No. 21-80132

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LESTER I. SPIELMAN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Respondent,

V.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant-Petitioner.

On Petition for Review from the United States District Court
for the Central District of California
Case No. 2:19-cv-01359-TJH-MAA
The Honorable Terry J. Hatter Jr.

RESPONDENT LESTER I. SPIELMAN'S OPPOSITION TO PETITION FOR PERMISSION TO APPEAL ORDER GRANTING CLASS CERTIFICATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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INTRODUCTION

Rule 23(f) review of an interlocutory class certification decision should be limited to rare cases involving highly unusual circumstances. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955-59 (9th Cir. 2005). This is not one of those cases. It is a simple case of contract interpretation—a prime example of litigation best suited for class treatment.[1] The District Court recognized this, finding (correctly) that interpretation of a form auto insurance policy will drive resolution of the case and determine in one fell swoop whether Defendant United Services Automobile Association ("USAA") is liable to Plaintiff Lester Spielman and all Class Members.

USAA's Rule 23(f) petition argues that the District Court's decision was "manifestly erroneous," but it fails to identify any genuine errors that warrant interlocutory review. To be "manifestly erroneous" for the purpose of Rule 23(f), a district court decision must be so facially deficient in its application of the applicable law that reversal on appeal is a near certainty. *Id.* at 962. Far from that, the District

[1] Every court to address the question has concluded that class treatment is appropriate for claims alleging, as here, that an insurer breached its policy by failing to include sales tax and/or mandatory fees in actual cash value payments. *See, e.g.*, *Davis v. GEICO Cas. Co.*, No. 2:19-CV-2477, 2021 WL 5877843 (S.D. Ohio Dec. 13, 2021); *Paris v. Progressive Am. Ins. Co.*, No. 19-21761-CIV, 2020 WL 7039018 (S.D. Fla. Nov. 13, 2020); *Joffe v. GEICO Indem. Ins. Co.*, No. 18-61361-CIV, 2019 WL 5078228 (S.D. Fla. July 31, 2019); *Sos v. State Farm Mut. Auto. Ins. Co.*, No. 6:17-CV-890, 2019 WL 3854761 (M.D. Fla. May 2, 2019); *Jones v. Gov't Emps. Ins. Co.*, No. 6:17-CV-891O, 2019 WL 1490703 (M.D. Fla. Apr. 4, 2019); *Roth v. GEICO Gen. Ins. Co.*, No. 16-62942-CIV, 2018 WL 9403428 (S.D. Fla. May 4, 2018).

Court's decision here was sound and well supported. It correctly identified and applied the Rule 23(a) prerequisites for class certification and the additional requirements of Rule 23(b)(3). It considered and cited settled Ninth Circuit precedent in reaching its decision. And its decision to certify the class was backed by a well-developed factual record.

USAA raises several issues that it believes the District Court should have discussed, but this Court has made clear that a class certification order is not manifestly erroneous just because it is concise. *Id.*; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). That is especially true here because USAA opposes class certification primarily based on merits issues that are irrelevant at this stage. For example, it argues that the District Court should have discussed "the California law applicable to the adjustment of total loss claims" or the tax treatment of leased vehicles under leasing agreements or California law. Those factual issues would at most be relevant to how USAA's auto policy is interpreted, if at all. They are *not* relevant to whether Mr. Spielman met his burden of showing that this case meets Rule 23's requirements for class treatment.

USAA also claims that it was manifest error for the District Court to decline to address USAA's predominance and ascertainability arguments, but this is incorrect for multiple reasons. First, these are issues regarding application of the law to the particular *facts* of this case, and such case-specific factual determinations—

even if might be incorrect (they *are* correct)—don't justify Rule 23(f) review because they don't involve application of an incorrect *legal* standard. *Chamberlan*, 402 F.3d at 959.

Second, addressing those issues would not have changed the outcome because they were based on mischaracterizations of law and, again, don't bear on the Rule 23 analysis. USAA speculates, as it did before the District Court, that hypothetical "variations in class members' lease forms" could impact Class Members' standing to sue, but USAA failed to identify any true examples of such variations, confused standing to sue (which this Court's case law makes clear that all Class Members have by virtue of USAA depriving them of their benefit of the bargain) with the real party in interest requirement, and failed to explain how any such individualized issues, if they exist at all, would predominate over the central contract-interpretation issues.

USAA further argues that the District Court should have addressed "limitations" to USAA's "data systems" in its certification order. But USAA's arguments about its poor recordkeeping only relate to ascertainability or the calculation of class-wide damages. There was thus no need to discuss "data systems" because in the Ninth Circuit there is no ascertainability requirement, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124-25 (9th Cir. 2017), and because in the Ninth Circuit the calculation of damages cannot defeat class certification, *Vaquero*

v. Ashley Furniture Indus., Inc., 824 F.3d 1150, 1155 (9th Cir. 2016). As a result, some purported failure to discuss evidence bearing on ascertainability or damages calculation cannot be any manifest error in the application of a legal standard.

Further, USAA's argument that the District Court should have specifically discussed the superiority requirement carries no weight because the record before the Court made it "readily apparent" that this factor was satisfied. *Chamberlan*, 402 F.3d at 962. And USAA makes much of the fact that the class definition purportedly contains an entity that is no longer a part of this case, but this is incorrect and is a harmless technical nit in any event.

For these and all of the reasons discussed herein, USAA cannot meet the *Chamberlan* standard. Interpretation of USAA's form auto insurance policy is the linchpin of this litigation, and it predominates over any individualized issues that might arise (and which USAA failed to identify or support with evidence). The District Court correctly recognized this and certified the class accordingly. That decision applied the correct legal standard and is supported by the record and briefing below. USAA's misguided arguments did not win the day in the District Court, and they don't win the day here. This Court should deny USAA's Rule 23(f) petition.

QUESTION PRESENTED

Should this Court take the exceedingly rare and extraordinary step of exercising Rule 23(f) review when the District Court's decision indisputably does not create a "death knell" situation for USAA, indisputably does not involve unsettled issues of great importance to class action law, and does not demonstrate any manifest legal errors?

CASE BACKGROUND

Throughout the Class Period, USAA used a standardized California form automobile insurance policy ("Policy"). D.E. 89 at 5-6. The Policy, which provides collision coverage, states that USAA will pay for loss, defined as "direct and accidental damage to the operational safety, function, or appearance of" a covered vehicle. *Id.* USAA's liability to pay to repair or replace the vehicle is limited to the vehicle's pre-loss Actual Cash Value ("ACV"). *Id.* at 6. The Policy defines ACV as "the amount that it would cost, at the time of loss, to buy a vehicle of the same make, model, body type, model year, and equipment, with substantially similar mileage and physical condition." *Id.* The Policy's definition of ACV makes no distinction between owned and leased vehicles. *Id.*

Mr. Spielman, who insured a leased vehicle with USAA in California, asserts that where USAA declines to pay to repair a damaged vehicle and instead considers the vehicle a "total" loss, this standardized language requires USAA to pay ACV—*i.e.*, the amount it would cost to replace the vehicle with one comparable to the total-

loss vehicle at the time it was lost—regardless whether the vehicle is owned or leased by the insured. Mr. Spielman argues that USAA breached the Policy by refusing to pay California insureds with leased vehicles the full ACV when their vehicles were determined to be a total loss. Specifically, USAA refused to pay these insureds sales tax based on the value of the lost vehicle, calculated as the applicable percentage of the underlying adjusted vehicle value ("ACV Sales Tax"). It likewise failed to pay them the mandatory title and registration fees necessary and mandatory to purchase a vehicle in California ("ACV Regulatory Fees").

Although the Policy defines ACV as the cost to *buy* a replacement vehicle comparable to the lost vehicle and applies that definition to *any* vehicle listed in the declarations, although Sales Tax and Regulatory Fees are a necessary cost of purchasing a replacement vehicle and therefore are part of the ACV of an insured vehicle (regardless whether the lost vehicle was owned or leased), and although USAA uniformly paid full ACV Sales Tax and Regulatory Fees to insureds with owned vehicles throughout the Class Period, USAA uniformly refused to pay these same taxes and fees to insureds with leased vehicles. *Id.* at 8-11. Instead, it conditioned payment of these ACV components on the amount of sales taxes and fees incurred by the insureds to pay for the *lost* vehicle, rather than paying these amounts based upon the cost to replace that vehicle.[2] *Id.* at 4.

[2] As of September 12, 2020, USAA changed its practice and now pays the same

Mr. Spielman accordingly brought this action on behalf of himself and similarly situated California insureds with leased vehicles to recover the ACV amounts that USAA failed to pay on their total loss claims. He sought certification of the following class:

> All individuals and entities in California insured by United Services Automobile Association or USAA Casualty Insurance Company whose insurance covered or covers a leased vehicle with private-passenger physical damage coverage, including collision or physical damage other than collision coverage, who made a first-party claim, filed within four years of the date the lawsuit was filed through September 12, 2020, that was adjusted by United Services Automobile Association or USAA Casualty Insurance Company as a total loss and who received an actual cash value payment from United Services Automobile Association or USAA Casualty Insurance Company that did not include sales tax and/or Vehicle Title and Registration Fees.

Id. at 2. As Mr. Spielman acknowledged in his reply in support of his motion to certify the class, the reference in the proposed class definition to USAA Casualty Insurance Company—which was previously dismissed—was inadvertent. D.E. 96 at 1 n.1.

USAA opposed class certification and filed a brief largely comprised of merits arguments, which simply reinforced the propriety of certifying the class, and irrelevant arguments, which sought to impose ascertainability and administrative-feasibility requirements that this Court has repeatedly rejected. *See generally* D.E. 93; D.E. 96 at 2-6 (explaining irrelevance and inappropriateness of USAA's arguments).

ACV to policy holders with leased vehicles that it has always paid to policy holders with owned vehicles. D.E. 89 at 1 n.1.

The District Court granted Mr. Spielman's motion to certify the class. D.E. 100. In its certification order, the Court observed that Mr. Spielman bore the burden of establishing the "four threshold requirements of Fed. R. Civ. P. 23(a): (1) Numerosity of proposed class members; (2) Commonality of issues of fact and law; (3) Typicality of the named representatives' claims; and (4) Adequacy of the named representatives and class counsel to fairly and adequately pursue the action." *Id.* at 2-3. The Court further pointed out that Mr. Spielman also bore the burden of "establishing at least one of the requirements of Fed. R. Civ. P. 23(b)." *Id.* at 3.

The Court then analyzed each of the Rule 23(a) prerequisites, finding that numerosity was established because "joining approximately 800 putative class members would be impracticable" and that "Spielman's claims are typical of the class because they are reasonably coextensive with those of the absent class members." *Id.* It further discussed and rejected USAA's baseless adequacy arguments, finding that there was "no basis to conclude that Spielman would not vigorously prosecute this case on behalf of the putative class" and that Mr. Spielman's attorneys "are adequate class counsel and satisfy the requirements of Fed. R. Civ. P. 23(g)." *Id.* at 3-4.

As for commonality, the Court explained that "[t]he primary question, here, common to the class is whether USAA, based on its standard policy language, was obligated to include taxes and registration fees in ACV payments to USAA insureds

who had leased a vehicle that was deemed by USAA to be a totaled loss." *Id.* at 3. Citing controlling precedent in this Circuit, the Court rejected USAA's merits arguments, observing that "[w]hether the class could actually prevail on the merits of their claims is not a proper inquiry in determining whether common questions exist." *Id.* (citing *Stockwell v. City & Cty. Of San Francisco*, 749 F.3d 1107, 1111-1112 (9th Cir. 2014)).

The District Court also found that "USAA's arguments that the class, here, should not be certified because it claims its payment practices were proper merely strengthens Spielman's argument that class certification will generate common answers to drive the resolution of this litigation." *Id.*

USAA subsequently and timely filed its Rule 23(f) petition.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 23(f), this Court has discretion to exercise or decline to exercise interlocutory review of a class certification decision. *Stockwell*, 749 F.3d at 1111. But Rule 23(f) review "should be a rare occurrence" reserved for cases where (1) "there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable"; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to

evade end-of-the-case review"; or (3) "the district court's class certification decision is manifestly erroneous." *Chamberlan*, 402 F.3d at 955-59.

ARGUMENT

USAA has failed to show that any of the discretionary factors justifying the extraordinary remedy of Rule 23(f) review are met here. First, the District Court's decision to certify the class is not a "death knell." Second, this case does not present any unsettled and fundamental issues in class-action law, and there are no issues that would evade review after this case is taken to judgment. Third, USAA fails to, and cannot, point to any aspect of the District Court's decision that constitutes manifest error.

I. No "Death Knell"

A "death knell" situation exists where a "grant of certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Chamberlan*, 402 F.3d at 957-58 (internal quotation marks omitted). However, the pressures to settle must be "without relation to the merits of the class's claims," such as when a defendant lacks the financial resources to defend the case or liability would be "ruinous" to the company. *Id.* at 960. Although recovery may be "unpleasant to a behemoth company," "the impact

of the class certification alone does not support an appeal." *Id.*

USAA has made no showing that it, a large nationwide insurer, lacks the resources to defend this case to a conclusion and appeal if necessary or that doing so would "run the risk of ruinous liability." *Id.*

II. No Unsettled, Fundamental Issue of Class Action Law

The District Court applied settled rules of law in certifying the class. USAA does not attempt to, and cannot, point to any unsettled issues of law in this case, much less fundamental issues.

III. No Manifest Error

Manifest error "is a difficult standard to meet." *In re Johnson*, 760 F.3d 66, 72 (D.C. Cir. 2014). Because Rule 23(f) review is an extraordinary remedy, this Court "generally will permit an interlocutory appeal only when the certification decision is manifestly erroneous and virtually certain to be reversed on appeal from the final judgment." *Chamberlan*, 402 F.3d at 962. Thus, a class certification order is typically not manifestly erroneous "unless the district court applies an incorrect Rule 23 standard or ignores a directly controlling case." *Id.* And class certification decisions "rarely will involve legal errors" because they "typically involve complex facts that are unlikely to be on all fours with existing precedent." *Id.*

A. The District Court Indisputably Applied the Correct Legal Standard

USAA does not claim (nor can it) that the District Court used the wrong legal standard or ignored directly controlling precedent. The District Court identified and applied the proper legal standard, correctly observing that Mr. Spielman bore the burden of establishing Rules 23(a)'s threshold requirements and at least one Rule 23(b) requirement. D.E. 100 at 2-3.

Because USAA fails to make this showing, the District Court's decision was not manifestly erroneous for the purpose of Rule 23(f), and this Court should deny USAA's petition on that basis alone.

B. The Record Robustly Supports the District Court's Decision

USAA, instead, primarily takes issue with the brevity of the District Court's certification order. Again, this is not an appropriate justification for the rare exercise of Rule 23(f) review because it doesn't involve misapplication of the governing legal standard or failure to cite controlling precedent.

Further, USAA's argument that the district court's analysis was manifestly erroneous because it was "too cursory to satisfy this court's requirement for a rigorous analysis" was rejected in *Chamberlan* and, thus, can be dispensed with directly. *Chamberlan*, 402 F.3d at 961.

Even in the context of non-interlocutory appellate review of a class certification order (which is for abuse of discretion, not the more exacting manifest-

error standard of review applicable to a Rule 23(f) petition), it is not reversible error (much less *manifest* error) for a district court's class certification order to be "succinct" where, as here, the common issues are "plain enough that no further explanation is required to justify the district court's decision." *Id.* Courts must of course rigorously analyze the Rule 23 factors, but if the issues are "readily apparent," forcing a district court to write out its lengthy analysis in its certification order "would produce nothing more than a lengthy explanation of the obvious." *Id.* That is especially true where, as here, the record is fully developed and amply supports the District Court's decision. *See Hanlon*, 150 F.3d at 1023 (affirming Rule 23 findings by the district court that were "almost conclusory" because the record provided "more than adequate foundation upon which to reach [its] conclusions").

Here, the District Court cut to the heart of the class-certification inquiry by observing that "[t]he primary question, here, common to the class is whether USAA, based on its standard policy language, was obligated to include taxes and registration fees in ACV payments to USAA insureds who had leased a vehicle that was deemed by USAA to be a totaled loss." D.E. 100 at 3. USAA criticizes the District Court for not expressly discussing the Rule 23(b)(3) requirements, but the Court's recognition of this common, predominant policy-interpretation issue coupled with the Court's observation that "class certification will generate common answers to drive the

resolution of this litigation," *id.*, support findings of both predominance and superiority under Rule 23(b)(3), in addition to commonality under Rule 23(a).

Indeed, the record fully supports the District Court's findings as to all the applicable Rule 23 factors:

1. **Rule 23(a) Prerequisites**

Numerosity. USAA's own records identify close to or more than 800 Class Members. D.E. 89 at 18. This is more than enough to satisfy the numerosity requirement. *See Rannis v. Recchia*, 380 Fed. Appx. 646, 651 (9th Cir. 2010) ("In general, courts find the numerosity requirement satisfied when a class includes at least 40 members.").

Commonality. It is undisputed that USAA used the same language pertaining to the definition of "Actual Cash Value" in its policies with all Class Members, and interpretation of that standardized language will determine whether USAA's uniform practice of not paying the applicable ACV Sales Tax and Regulatory fees to policyholders with leased vehicles constituted a breach of its agreements with Class Members, thus determining USAA's liability as to all Class Members in a single stroke. D.E. 89 at 19.

Typicality. Mr. Spielman's claims arise from the same USAA practices at issue in the case and are based on the same theory of liability. *Id.* at 20. Thus, Mr. Spielman suffered the same harm as the Class. *See Rodriguez v. Hayes*, 591 F.3d

1105, 1124 (9th Cir. 2010) (typicality established where plaintiff's and class members' claims are based on similar legal theories).

Adequacy. The record supports the District Court's finding that Mr. Spielman and his counsel will adequately represent the interests of the Class. D.E. 100 at 3-4. There is no hint in the record of a conflict of interest between Mr. Spielman and the members of the Class, as he suffered from the same type of contractual breach as the other putative Class Members and has the same claims. D.E. 89 at 22. He has also repeatedly demonstrated his commitment to vigorously prosecuting this action and protecting the interest of absent Class Members. *Id.* at 22-23. And Class Counsel indisputably has substantial experience litigating class actions, including class actions of this type, and has committed and will continue to commit all the resources required to vigorously litigate this case. *Id.* at 23-24.

2. Rule 23(b)(3) Factors

Predominance. The same facts demonstrating commonality also amply support the District Court's finding that these common policy-interpretation questions will "drive the resolution of this litigation." D.E. 100 at 3. Thus, these common issues overwhelm any individualized questions. Indeed, any such individualized issues would potentially arise (if at all) in calculating individual Class Members' damages *after* liability has been adjudicated. D.E. 89 at 11-18; D.E. 96 at 8-14. And this Court has "repeatedly confirmed . . . that the need for individualized

findings as to the amount of damages does not defeat class certification." *Vaquero*, 824 F.3d at 1155; *see also, e.g.*, *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975); *Pulaski & Middleman, LLC v. Google, Inc.*, 862 F.3d 979, 986-87 (9th Cir. 2015).

In short, nothing in the law of this Circuit or the well-developed record before the District Court supports USAA's assertion that the need to individually calculate damages by reviewing less than 800 files for certain limited information would predominate over the central policy-interpretation issues.

Superiority. The record readily demonstrates that a class action is superior. USAA concedes that there are approximately 800 potential Class Members and that its relationship with each Class Member is governed by the same form Policy, such that, as the District Court observed, even USAA's arguments in support of its defenses have class-wide application. D.E. 96 at 5. As such, class treatment is plainly superior and preferable to litigating hundreds of individual lawsuits on the same merits and with the same evidence, interpreting the same uniform Policy language repeatedly in front of different tribunals, and conducting the same damages analysis in each individual case. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d. 1227, 1234-35 (9th Cir. 1996) (superiority is often demonstrated where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency").

Superiority is also supported by the fact that the individual amounts of Class Member losses pale in comparison to the cost of litigating a case against a large insurance company in federal court. *See* D.E. 96 at 18 (as of the close of class certification briefing, Tycko & Zavareei LLP alone had expended nearly 600 hours and more than $17,000 in expenses in this action). Where, as here, "recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).

Put simply, the record supports the District Court's decision to certify the class. There is nothing in the record even suggesting that the District Court abused its discretion in doing so, and there is certainly nothing to suggest that this decision was manifestly erroneous.

C. USAA's Remaining Arguments Fail

USAA's other asserted grounds for Rule 23(f) review fare no better. They are rife with irrelevant arguments and are all concerned with the District Court's treatment of *facts* specific to this case, not its application of the proper legal standard.

As it unsuccessfully did at class certification, USAA recycles (at Pet. 18) numerous merits arguments, but these assertions are inappropriate at class certification (and likewise in a Rule 23(f) petition). Whether the District Court "discuss[ed] the California law applicable to the adjustment of total loss claims,"

"discuss[ed] California's differing tax treatment of leased and owned vehicles," or considered evidence "regarding how leased vehicles differ from owned vehicles in terms of tax treatment and the lessee/insured's tax obligations" are all merits issues that have nothing to do with Rule 23's requirements. Indeed, this Court lacks jurisdiction to consider the merits in a Rule 23(f) appeal. *See Stockwell*, 749 F.3d at 1113 ("The principle that courts must consider merits issues only as necessary to determine a pertinent Rule 23 factor, and not otherwise, has special force at the appellate level where, as here, we review a class certification determination under Rule 23(f). … [M]erits inquiries unrelated to certification exceed our limited Rule 23(f) jurisdiction, as well as the needs of Rule 23(a)-(b).").

And again, even if these merits questions had some bearing on class certification, they are fact issues that do not justify Rule 23(f) review. In this Circuit, "[t]he kind of error most likely to warrant interlocutory review will be one of law, as opposed to an incorrect application of law to facts." *Chamberlan*, 402 F.3d at 959. USAA's criticisms of the District Court's decision have to do with USAA's (erroneous) view of the facts, not the District Court's application of the correct law.

USAA's remaining arguments equally fail to demonstrate manifest error. As it did at class certification, USAA speculates (at Pet. 19) that there may be "material variations in class members' lease forms" that could hypothetically affect their "standing to sue" or bear on whether they "have sustained any injury" because they

could have assignment clauses that entitled the leasing company to a portion of the insurance proceeds in the event of a total loss of the leased vehicle. The trial court record provides plenty of support for the District Court's rejection of this argument. As Mr. Spielman explained, USAA put forth only three exemplars of such "variations"—despite the fact that it has access to every Class Member's lease agreement in its claim files—and none of those three examples contained "variations" that would change the fact that Class Members suffered a concrete injury as a result of USAA's breach of the Policy. D.E. 96 at 13 n.5. "[U]nsubstantiated claims in a brief do not preclude class certification." *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 398 (M.D.N.C. 2015), *aff'd*, 925 F.3d 643 (4th Cir. 2019).

Further, as Mr. Spielman explained, these speculative individualized issues would have bearing only on calculation of damages, which cannot defeat class certification. *Id.* at 12. Controlling precedent in this Court holds that "the difference in value between what was bargained for and what was received" is an economic injury sufficient to confer Article III standing. *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 705–06 (9th Cir. 2020). Thus, insureds who bargained for and paid premiums on auto insurance policies suffered harm sufficient to give them Article III standing when USAA denied them the full benefit of their bargain by withholding the ACV Sales Tax and Regulatory Fees promised under those policies. D.E. 96 at 12.

In addition, the Federal Rules of Civil Procedure authorize Class Members, as individuals in whose names the policies were issued, to seek redress for USAA's breach as real parties in interest. *See, e.g.*, Fed. R. Civ. P. 17(a)(1)(F) (authorizing "a party with whom or in whose name a contract has been made for another's benefit" to sue in their own name "without joining the person for whose benefit the action is brought"); *Mitsui & Co. v. Puerto Rico Water Res. Auth.*, 528 F. Supp. 768, 776 (D.P.R. 1981) (explaining that Rule 17(a)(1)(F) makes contracting parties "real parties in interest even though they will not benefit from any judgment"); D.E. 96 at 13-14. Thus, the unshown lease provisions relied on by USAA could at most affect division of proceeds (a damages issue), not standing to sue. The District Court's choice to not address this irrelevant issue was not manifestly erroneous.

USAA then tries to fault the District Court (at Pet. 19) for not "address[ing] the limitations in USAA's data systems" that it speculates could make it difficult to identify some class members or determine whether or how much they were paid in ACV Sales Tax and Regulatory Fees.

Issues related to limitations in USAA's data systems are irrelevant to class certification because (1) there is no ascertainability requirement in this Circuit, *see, e.g.*, *Briseno*, 844 F.3d at 1124-25 (declining to impose a requirement that class proponents "demonstrate that there is an administratively feasible way to determine who is in the class" or "identify class members" at the certification stage), and (2)

individualized damages issues don't defeat class certification, *Vaquero*, 824 F.3d at 1155; *Blackie*, 524 F.2d at 904; *Pulaski*, 862 F.3d at 986-87. As such, there was no need to discuss USAA's data systems because USAA's arguments about them did not relate to any applicable legal standard.

In any event, the amount of ACV Sales Tax and Regulatory Fees paid by most Class Members can be accurately determined by the spreadsheet data USAA has already produced, *see* D.E. 96 at 8-9, and USAA admits it can review the claim files for any remaining Class Members for which the amount of taxes and fees can't be determined using that data, *id.* at 10. At most, USAA would have to review 800 claim files, an eminently feasible exercise, especially when compared against the expense and time of litigating hundreds of these claims individually. *Id.* at 9, 18. Thus, the record supports the District Court's decision to certify the class and refutes USAA's contention that the District Court's rejection of these arguments was manifest error.

Finally, USAA repeatedly attempts to play "gotcha" (at Pet. 2, 5-6, 18) by claiming that a second USAA entity was included in the class definition. This is incorrect. The District Court granted the relief sought by Mr. Spielman, who dismissed this entity, D.E. 78, and is not seeking to include it in the class definition, D.E. 96 at 1 n.1. USAA assumes that the class definition "included" this entity because the District Court referenced the proposed class definition put forth in Mr.

Spielman's moving papers, D.E. 100 at 1, but this is pure semantics when the entity is not part of the case. In any event, Mr. Spielman will file an unopposed motion in the District Court to clarify that the class definition does not include the dismissed entity. The District Court's response will resolve any ambiguity concerning this technical nit without the need for appellate review.

The bottom line is that USAA's various arguments evince its factual disagreements with the District Court's decision, not any clear error of law that supports Rule 23(f) review.

CONCLUSION

The District Court's decision does not present a "death knell" situation for USAA. Nor does it involve unsettled issues of great importance to class-action law that would evade review at the conclusion of the litigation. And it is not manifestly erroneous. Accordingly, this Court should deny USAA's Rule 23(f) petition.

Dated: January 3, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff-Respondent Lester I. Spielman, certifies the following in compliance with Federal Rule of Appellate Procedure 32(a):

1. This Opposition complies with the type and volume limitations of Fed. R. App. P. 5(c)(1) and 32(f) and Circuit Rules 5-2(b) and 32-3(2), because this Opposition contains 5,190 words, excluding the portions exempted by Fed R. App. P. 5(b)(1)(E) and 32(f).

2. This Opposition complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Opposition has been prepared in a proportionally spaced, Roman-style typeface using Microsoft Word in 14-point.

Dated: January 3, 2022

/s/ Annick M. Persinger
Annick M. Persinger

Attorney for Plaintiff-Respondent Lester I. Spielman