication, an analysis that "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 164 (1974). In determining whether superiority is met, a court considers:

> (A) the class members' interest in individually controlling the prosecution of separate actions;

(B) the extent and nature of any litigation concerning this controversy already commenced by potential class members;
(C) the desirability of concentrating the litigation of the claims in this forum; and
(D) the difficulties likely to be encountered in managing a class action.

Rule 23(b)(3).

Vogt is the only class member to have come forward seeking to act as lead plaintiff in this class action. The costs of prosecuting each class member's claims individually would likely exceed each member's damages. *See* Doc. 150-2, ¶ 27. There is no evidence before the Court that there is any other case concerning the claims at issue here. The class members are persons in the State of Missouri. This division is centrally located in the state. State Farm does not suggest that the management of this case as a class action would present any significant or unusual difficulties.

Over [redacted] insureds would have to bring claims individually if a class is not certified. In light of the predominance of common questions, alternatives to class litigation would be more burdensome and less efficient than participation in class litigation.

Thus, a class action is the superior method for adjudicating the claims of the proposed class members.

C. Rule 23(b)(2)

Rule 23(b)(2) requires that "the party opposing the class ha[ve] acted or refused to act on grounds that apply generally to the class, so that final injunctive

relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." The Eighth Circuit has stated that, "[i]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)." *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (quoting 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 1775 (1986)).

Although a Rule 23(b)(2) class is not required to satisfy the additional predominance and superiority requirements of Rule 23(b)(3), "the class claims must be cohesive." *Ebert v. General Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016) (quotation marks and citation omitted). In other words, "the relief sought must perforce affect the entire class at once." *Id.* (emphasis omitted, citing *Dukes*, 131 S. Ct. at 2558). Cohesiveness is lacking where "each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Id.* at 480-81.

Because the terms of the Policy are the same for all potential class members, the interpretation will result in one declaratory judgment applicable to all class members. *See Bond v. Liberty Ins. Corporation*, No. 15-04236-NKL, 2017 WL 1628956, at *11 (W.D. Mo. May 1, 2017), *appeal denied*, No. 17-8021, 2017 WL 5484786 (8th Cir. May 24, 2017) (finding that, "because the litigation involves a form contract, the interpretation will result in one declaratory judgment and/or injunction applicable to all class members" and the requirement of cohesiveness therefore was satisfied), *appeal denied*, No. 17-8021, 2017 WL 5484786 (8th Cir. May 24, 2017).

However, under *Wal-Mart*, a class may not be certified for a claim for individualized monetary relief

that is not merely incidental to the declaratory relief sought. 564 U.S. at 360-61. Vogt argues that declaratory relief in this case is "merely a prelude to a request for damages," and the individual monetary damages claims do not preclude certification, but the only cases Vogt cites in support of this argument predate *Dukes*. *See Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 763-64 (7th Cir. 2003); *Senn v. AMCA Int'l*, No. 87– 1353, 1988 WL 168321, at *5 n.2 (E.D. Wis. Dec. 21, 1988). The Court therefore will certify a class pursuant to Rule 23(b)(3) only as to Count IV, which seeks declaratory relief.

III. CONCLUSION

For the foregoing reasons, Vogt's motion for class certification is granted. Pursuant to Rule 23(b)(3), the Court certifies a class of plaintiffs consisting of "[a]ll persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri" for all counts, except that the Excluded Persons are excluded from the class. Pursuant to Rule 23(b)(2), the Court certifies a class of plaintiffs consisting of "[a]ll persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri" for Count IV alone, except that the Excluded Persons are excluded from the class.

/s/ Nanette K. Laughrey
NANETTE K.
LAUGHREY United
States District Judge

Dated: April 20, 2018
Jefferson City, Missouri

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

MICHAEL VOGT, on behalf of himself and all others similarly situated, Plaintiff, v STATE FARM LIFE INSURANCE COMPANY, Defendant.	No. 2:16-cv-04170-NKL Oct. 11, 2018

ORDER

On June 6, 2018, a judgment of $33,333,495.81 was entered in favor of the class on Plaintiffs' claims for breach of contract and conversion. Plaintiffs now seek to alter or amend the judgment to add a class definition, to add prejudgment interest, and to reduce damages to account for class members who have opted out. Plaintiffs' Motion to Amend (Doc. 377) is granted in part and denied in part.

I. ANALYSIS

a. Class Definition

Plaintiffs want the judgment amended to include the following class definition:

> All persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri. The

> Class excludes: State Farm; any entity in which State Farm has a controlling interest; any of the officers, directors, or employees of State Farm; the legal representatives, heirs, successors, and assigns of State Farm; anyone employed with Plaintiffs' counsel's firms; and any Judge to whom this case is assigned and his or her immediate family. The Class also excludes the owners of 487 policies that were not subject to overcharges alleged by Plaintiffs (identified in Exhibit A) and the 55 policy owners of 62 policies who timely requested exclusion from the class (identified in Exhibit B).

State Farm has no objection except for the request involving the 487 policyholders who suffered no damages because they never paid an overcharge or their overcharge was immediately refunded. State Farm contends that the presence of these policyholders in the definition of the class requires that the class be decertified because they lack standing. Doc. 353 (State Farm's Suggestions in Support of its Motion to Decertify the Class), pp. 4-5. But any claim by the 487 policyholders was abandoned by the Plaintiffs before trial, and was excluded from the class notice with the agreement of State Farm. Effectively, although not technically changed, the definition of the class was functionally modified prior to the trial. Under these circumstances, it is appropriate to formally amend the class definition to exclude the 487 policyholders pursuant to Federal Rule of Civil Procedure 23(c)(1)(C). This rule permits a court to modify the class definition before the entry of a final judgment, including after a trial on the merits. *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1297 (D. Kan. 2012), *aff'd*, 770 F.3d 1300 (10th Cir. 2014) (collecting authorities); *In re*

Urethane Antitrust Litigation, No. 04-1616, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013), *amended*, No. 04-1616, 2013 WL 3879264 (D. Kan. July 26, 2013).

State Farm also asks to amend the definition of the class to exclude State Farm's independent contractor insurance agents who own or owned insurance policies on policy form 94030. Plaintiffs do not object to this amendment and the Court sees no reason to deny State Farm's request. The final judgment therefore is amended to include the following definition of the class:

> All persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri. The Class excludes: State Farm; any entity in which State Farm has a controlling interest; any of the officers, directors, or employees of State Farm; the legal representatives, heirs, successors, and assigns of State Farm; any State Farm independent contractor insurance agents; anyone employed with Plaintiffs' counsel's firms; and any Judge to whom this case is assigned and his or her immediate family. The Class also excludes the owners of 487 policies that were not subject to overcharges alleged by Plaintiffs (identified in Exhibit A) and the 55 policy owners of 62 policies who timely requested exclusion from the class (identified in Exhibit B).

b. Reduction of damage award to reflect opt-outs received after deadline

Plaintiffs seek to reduce the damages award to reflect that three class members opted-out after the commencement of the jury trial. State Farm agrees

that the damages award should be reduced as requested. Therefore, the jury's award of $34,333,495.81 is reduced by $11,080.97, resulting in a total damages award of $34,322,414.84.

c. Prejudgment Interest

Plaintiffs seek prejudgment interest for their breach of contract claim and their conversion claim. Prejudgment interest is authorized at a rate of nine percent per annum for a breach of contract claim if the amount of damages is liquidated and if no other rate is agreed upon by the parties. *See* Mo. Rev. Stat. § 408.020 ("Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts . . . ."). This statute also applies to Plaintiffs' conversion claim. *Stromberg v. Moore*, 170 S.W.3d 26, 32 (Mo. App 2005) ("In action for conversion, [t]he rate of allowable interest is that prescribed by Section 408.020"). For the conversion claim, there must also be a demand for payment and "the judgment or order [must exceed] the demand for payment . . . ." Mo. Rev. Stat. § 408.040.

"[T]he burden is on the party seeking to avoid application of Section 408.020 to establish that the parties agreed to an alternative arrangement." *G & G Mechanical Contractors, Inc. v. Jeff City Industry, Inc*., No. WD80840, 2018 WL 1384503, at *2 n.4 (Mo. App. Mar. 20, 2018).

State Farm opposes the prejudgment interest request for three primary reasons. First, it argues that the amount of damages was not liquidated because the method for calculating damages was disputed by

the parties. Second, it contends that prejudgment interest was already included in the jury's damages award because Plaintiffs' expert's damages model added interest of more than 10 million dollars to the class members' accounts. Third, according to State Farm, the insurance policy in dispute included a rate of interest of four percent and Section 408.020 specifically provides that the nine percent statutory prejudgment interest is only permitted if the parties have not agreed to a different rate of interest.

As to the third argument, Plaintiffs respond that the contract only sets a minimum rate of interest and therefore the parties did not agree to the actual rate of interest to be applied. Further, even if they did agree to a specific rate of interest for purposes of Section 408.020, Plaintiffs claim to be entitled to five percent more in interest to make up the difference between the four percent minimum to which they agreed and the nine percent interest rate authorized by Section 408.020.

The Court rejects Plaintiffs' arguments because the parties agreed to a rate of interest in their contract. The policy provides for a minimum rate of interest. State Farm has discretion, but no obligation, to exceed the minimum interest rate. The rate of interest to be paid thus is controlled by the terms of the contract.

Because the evident purpose of Section 408.020 is to provide for statutory interest only when the parties have failed to set the rate of interest in their contract, the fact that the exact numerical amount of interest is not stated does not mean that the rate was not addressed in the contract. While there is no case on point, *Manfield v. AuditoriumB & Grill Inc.*, 965 S.W.2d 262, 269 (Mo. App. 1998), is instructive. In

that case, the Missouri Court of Appeals found that no prejudgment interest was permitted because the contract between the parties provided for zero percent interest. The Missouri Court of Appeals found that this showed that the parties did not intend interest at a different rate.

Here, the parties agreed that the interest would be no less than four percent, necessarily leaving to State Farm the right to set the rate of interest higher. Therefore, the contract addressed whether interest was payable and how that interest rate would be determined. Reading Section 480.020 as meaning that providing for a minimum interest rate does not by contract resolve the interest to be paid is inconsistent with the purpose of the statute.

Because the Court finds that Section 480.020 precludes prejudgment interest in this case, it will not address State Farm's other arguments as to why prejudgment interest should not be awarded.

d. Post-Judgment Interest

Plaintiffs seek post-judgment interest at the rate of 2.23% compounded annually from the date of the entry of judgment, June 6, 2018. State Farm has no objection. Therefore, the judgment is amended to provide post-judgment interest at the rate of 2.23%, compounded annually beginning June 6, 2018 until paid.

e. Plaintiffs' Plan of Allocation.

Plaintiffs ask the Court to approve Plaintiffs' plan for allocating the damages awarded by the jury. They seek to have the damages distributed among the class members in proportion to their losses after deducting attorneys' fees and non-taxable expenses that might be awarded to class counsel, and any service award

that might be given to Mr. Vogt. They ask the Court to use Exhibit D to determine the losses sustained by each class member. Exhibit D reflects Dr. Witt's lost Account Value calculation shown in Plaintiffs' Exhibit 242 with a modification to reflect the six excluded policy holders who asked to be excluded after trial commenced. Plaintiffs propose to determine the pro-rata share of each class member by using a fraction where the numerator is each class member's lost account value as stated in Exhibit D plus each class member's share of post–judgment interest and the denominator is the total damages awarded by the jury plus any post judgment interest awarded by the Court. The total amount of damages and post judgment interest (after deduction of any attorneys' fees and any non-taxable expenses and any service award to Mr. Vogt that the Court may award) is then multiplied by this fraction to determine the award for each class member. This calculation necessarily assumes that each class member will bear a pro-rata share of fees and expenses, which the Court finds fair and reasonable. It also ensures that no class member receives a share if they did not incur any loss in their account value.

Because State Farm cannot contest the method of allocation (*see Bouaphakeo v. Tyson Foods, Inc.*, 593 Fed. Appx. 578, 586 (8th Cir. 2014)), and because the Court finds that the method of allocation is fair and reasonable, the plan of allocation is approved.

Plaintiffs also ask for the appointment of Angeion Group to oversee the distribution of net funds to the class. Given their prior involvement and recent experience communicating with the class, the Court finds that they should be appointed as requested.

Finally, Plaintiffs seek to shift to State Farm the administrative cost of distributing damages to each

class member. Plaintiffs' request is denied without prejudice. As State Farm says, if Plaintiffs' request were granted, it would give Plaintiffs' a blank check because the costs of distribution have not even been estimated. Moreover, the request is not even limited to the reasonable costs incurred by the administrator.

II. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to amend the judgment is granted in part and denied in part. The class definition is amended to read as follows:

> All persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri. The Class excludes: State Farm; any entity in which State Farm has a controlling interest; any of the officers, directors, or employees of State Farm; the legal representatives, heirs, successors, and assigns of State Farm; any State Farm independent contractor insurance agents; anyone employed with Plaintiffs' counsel's firms; and any Judge to whom this case is assigned and his or her immediate family. The Class also excludes the owners of 487 policies that were not subject to overcharges alleged by Plaintiffs (identified in Exhibit A) and the 55 policy owners of 62 policies who timely requested exclusion from the class (identified in Exhibit B).

The jury's award is reduced to $34,322,414.84. The judgment is amended to provide post-judgment interest at the rate of 2.23%, compounded annually beginning June 6, 2018 until paid. Plaintiff's proposed method of allocation and the proposal to appoint

Angeion Group to oversee the distribution of net funds to the class each are approved. Plaintiffs' request for additional prejudgment interest is denied without prejudice.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: October 11, 2018
Jefferson City, Missouri

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

MICHAEL VOGT, on behalf of himself and all others similarly situated, Plaintiff, v. STATE FARM LIFE INSURANCE COMPANY, Defendant.	No. 2:16-cv-04170-NKL Oct. 11, 2018

ORDER

Pending before the Court is the defendant's motion to decertify the class, Doc. 352. For the following reasons, the motion is denied.

The class in this case was certified on April 20, 2018. Defendant argues that it should now be decertified because (1) some members of the class were not injured; (2) Plaintiffs' damages theory would cause an increase in the cost of insurance for some members of the class who had owned their policy for a longer period of time, creating an internal conflict of interest between Plaintiff and some members of the class; and (3) Plaintiffs' damages theory would cause an intra-class conflict because State Farm allegedly pooled it non-mortality factors.

While Defendant's motion for decertification was pending, a jury returned a verdict for Plaintiffs in the amount of $34,333,495.81. Doc. 171. That verdict necessarily rejected Defendant's argument that it pooled its mortality rates before loading expenses and profits.

I. Legal Standard

To achieve class certification, plaintiffs must meet Rule 23's requirements of numerosity, commonality, typicality, and fair and adequate representation. Fed. R. Civ. P. 23(a). A plaintiff bears the initial burden of showing that the class should be certified under Rule 23. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364 (1982) (footnote omitted); *see also* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

In *Day v. Celadon Trucking Servs., Inc.* 827 F.3d 817, 832 (8th Cir. 2017), the Eighth Circuit stated as follows regarding the burden of proof on a motion for decertification:

> Generally, the proponent of a motion bears the initial burden of showing that the motion should be granted. Additionally, a district court maintains an independent duty to assure that a class continues to be certifiable under Rule 23(a). The existence of this independent obligation lends further support for requiring the movant to bear the burden of showing that the district court mistakenly maintained class certification. Moreover, a

> defendant bears a more onerous burden in challenging certification where . . . the initial certification decision was carefully considered and made after certification-related discovery.

Id. (citation omitted).

II. Discussion

A. Whether Class Members Who Incurred No Damages Have Standing

In *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010), the Eighth Circuit held that each member of a class must have standing. To have standing, a class member must show an injury in fact "that is fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). In the absence of such evidence, there is no case or controversy, which is a prerequisite for federal court jurisdiction.

State Farm argues that because some class members cannot show damages, they were not injured and therefore the class should not be certified. Its argument is premised on the so-called cross-over credit that the jury gave State Farm. The cross-over credit is the set-off that State Farm received for months when State Farm's COI charge was lower than the mortality-only rate. For 29 class members, this set-off resulted in no net damages. The Court permitted this set-off argument even though State Farm had never raised set-off as an affirmative defense.

The cross-over credit, however, does not mean that these 29 class members were not injured. In the months when their mortality-only COI was lower

than what State Farm charged, they sustained an injury-in-fact. The only reason they did not sustain net damages is because their injury was offset by the months when their mortality-only rate was higher than the COI charge State Farm levied. The fact that that they did not sustain net damages does not mean that they had no injury and no standing to resolve the dispute. A defendant may prevail on an affirmative defense, but that does not mean that there is no injury in fact.

Moreover, even if damages cannot ultimately be proved, that does not mean that there was no standing to sue. *See, e.g., Kohen v. Pac. Inv. Mgmt. Co., LLC,* 571 F.3d 672, 677 (7th Cir. 2009) ("When a plaintiff loses a case because he cannot prove injury the suit is not dismissed for lack of jurisdiction."); *see also* Commentary to Fed. R. Civ. P 23 ("If it turns out that some members of the class are not entitled to relief, that represents a failure on the merits, not the lack of a justiciable clam."); *see also Ziggy1 Corp. v. Lynch*, No. 15-0715, 2016 WL 4083656, at *1 (W.D. Okla. Mar. 23, 2016).

Finally, the Court finds instructive *Buoaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *aff'd,* 136 S. Ct. 1036. In that case, the Eighth Circuit approved class certification despite the fact that not all members of the class incurred damages. Such a result makes particular sense in a case like this, where only 29 out of nearly 24,000 class members were found not to be entitled to net damages after a jury trial. The appropriate course of action to ensure compliance with *Tyson Foods, Inc.* is to not award damages to those class members who were not damaged. It certainly is not appropriate to decertify a class for that reason.

As for the 487 Missouri-issued Form 94030 policy owners who never paid a COI charge that included a non-mortality charge or had such charges immediately refunded, they were excluded from the class before trial and no claim on their behalf was ever tried or submitted to the jury. Effectively, Plaintiffs abandoned any claims for these policy owners recognizing that they were not injured and State Farm did not oppose the abandonment. In fact, State Farm agreed that the class notice would be modified to state that "policy owners who did not suffer any harm" were excluded from the class. Now State Farm argues that all 24,000 class members who were injured should be denied the remedy found appropriate by the jury simply because 487 policy owners were technically included in the class certification definition, although their claims were abandoned before trial.

To the extent that there was any lack of clarity, the Court concludes that it is in the interest of fairness, common-sense, and efficiency to identify the 487 policy owners and exclude them from the class to avoid any technical dispute. Federal Rule of Civil Procedure 23(c)(1)(C) permits the court to modify the class definition before the entry of a final judgment and that includes after a trial on the merits. *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1297 (D. Kan. 2012) *aff'd,* 770 F.3d 1300 (10th Cir. 2014) (collecting authorities); *In re Urethane Antitrust Litigation*, No. 04-1616, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013), *amended*, 2013 WL 3879264 (D. Kan. July 26, 2013).[1]

[1] This matter will be addressed in the Court's order resolving Plaintiffs' motion to amend the judgment.

B. Whether There Is an Intra-Class Conflict Because Some COI Rates Would Rise Under Plaintiffs' Damages Theory

State Farm argues that Plaintiffs' damages theory will result in an increased COI rate for some policy owners going forward and therefore there is an intra-class conflict between short-term and long-term policy owners who are members of the class. In other words, some long-term policy owners may theoretically benefit from State Farm's breach of contract going forward.

State Farm's argument fails because this lawsuit will not set rates going forward and, as State Farm acknowledges, what State Farm will do in the future is merely conjecture. *See* Doc. 387 (State Farm's Reply in Support of Its Motion to Decertify the Class), p. 2. While it is expected that State Farm will comply with its contractual obligations going forward, it would be speculation to assume that including only mortality factors in its COI rates would result in increased premiums for State Farm's long term customers. What is not conjecture is that to date, nearly 24,000 class members received the benefit of their bargain by holding State Farm to its contractual agreement. Further, State Farm has always taken the position that it had discretion under the policy to set rates at any level, so long as they were under the guaranteed maximum in the policy, and this lawsuit only lowered that ceiling, to the benefit of all class members. Speculation about what might occur after final judgment is entered is not a basis for finding that an intra-class conflict currently exists.

C. Whether State Farm's Argument that It Pooled Its Mortality Rates Creates an Intra-Class Conflict

State Farm contends that it pooled its mortality rates and as a result, some members of the class will be disadvantaged by the Plaintiffs' damages theory, and therefore there is an intra-class conflict. It also argues that because it pooled its mortality rate, the named Plaintiff, Vogt, incurred no damages and therefore is not an adequate representative.

State Farm's argument fails because the jury found that it did not pool its mortality rates. The Court also rejects State Farm's argument that by proposing a damages theory that is not based on pooling, Plaintiffs created an intra-class conflict because the potential existed that some class members would be disadvantaged by a finding that State Farm did not pool its mortality factors. State Farm does not explain how arguing a fact that was found to be true creates an intra-party conflict. The class representative cannot be faulted for failing to argue a fact that was found untrue. Further, Plaintiffs' position was supported by the explanation in the actuarial memorandum that State Farm submitted to New Jersey regulators showing that the unpooled 88-91 SF table formed the basis for State Farm's COI charge calculations.

* * *

Finally, issues related to State Farm's other post-trial motions will be dealt with in the course of deciding those motions.

III. Conclusion

For the reasons discussed above, State Farm's motion to decertify the class, Doc. 352, is denied.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: October 11, 2018
Jefferson City, Missouri

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

MICHAEL VOGT, on behalf of himself and all others similarly situated, Plaintiff, v. STATE FARM LIFE INSURANCE COMPANY, Defendant.	No. 2:16-cv-04170-NKL Oct. 12, 2018

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury.

__X__ Decision by Court. This action came to trial or hearing before the Court. The issues have been determined and a decision has been made.

IT IS ORDERED AND ADJUDGED that pursuant to the Order, Doc. 402, entered by the Honorable Nanette K. Laughrey on October 11, 2018, State Farm's motion to decertify the class, Doc. 352, is denied. It is further

ORDERED that pursuant to the Order, Doc. 403, entered by the Honorable Nanette K. Laughrey on October 11, 2018, State Farm's Rule 50 motions for judgment as a matter of law and its Rule 59 motion for a new trial, Docs 347 and 373, are denied. It is further

ORDERED that pursuant to the Order, Doc. 404, entered by the Honorable Nanette K. Laughrey on October 11, 2018, Plaintiffs' motion to amend the judgment (Doc. 377) is granted in part and denied in part. The class definition is amended to read as follows: "All persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri. The Class excludes: State Farm; any entity in which State Farm has a controlling interest; any of the officers, directors, or employees of State Farm; the legal representatives, heirs, successors, and assigns of State Farm; any State Farm independent contractor insurance agents; anyone employed with Plaintiffs' counsel's firms; and any Judge to whom this case is assigned and his or her immediate family. The Class also excludes the owners of 487 policies that were not subject to overcharges alleged by Plaintiffs (identified in Exhibit A) and the 55 policy owners of 62 policies who timely requested exclusion from the class (identified in Exhibit B)." The jury's award is reduced to $34,322,414.84. The judgment is amended to provide postjudgment interest at the rate of 2.23%, compounded annually beginning June 6, 2018 until paid. Plaintiff's proposed method of allocation and the proposal to appoint Angeion Group to oversee the distribution of net funds to the class each are approved. Plaintiffs' request for additional prejudgment interest is denied.

Date: October 12, 2018

/s/ PAIGE WYMORE-WYNN
Clerk of Court

/s/ RENEA MATTHES MITRA
By: Renea Matthes Mitra, Courtroom Deputy

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3419

Michael G. Vogt

Appellee

v.

State Farm Life Insurance Company

Appellant

Washington Legal Foundation, et al.

Amici on Behalf of Appellant(s)

Public Citizen

Amicus on Behalf of Appellee(s)

No: 18-3434

Michael G. Vogt

Appellant

v.

State Farm Life Insurance Company

Appellee

American Council of Life Insurers

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:16-cv-04170-NKL)
(2:16-cv-04170-NKL)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 24, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Michael E. Gans

APPENDIX G

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(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. The matters pertinent to these findings include:

(A) the class members' interests in individually control- ling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(C) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3) or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require to protect class members and fairly conduct the action giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class or a class proposed to be certified for purposes of settlement may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action

certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the

appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX H

STATE FARM LIFE INSURANCE COMPANY

HOME OFFICE: ONE STATE FARM PLAZA,
BLOOMINGTON, ILLINOIS 61710-0001

INSURED	MICHAEL G VOGT (Male)
AGE	54
POLICY NUMBER	LF -1722-5380
POLICY DATE	October 6, 1999
INITIAL BASIC AMOUNT	$100,000

This policy is based on the application and the payment of premiums, as specified in the policy, while the Insured lives. State Farm Life Insurance Company will pay the proceeds to the beneficiary when due proof of the Insured's death is received.

30-Day Right to Examine the Policy. This policy may be returned within 30 days of its receipt for a refund of all premiums paid. Return may be made to State Farm Life Insurance Company or one of its agents. If returned, this policy will be void from the policy date.

Read this policy with care. This is a legal contract between the Owner and State Farm Life Insurance Company.

/s/
Secretary

/s/
President

/s/
Registrar

BASIC PLAN DESCRIPTION

Flexible premium adjustable whole life insurance. A death benefit is payable when the Insured dies. Flexible premiums are payable while the Insured is alive. The basic plan is eligible for annual dividends.

CONTENTS

The Application and any Riders and Endorsements follow page 12.

POLICY IDENTIFICATION

Insured	MICHAEL G VOGT (Male)	Age	54
Policy Number	LF-1722-5380	Initial Basic Amount	$100,000
Policy Date	October 6, 1999		
Issue Date	October 6, 1999		

SCHEDULE OF BENEFITS

Universal Life Basic Plan:

Death Benefit Option 1 (Basic Amount includes the Account Value)

Basic Amount (Table 4 Rate Class-Male Non-Tobacco): $100,000

SCHEDULE OF PREMIUMS

The Initial Premium is $278.50.
Planned premiums are included in the schedule shown below. The payment period for the planned premiums is 1 month starting on November 6, 1999.
A premium expense charge of 5% is deducted from each premium paid.

Beginning:	Total Premiums For Policy Year
October 6, 1999	$1,800.00

MONTHLY DEDUCTIONS

The deduction date is the 6th of each month.

Maximum monthly cost of insurance rates are shown on page 4. The cost of insurance is deductible while the policy is in force.
The monthly expense charge is $5.00.

NOTE: Insurance may terminate if premiums paid are not sufficient to continue the insurance.

SCHEDULE OF SURRENDER CHARGES

Beginning Policy Year	Beginning Policy Month	Surrender Charger	Beginning Policy Year	Beginning Policy Month	Surrender Charger
1	1	$128.00	1	12	$1,536.00
1	2	256.00	2	1	1,536.00
1	3	384.00	3	1	1,536.00
1	4	512.00	4	1	1,344.00
1	5	640.00	5	1	1,152.00
1	6	768.00	6	1	960.00
1	7	896.00	7	1	768.00
1	8	1,024.00	8	1	576.00
1	9	1,152.00	9	1	384.00
1	10	1,280.00	10	1	192.00
1	11	1,408.00	11	1	0.00

COST OF INSURANCE RATES AND MONTHLY CHARGES

Maximum Monthly Cost of Insurance Rates Per $1000

(Table 4 Rate Class-Male Non-Tobacco)

Age	Rate	Age	Rate	Age	Rate	Age	Rate
54	1.3080	66	3.9005	78	10.745290		23.9588
55	1.4280	67	4.2886	79	11.531991		25.4318
56	1.5630	68	4.6444	80	12.361992		27.0871
57	1.7032	69	5.0168	81	13.258293		29.1442
58	1.8494	70	5.4647	82	14.252394		32.1253
59	2.0142	71	5.9870	83	15.342495		36.8122
60	2.2009	72	6.5723	84	16.487596		45.4751
61	2.4130	73	7.2229	85	17.684797		63.4414
62	2.6423	74	7.8601	86	18.906398		73.4224
63	2.9097	75	8.4847	87	20.126299		83.3333
64	3.2054	76	9.2095	88	21.3254	& over	
65	3.5459	77	9.9577	89	22.5843		

DEFINITIONS

We, us, and **our** refer to State Farm Life Insurance Company.

You and **your** refer to the Owner.

Application. Includes any life insurance application, any application for change in the policy, medical history, questionnaire, and other documents from you or any other person proposed for insurance which are made a part of this policy.

Basic Amount. The Initial Basic Amount plus any increases less any decreases.

Basic Amount Minimum. On or after the policy anniversary when the Insured is age 55, the Basic Amount cannot be less than $25,000. Otherwise, the Basic Amount cannot be less than $50,000.

Benefit Period Ends. The coverage for the benefit extends to, but does not include, the policy anniversary in the year shown on page 3 under this heading.

Deduction Date. The policy date and each monthly anniversary of the policy date.

Dollars. Any money we pay, or which is paid to us, must be in United States dollars.

Effective Date. Coverage starts on this date.

Initial Basic Amount. The amount of coverage on the Insured provided by the Basic Plan on the policy date.

Insurance Amount. The amount of coverage on the effective date of each rider shown on page 3.

Monthly Charge Deductible. A monthly charge for any rider is deducted as part of the monthly deduction

until the policy anniversary in the year shown on page 3.

Officer. The president, a vice president, the secretary, or an assistant secretary of State Farm Life Insurance Company.

Payee. On the Insured's death, the beneficiaries shown in the application, unless changed. If you cash surrender this policy, the persons that you have named. A payee can be other than a natural person only if we agree.

Planned Premium. The premium amount that you have chosen. This amount is shown on page 3 for the payment period that you have chosen.

Policy Date. The effective date of this policy.

Policy Month, Year, or Anniversary. A policy month, year, or anniversary is measured from the policy date.

Proceeds. The amounts payable on the death of the Insured.

Rate Class. The underwriting class of the person insured. A rate class will be determined for the Initial Basic Amount and each increase in the Basic Amount.

Request. A written request signed by the person making the request. Such request must be sent to and be in a form acceptable to us.

Rider. Any benefit, other than the Basic Plan, made a part of this policy.

OWNERSHIP PROVISIONS

Owner. The Owner is as named in the application, unless changed. You may exercise any policy provision only by request and while the Insured is alive.

Change of Owner. You may change the ownership of this policy by sending us a request while the Insured is alive. We have the right to request this policy to make the change on it. The change will take effect the date you sign the request, but the change will not affect any action we have taken before we receive the request. A change of owner does not change the beneficiary designation.

DEATH BENEFIT AND DEATH BENEFIT OPTIONS PROVISIONS

Death Benefit. The amount of death benefit is an amount of insurance based on the death benefit option plus any insurance amounts payable under any riders on the Insured and the part of the cost of insurance for the part of the policy month beyond the Insured's death less any loan, accrued loan interest, and, if the Insured dies during the grace period, the monthly deductions from the start of the grace period.

Death Benefit Options. There are two death benefit options. If you do not choose an option, we will use option 2. The account value on the date of death is used in determining the amount of insurance.

Option 1. The amount of insurance will be the greater of (1) the Basic Amount plus 95% of any premium received since the last deduction date plus interest earned on that amount of premium or (2) a percentage of the account value. Such percentage is

based on the Insured's age at the start of the current policy year.

Option 2. The amount of insurance will be the greater of (1) the Basic Amount plus the account value or (2) a percentage of the account value. Such percentage is based on the Insured's age at the start of the current policy year.

Percentage of Account Value Table

Age	Percentage	Age	Percentage
0-40	250%	61	128%
41	243%	62	126%
42	236%	63	124%
43	229%	64	122%
44	222%	65	120%
45	215%	66	119%
46	209%	67	118%
47	203%	68	117%
48	197%	69	116%
49	191%	70	115%
50	185%	71	113%
51	178%	72	111%
52	171%	73	109%
53	164%	74	107%
54	157%	75-90	105%
55	150%	91	104%
56	146%	92	103%
57	142%	93	102%
58	138%	94	101%
59	134%	95 & up	100%
60	130%		

Change in Basic Amount. You may request a change in the Basic Amount once each policy year. The minimum amount of change is $25,000 for an increase and $10,000 for a decrease. For any change in Basic Amount, we will send you a revised page 3 to be placed with this policy.

If you request an increase, an application must be completed, evidence of insurability satisfactory to us must be furnished, and there must be enough cash surrender value to make a monthly deduction which includes the cost of insurance for the increase. No increases will be allowed after the policy anniversary when the Insured is age 80. The revised page 3 will show the amount of the increase and its effective date.

If you request a decrease, the Basic Amount remaining after the decrease cannot be less than the Basic Amount Minimum. We reserve the right to not accept a request for a decrease in the Basic Amount if such decrease could result in this policy being disqualified as a life insurance contract under any section of the United States Internal Revenue Code, as amended from time to time. Any decrease will first be used to reduce the most recent increase. Then, the next most recent increases will be reduced. Finally, the Initial Basic Amount will be reduced. The revised page 3 will show the amount of decrease and its effective date. The decrease will take effect on the date we receive the request.

Change of Death Benefit Option. You may request a change of death benefit option once each policy year. For a change in death benefit option, we will send you a revised page 3 to be placed with this policy. The revised page will show the effective date of the change.

If the change is to option 1, the Basic Amount will be increased by the account value on the effective date of the increase. We reserve the right to not accept a request for a change to option 1 if such change could result in this policy being disqualified as a life insurance contract under any section of the United States Internal Revenue Code, as amended from time to time.

If the change is to option 2, the Basic Amount will be decreased by the account value on the effective date of the decrease.

PAYMENT OF BENEFITS PROVISIONS

Beneficiary Designation. This is as shown in the application, unless you have made a change. It includes the name of the beneficiary and the order and method of payment. If you name "estate" as a beneficiary, it means the executors or administrators of the last survivor of you and all beneficiaries. If you name "children" of a person as a beneficiary, only children born to or legally adopted by that person will be included.

We may rely on an affidavit as to the ages, names, and other facts about all beneficiaries. We will incur no liability if we act on such affidavit.

Change of Beneficiary Designation. You may make a change while the Insured is alive by sending us a request. The change will take effect the date the request is signed, but the change will not affect any action we have taken before we receive the request. We have the right to request your policy to make the change on it.

Order of Payment on the Insured's Death. When the Insured dies, we will make payment in equal

shares to the primary beneficiaries living when payment is made. If a primary dies after the first payment is made, we will pay that primary's unpaid share in equal shares to the other primaries living when payment is made. If the last primary dies, we will make payment in equal shares to the successor beneficiaries living when payment is made. If a successor dies while receiving payments, we will pay that successor's unpaid share in equal shares to the other successors living when payment is made. If, at any time, no primary or successor is alive, we will make a one sum payment in equal shares to the final beneficiaries. If, at any time, no beneficiary is living, we will make a one sum payment to you, if living when payment is made. Otherwise, we will make a one sum payment to the estate of the last survivor of you and all beneficiaries. "When payment is made" means (1) the date that a periodic payment is due or (2) the date that a request is signed for a cash withdrawal or a one sum payment. You may change this order of payment by sending us a request while the Insured is alive.

Methods of Payment. We will pay the proceeds under the Interest method unless you choose another method. If the payee is other than a natural person, we will make payment under the One Sum method,

All payment intervals are measured from the date the policy is surrendered or from the date the Insured dies. No part of any payment can be assigned before the payment is made.

After the Insured's death, anyone who has the right to make a withdrawal may change the method of payment and may name a successor to their interest. The successor payee may be their estate.

Method 1 (Interest Method). We will pay interest at the end of each monthly interval. The interest rate will be at least 3½% a year. If chosen, we will pay interest at the end of 3, 6, or 12 month intervals. Withdrawals may be made at any time, but any withdrawal must be at least $500. We will pay interest to the date of withdrawal on the amount withdrawn,

Method 2 (Fixed Years Method). We will make equal payments at the end of each monthly interval for a fixed number of years. These payments include interest. The guaranteed interest rate is 3½% a year. The present value of any unpaid payments may be withdrawn at any time.

FIXED YEARS TABLE

Monthly payments that $1000 will provide for the number of years chosen. Payments for years not shown will be given, if requested.

Years	Payments	Years	Payments
1	$84.90	8	$11.93
2	43.18	9	10.78
3	29.28	10	9.86
4	22.33	15	7.12
5	18.17	20	5.77
6	15.39	25	4.98
7	13.41	30	4.46

PAYMENT OF BENEFITS PROVISIONS (CONTINUED)

Method 3 (Life Income Method). We will make equal payments at the end of each monthly interval as long as the payee is alive. We base the amount of each payment on the payee's age and sex at the start of the

first monthly interval. We may require proof of the payee's age and sex. The payee may not withdraw the present value of the payments. If the payee dies during a certain period, we will continue the payments to the end of the certain period; or the successor payee may have the present value of any remaining payments paid in one sum.

LIFE INCOME TABLE

Monthly payments for life that $1000 will provide. Payments for ages not shown will be given, if requested.

	Life		Life with 10 Years Certain	
Age Last Birthday	**Male**	**Female**	**Male**	**Female**
50	$4.50	$4.15	$4.46	$4.13
55	4.91	4.48	4.84	4.45
60	5.47	4.92	5.34	4.86
65	6.25	5.53	5.98	5.41
70	7.34	6.38	6.76	6.12
75	8.85.	7.64	7.62	7.01

Method 4(Fixed Amount Method). We will make equal payments at the end of 1, 3, 6, or 12 month intervals. We will continue payments until the amount put under this method together with compound interest has been paid. The interest rate will be at least $3^1/_2$% a year. The payment interval chosen must provide a total annual payment of at least $100 for each $1000 put under this method. The unpaid balance may be withdrawn at any time.

Method 5 (Joint Life Income Method). We will make equal payments at the end of each monthly

interval as long as at least one of the two payees is alive. We will base each payment on the age and sex of both payees at the start of the first monthly interval. We may require proof of the age and sex of each payee. The payees may not withdraw the present value of any payments.

JOINT LIFE INCOME TABLE

Monthly payments that $1000 will provide as long as at least one of the two payees S alive. Payments for age combinations not shown will be given, if requested.

	Female			
Age Last Birthday Male	**60**	**65**	**70**	**75**
60	$4.45	$4.69	$4.91	$5.10
65	4.60	4.92	5.24	5.55
70	4.71	5.11	5.56	6.02
75	4.79	5.26	5.83	6.47

Method 6 (One Sum Method). We will pay the cash surrender value or the proceeds in one sum. Interest at the rate of at least 3½% a year will be paid from the date of the Insured's death to the date of payment.

Method 7 (Other Method). Payment by any other method may be made if we agree.

Minimum Payment. If any payment, except the last, under a method of payment would be less than $100 per payee, we will pay the present value of any unpaid payments in one sum.

Basis of Computation for Payments. The monthly payments shown for methods 3 and 5 are

guaranteed payments based on an interest rate of 3/% a year and the 1983 Table a, projected 10 years using Projection Scale G.

Any present values will be based on the interest rate used in determining the payments for the method.

Additional Amounts Payable. Each year we may apportion and pay dividends or additional interest under any method of payment.

PREMIUM PROVISIONS

Payment of Premiums. You may pay premiums at our Home Office, a regional office, or to one of our agents. We will give you a receipt signed by one of our officers, if you request one.

The initial premium is shown on page 3 and is due on the policy date. All other premiums may be paid in any amount and at any time if:

(1) the amount is at least $25 and

(2) in a policy year, the total premiums, excluding the initial premium, do not exceed without our consent, the total Planned Premiums for a policy year.

Premium Limitations. We reserve the right to refund any premium paid if such premium amount would result in this policy being disqualified as a life insurance contract under any section of the United States Internal Revenue Code, as amended from time to time. No expense charge will be deducted from the refunded premium.

Grace Period. If, on any deduction date, the cash surrender value is not enough to cover the monthly deduction, the policy will stay in force until the end of the grace period. The grace period is 61

days and starts on that deduction date. We will mail a notice at least 31 days prior to the end of the grace period to you and to any assignee of record. A premium large enough to cover the monthly deductions for the grace period and any increase in the surrender charges must be paid before the end of the grace period; otherwise, this policy will lapse and terminate without value.

Reinstatement. If the policy is terminated at the end of the grace period, you may apply to reinstate it within 5 years after lapse. You must give us proof of the Insured's insurability that is satisfactory to us. You must pay premiums (1) to keep the policy in force for 2 months and (2) to pay the monthly deductions for the grace period. Reinstatement will take effect on the date we approve the application for reinstatement.

GUARANTEED VALUES PROVISIONS

Account Value. The account value on the policy date is 95% of the initial premium less the monthly deduction for the first policy month.

The account value on any deduction date after the policy date is the account value on the prior deduction date:

(1) plus 95% of any premiums received since the prior deduction date,

(2) less the deduction for the cost of insurance for any increase in Basic Amount and the monthly charges for any riders that became effective since the prior deduction date,

(3) less any withdrawals since the prior deduction date,

(4) less the current monthly deduction,

(5) plus any dividend paid and added to the account value on the current deduction date, and

(6) plus any interest accrued since the prior deduction date.

The account value on any other date is the account value on the prior deduction date:

(1) plus 95% of any premiums received since the prior deduction date,

(2) less the deduction for the cost of insurance for any increase in Basic Amount and the monthly charges for any riders that became effective since the prior deduction date,

(3) less any withdrawals since the prior deduction date, and

(4) plus any interest accrued since the prior deduction date.

Monthly Deduction. This deduction is made each month, whether or not premiums are paid, as long as the cash surrender value is enough to cover that monthly deduction. Each deduction includes:

(1) the cost of insurance,

(2) the monthly charges for any riders, and

(3) the monthly expense charge.

GUARANTEED VALUES PROVISIONS (CONTINUED)

Cost of Insurance. This cost is calculated each month. The cost is determined separately for the Initial Basic Amount and each increase in Basic Amount.

The cost of insurance is the monthly cost of insurance rate times the difference between (1) and (2), where:

(1) is the amount of insurance on the deduction date at the start of the month divided by 1.0032737, and

(2) is the account value on the deduction date at the start of the month before the cost of insurance and the monthly charge for any waiver of monthly deduction benefit rider are deducted.

Until the account value exceeds the Initial Basic Amount, the account value is part of the Initial Basic Amount. Once the account value exceeds that amount, if there have been any increases in Basic Amount, the excess will be part of the increases in order in which the increases occurred.

Monthly Cost of Insurance Rates. These rates for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class. A rate class will be determined for the Initial Basic Amount and for each increase. The rates shown on page 4 are the maximum monthly cost of insurance rates for the Initial Basic Amount. Maximum monthly cost of insurance rates will be provided for each increase in the Basic Amount. We can charge rates lower than those shown. Such rates can be adjusted for projected changes in mortality but cannot

exceed the maximum monthly cost of insurance rates. Such adjustments cannot be made more than once a calendar year.

Interest. An interest rate of at least 4% a year will be applied to the account value. The rate applied to the amount of account value up to the amount of any loan may differ from the rate applied to the account value in excess of the amount of any loan. We will determine these rates at least once a year.

Cash Surrender Value. You may request surrender of this policy at any time. This policy will terminate on the date we receive the request or later date if you so request it. We will pay you the cash surrender value as of the date coverage ceases plus the monthly deduction for the part of the policy month beyond that date. We will pay you in one sum unless you choose another method of payment. The cash surrender value of this policy is its account value less any surrender charge and any loan and accrued loan interest. The cash surrender value will not be less than zero. If this policy is surrendered within 31 days after a policy anniversary, the cash surrender value will not decrease within that period except for any loans or withdrawals. We may defer paying you the cash surrender value for up to six months after receiving your request.

Surrender Charge. The schedule of surrender charges is shown on page 4. For each increase in Basic Amount, additional surrender charges will apply. The revised page 4 will show a revised schedule of surrender charges which includes those additional charges.

Upon reinstatement, the surrender charges will be adjusted for any surrender charge deducted at the time

of lapse. The revised page 4 will show a schedule of the adjusted surrender charges.

Withdrawals. You may request to withdraw part of the account value while this policy is in force. No more than 4 withdrawals can be made in any policy year. Any withdrawal must be at least $500 and must be less than the cash surrender value. We may defer paying you a withdrawal for up to six months unless the withdrawal is to pay premiums on other policies with us.

If death benefit option 1 is in effect, then the Basic Amount will be reduced by the withdrawal, effective with the date of the withdrawal. The reduction will be made as if a decrease in the Basic Amount had been requested.

GUARANTEED VALUES PROVISIONS (CONTINUED)

Basis of Computation. The guaranteed values in this policy are at least as large as those required by law in the state where it is delivered. The insurance authority there has a statement of how these values are determined.

The guaranteed values and maximum cost of insurance rates are based on the Insured's age last birthday and sex, The interest rate is 4% a year. The Commissioners 1980 Standard Ordinary Mortality Table is used. Modifications are made for rate classes other than standard.

POLICY LOAN PROVISIONS

Loan. You may borrow against this policy. This policy is the sole security for such loan. We may defer a loan for up to 6 months after receiving your request unless the loan will be used to pay premiums on other policies with us.

You may borrow the loan value less any existing loan and accrued interest and monthly deductions for the next 2 months. If your unpaid loan plus accrued interest exceeds the loan value on the monthly deduction date, the Grace Period provision will apply.

Loan Value. The loan value is the account value of this policy less the surrender charge.

Loan Interest. Interest accrues and is payable each day at a rate of 8% a year. Any interest not paid is added to the loan on each policy anniversary.

Loan Repayment. You may repay all or part of a loan at any time before the Insured dies or the policy is surrendered or terminated.

GENERAL PROVISIONS

The Contract. The policy contains the Basic Plan, any amendments, endorsements, and riders, and a copy of the application. A copy of any application for a change to this policy will be sent to you to be placed with the policy. Such applications become part of this policy. The policy is the entire contract. We have relied on the statements in the application in issuing this policy, We reserve the right to investigate the truth and completeness of those statements. In the absence of fraud, they are representations and not warranties. Only statements in the application will be used to rescind this policy or deny a claim.

Only an officer has the right to change this policy. No agent has the authority to change the policy or to waive any of its terms. All endorsements, amendments, and riders must be signed by an officer to be valid.

Annual Report. Each year, we will send you a report. This report will show:

(1) the account value, the cash surrender value, any loan and accrued loan interest, and the amount of the death benefit as of the date of the report and

(2) any premiums paid, any deductions made, and any withdrawals made since the last report.

Projection of Benefits and Values. You may request a projection of death benefits, account values, and cash surrender values. We may charge a reasonable fee for providing this projection.

GENERAL PROVISIONS (CONTINUED)

Annual Dividends. We do not expect to pay dividends on this policy; however, we may apportion and pay dividends each year. All dividends apportioned will be derived from the divisible surplus of our participating business. Any such dividends will be paid only at the end of the policy year. There is no right to a partial or pro rated dividend prior to the end of the policy year.

Dividend Options. You may choose to have your dividend used under one of these options:

1. **Cash**. We will pay it to you in cash.
2. **Addition to Account Value**. We will add it to the account value at the end of the policy year.

If you do not choose an option or the option you choose is not available, we will use option 2. You may request to change the option. The change will apply only to dividends paid after we receive the request.

Assignment. You may assign this policy or any interest in it. We will recognize an assignment only if it is in writing and filed with us. We are not responsible for the validity or effect of any assignment. An assignment may limit the interest of any beneficiary.

Error in Age or Sex. If the Insured's date of birth or sex is not as stated in the application, we will adjust each benefit on the Insured to the benefit payable had the Insured's age and sex been stated correctly. Such adjustment will be based on the ratio of the correct monthly deduction for the most recent deduction date for that benefit to the monthly deduction that was made. For the Basic Plan, the adjustment is made to the amount of insurance less the account value.

Incontestability. We will not contest the Basic Plan after it has been in force during the Insured's lifetime for two years from the earlier of the policy date or the issue date of the policy. We will not contest any increase in Basic Amount or reinstatement after it has been in force during the lifetime of the Insured for two years from the effective date of the increase in Basic Amount or reinstatement. We will not contest an increase due to a change to Death Benefit Option 1. Any contest of any increase in Basic Amount or reinstatement will be limited to material statements contained in the application for such increase or reinstatement.

Each rider has its own incontestability provision.

Limited Death Benefit. If the Insured dies by suicide while sane or by self-destruction while insane within two years from the earlier of the policy date or

the issue date of the policy, the Basic Amount will not be paid. The proceeds in this case will be limited to the premiums paid on the Basic Plan less any loan, accrued loan interest, any withdrawals from the account value, and any dividends paid on the Basic Plan.

Any increase in Basic Amount or amount reinstated will not be paid if the Insured's death results from suicide while sane or self-destruction while insane within two years from the effective date of such increase or reinstatement. The proceeds of the increase will be limited to the monthly deductions for the increase. This does not apply to an increase due to a change to Death Benefit Option 1. The proceeds of a reinstated policy will be limited to the premiums paid on the Basic Plan since reinstatement less any loan, accrued loan interest, any withdrawals from the account value, and any dividends paid on the Basic Plan.

Suicide or self-destruction is no defense to payment of proceeds under this policy where this policy is issued to a Missouri citizen, unless we can show that the Insured intended suicide or self-destruction when this policy, an increase, or reinstatement was applied for.

Each rider has its own limited death benefit provision.

State Farm Insurance Companies 

STATE FARM LIFE INSURANCE COMPANY

AMENDMENT OF APPLICATION

I, Michael G Vogt, amend my application dated August 30, 1999, as follows:

Issue with a Table 4 rating.

Issue without the Waiver of Monthly Deduction Benefit Rider.

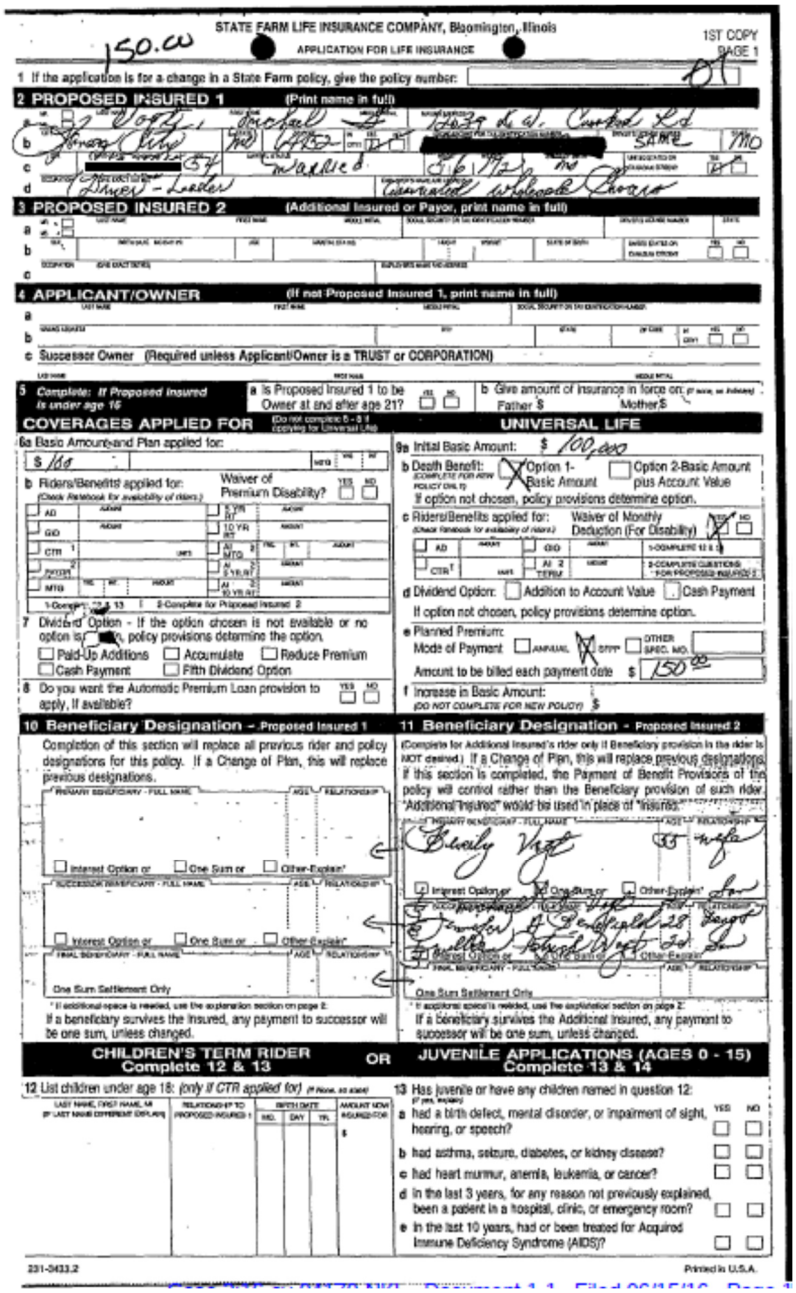
I agree that this amendment will control over any conflicting language contained in the application. The consideration for this amendment issuance of the policy with the above agreed upon changes.

Dated on _____at _____

_____ _____

Signature of Agent as witness Signature of Application or Owner

Policy No. LF-1722-5380
2-31-1634.2



STATE FARM LIFE INSURANCE COMPANY, Bloomington, Illinois

APPLICATION FOR LIFE INSURANCE

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PAGE 1

150.00

1 If the application is for a change in a State Farm policy, give the policy number:

2 PROPOSED INSURED 1 (Print name in full)

3 PROPOSED INSURED 2 (Additional Insured or Payor, print name in full)

4 APPLICANT/OWNER (If not Proposed Insured 1, print name in full)

c Successor Owner (Required unless Applicant/Owner is a TRUST or CORPORATION)

5 Complete: If Proposed Insured is under age 16 — a Is Proposed Insured 1 to be Owner at and after age 21? — b Give amount of insurance in force on: Father $ Mother $

COVERAGES APPLIED FOR (Do not complete 6 - 8 if applying for Universal Life)

UNIVERSAL LIFE

6a Basic Amount and Plan applied for: $ 100

b Riders/Benefits applied for: (Check Rulebook for availability of riders.) Waiver of Premium Disability?

7 Dividend Option - If the option chosen is not available or no option is chosen, policy provisions determine the option.
Paid-Up Additions Accumulate Reduce Premium
Cash Payment Fifth Dividend Option

8 Do you want the Automatic Premium Loan provision to apply, if available?

9a Initial Basic Amount: $ 100,000

b Death Benefit: Option 1- Basic Amount Option 2-Basic Amount plus Account Value
If option not chosen, policy provisions determine option.

c Riders/Benefits applied for: Waiver of Monthly Deduction (For Disability)

d Dividend Option: Addition to Account Value Cash Payment
If option not chosen, policy provisions determine option.

e Planned Premium: Mode of Payment ANNUAL SEMI-ANNUAL QTRLY OTHER SPEC. MO.
Amount to be billed each payment date $ 150.00

f Increase in Basic Amount: (DO NOT COMPLETE FOR NEW POLICY) $

10 Beneficiary Designation - Proposed Insured 1

Completion of this section will replace all previous rider and policy designations for this policy. If a Change of Plan, this will replace previous designations.

PRIMARY BENEFICIARY - FULL NAME — AGE — RELATIONSHIP

Interest Option or One Sum or Other-Explain*

SUCCESSOR BENEFICIARY - FULL NAME — AGE — RELATIONSHIP

Interest Option or One Sum or Other-Explain*

FINAL BENEFICIARY - FULL NAME — AGE — RELATIONSHIP

One Sum Settlement Only

* If additional space is needed, use the explanation section on page 2.

If a beneficiary survives the Insured, any payment to successor will be one sum, unless changed.

11 Beneficiary Designation - Proposed Insured 2

(Complete for Additional Insured's rider only if Beneficiary provision in the rider is NOT desired.) If a Change of Plan, this will replace previous designations. If this section is completed, the Payment of Benefit Provisions of the policy will control rather than the Beneficiary provision of such rider. "Additional Insured" would be used in place of "Insured."

PRIMARY BENEFICIARY - FULL NAME — AGE — RELATIONSHIP

Interest Option or One Sum or Other-Explain*

SUCCESSOR BENEFICIARY - FULL NAME — AGE — RELATIONSHIP

Interest Option or One Sum or Other-Explain*

FINAL BENEFICIARY - FULL NAME — AGE — RELATIONSHIP

One Sum Settlement Only

* If additional space is needed, use the explanation section on page 2.

If a beneficiary survives the Additional Insured, any payment to successor will be one sum, unless changed.

CHILDREN'S TERM RIDER Complete 12 & 13 OR JUVENILE APPLICATIONS (AGES 0 - 15) Complete 13 & 14

12 List children under age 18: (only if CTR applied for) (If None, so state)

LAST NAME, FIRST NAME, MI (IF LAST NAME DIFFERS, EXPLAIN) — RELATIONSHIP TO PROPOSED INSURED 1 — BIRTH DATE MO. DAY YR. — AMOUNT NOW INSURED FOR $

13 Has juvenile or have any children named in question 12: (IF YES, EXPLAIN)

	YES	NO
a had a birth defect, mental disorder, or impairment of sight, hearing, or speech?	☐	☐
b had asthma, seizure, diabetes, or kidney disease?	☐	☐
c had heart murmur, anemia, leukemia, or cancer?	☐	☐
d in the last 3 years, for any reason not previously explained, been a patient in a hospital, clinic, or emergency room?	☐	☐
e in the last 10 years, had or been treated for Acquired Immune Deficiency Syndrome (AIDS)?	☐	☐

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APPLICATION FOR LIFE INSURANCE

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ALL Applications Complete 14

14a Do you have personal and business life insurance of more than $200,000?

b Do you have any accidental death insurance excluding group?

c Will this policy replace or change insurance or annuities you now have?

d Are you now applying for life or health insurance with any other company?

e Do you plan to leave or travel from the United States or Canada in the next 6 months?

Applications (Ages 16 & Up):
-If NO Medical Exam required complete 15 - 20
-If Medical Exam required complete 15, 16, 18a, & 18e.

15 Have you used tobacco in any form in the last 12 months?

16 Have you, in the last 3 years:

a flown as a pilot, crew member, or a student pilot in aircraft such as an airplane, helicopter, glider, or ultralight? Or, is any such activity planned in the next 6 months?

b engaged in avocations such as mountain or rock climbing, auto, motorcycle, or powerboat racing, scuba or sky diving, hang gliding, or ballooning? Or, is any such activity planned in the next 6 months?

c had your driver's license suspended or revoked, had any moving violations, had 2 or more accidents, or been charged with driving under the influence of alcohol or drugs?

17 Have you ever:

a applied for or received disability benefits?

b had an impairment or loss of sight or hearing, or an impairment of neck, back, or limb?

18 Have you, in the last 10 years, had or been treated for:

*a high blood pressure, stroke, heart murmur, chest pain, heart attack, tumor, cancer, or lymph gland disorder?

b mental, nervous, or convulsive disorder; or epilepsy?

c pneumonia, emphysema, asthma; ulcer, colitis, liver, or intestinal disorder; anemia or blood disorder?

d diabetes, arthritis, sexually transmitted disease, or kidney disease?

*e Acquired Immune Deficiency Syndrome (AIDS)?

f chronic diarrhea, unexplained weight loss, recurrent fever, fatigue, or night sweats?

19 Have you, in the last 5 years:

a used cocaine, marijuana, hallucinogenic drugs, or narcotics not prescribed by a physician?

b been treated or counseled, or advised to seek treatment or counsel, for alcohol or drug use?

20 Have you, in the last 5 years, for any reason not previously explained:

a had treatment or a test in any medical facility such as a lab, clinic, emergency room, or hospital?

b had treatment or advice from any physician or psychologist?

c taken prescribed medication?

d had surgery or been told surgery was necessary?

* **AGENT - If yes, it may be advisable not to collect money or give a Binding Receipt - Consult Agents Service for specific instructions.**

Explanations: If space below is insufficient, use additional sheets, which will be part of this application. Sheets must be signed & dated by Proposed Insured(s) and/or Applicant, and witnessed by Agent.

QUESTION NUMBER	NAME OF PERSON	NATURE AND SEVERITY OF CONDITION - FREQUENCY OF ATTACKS - TREATMENT RECEIVED	DATES ONSET MO. YR.	DATES RECOVERY MO. YR.	NAMES & ADDRESSES OF MEDICAL ATTENDANTS AND HOSPITALS
18A	Michael	S.W. Nurse			[illegible] Holland Clinic
18D		marginal			"

Coverage will be effective as of the policy date if the following conditions are met: the first premium is paid when the policy is delivered; the Proposed Insureds are living on the delivery date; and, on that delivery date, the information given to State Farm Life is true and complete without material changes.

For changes in Basic Amount for a Universal Life Policy, the change will be effective on the deduction date on or next following acceptance of the change by State Farm Life if on such deduction date the following conditions are met: there is enough cash surrender value to make the required deduction; the Proposed Insureds are all living; and the information given to State Farm Life is true and complete without material changes.

However, if a binding receipt has been given and is in effect, its terms apply.

All Proposed Insureds and the Applicant state that the information in this application and any medical history is true and complete. It is agreed that State Farm Life can investigate the truth and completeness of such information while the policy is contestable.

By accepting the policy, the Owner agrees to the beneficiaries named, method of payment, and corrections made. No change in plan, amount, benefits, or age at issue may be made on the application unless the Owner agrees in writing. Only an authorized company officer may change the policy provisions. Neither the agent nor a medical examiner may pass on insurability.

Social Security or Tax Identification Number (TIN) Certification - By signing this application, I certify under penalties of perjury that (1) the TIN shown above is correct, and (2) that I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding. *(If you are subject to backup withholding, cross out item 2.)* The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding.

Any policy issued on this application will be owned by Proposed Insured 1 or the Applicant, if other than Proposed Insured 1.

DATED ON 8-30-99 MONTH DAY YEAR

AT [illegible]

Signature of Agent as Witness to all Signatures [illegible]

Signature of Proposed Insured 1 X Michael G. Vogt

Signature of Proposed Insured 2 X

Signature of Applicant X

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STATE FARM INSURANCE COMPANIES
HOME OFFICES: BLOOMINGTON, ILLINOIS 61710-0001

☐ STATE FARM LIFE INSURANCE COMPANY
☐ STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY - HEALTH INSURANCE DEPARTMENT

MEDICAL EXAMINER'S REPORT-ADULT (PARAMEDICAL)
MEDICAL HISTORY portion of LIFE and/or HEALTH INSURANCE APPLICATION File No.(s)

1. a. Name of Proposed Insured: Michael G. Vogt — Birthdate [redacted]

2. a. Name and Address of Personal Physician or Clinic (If none, so state.) Dr. Martin Kahne - 9411 N. Oak Trfwy, K.C. MO 64155

b. Date and Reason Last Seen and Treatment Given? (List medications prescribed, indicating those still being administered.) May 99 - annual physicals c̄ CXR, EKG, Blood - all good results. Refill RX Glipizide - F&G

3. Have you, in the last 10 years, had or been treated for:	Yes	No
a. Disorder of (eyes) ears, nose, or throat?	☒	☐
b. Dizziness, fainting, epilepsy, convulsions; frequent or severe headaches; paralysis or stroke; or mental or nervous disorder?	☐	☒
c. Shortness of breath, allergy, asthma, emphysema, pneumonia or other respiratory disorder?	☐	☒
d. Chest pain, (high blood pressure), heart murmur, heart attack, or other disorder of the heart?	☒	☐
e. Ulcer, hernia, chronic diarrhea, or colitis; or disorder of the stomach, intestines, liver, or gallbladder?	☐	☒
f. Varicose veins, hemorrhoids, or rectal disorder?	☐	☒
g. Sugar, albumin, blood or pus in the urine; stones or other disorder of the kidneys, or bladder?	☐	☒
h. (Diabetes); thyroid or other endocrine disorders?	☒	☐
i. Sexually transmitted disease; disorder of breasts or breast implants, prostate or reproductive organs?	☐	☒
j. Arthritis; injury or disorder of the spine, neck or back, arm, leg, shoulder, wrist, hand, hip, knee, ankle, or foot?	☐	☒
k. Deformity or amputation?	☐	☒
l. Disorder of skin or lymph glands, cyst, tumor, or cancer?	☐	☒
m. Leukemia, anemia, immune deficiency or any other blood disorder?	☐	☒
n. Recurrent fever, fatigue or night sweats?	☐	☒
4. Are you now receiving any treatment or taking prescribed medication? See 2b	☒	☐
5. To the best of your knowledge and belief, are you now pregnant or ever had complications of pregnancy including cesarean section?	N/A	
6. Have you in the last 5 years:		
a. Used cocaine, marijuana, hallucinogenic drugs, or narcotics not prescribed by a physician?	☐	☒
b. Been treated or counseled, or been advised to seek treatment or counsel, for alcohol or drug use?	☐	☒
7. Have you had any unexplained change in weight in the last 12 months?	☐	☒
8. Other than above, have you, in the last 5 years:		
a. Had any mental or physical disorder not listed above?	☐	☒
b. Had or been advised to have treatment or a test in any medical facility such as a lab, clinic, emergency room, or hospital?	☐	☒
c. Had or been told an electrocardiogram or x-ray was necessary?	☒	☐
d. Had surgery or been told surgery was necessary?	☐	☒
9. Have you, in the last 3 years, claimed or received any benefits because of injury, sickness, or disability?	☐	☒
10. Have you used tobacco in any form in the last 12 months? (If yes, explain)	☐	☒
11. Has your father, mother, or any brother or sister ever had (diabetes), (cancer), kidney disease or mental illness? Have any had high blood pressure, stroke, or heart disease before age 60?	☒	☐

DETAILS of "Yes" answers. (IDENTIFY QUESTION NUMBER, CIRCLE APPLICABLE ITEMS: Include diagnoses, dates, duration, and names and addresses of all attending physicians and medical facilities.) Diabetes 1st Dx'ed 1998 - good results c̄ RX

2b. Norvasc ī qd for HTN - 1st Dx'ed 1971
Lipitor ī qd for elevated cholesterol since March 99. Dr. Howard Rosen - endocrinologist 2750 Clay Edwards Dr., N. Kansas City, MO
Dr. Rosen does q 6 month blood work to monitor diabetes & cholesterol - last checked June 99 - WNL.

3A. May 1999 - (L) eye cataract removed - good results. Dr. Stephen Wiles - 211 NE 54th, K.C., MO 64118
Liberty Hospital - out pt.
2525 Glen Hendren Dr., Liberty, MO

3d. See 2b.
3h. See 2b.

8C. Routine colonoscopy q 3 years - last one June 99 - all neg results.
3 benign polyps Removed
Dr. Paul Torres (Same address at 2A)
St. Lukes Northland - 5830 NW Barry Rd. K.C., MO 64153

11. Mother & Father - adult onset diabetes
Father - died age 57 - colon cancer
2 sisters & 1 brother - adult onset diabetes

I state that all information in this medical history is true and complete to the best of my knowledge and belief. This medical history will be part of my application.

Witness X *[signature]* LISA DUNN
Signature of Examiner or Paramedical Laboratory Technician

Dated On 9-30 (Month, Day) 99 (YR)

X *Michael G. Vogt*
SIGNATURE OF PROPOSED INSURED

231-2199.3 05-1998 Printed in U.S.A.

BASIC PLAN DESCRIPTION

Flexible premium adjustable whole life insurance. A death benefit is payable when the Insured dies. Flexible premiums are payable while the Insured is alive. The basic plan is eligible for annual dividends.