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February 23, 2017

VIA CM/ECF

Michael E. Gans

U.S. Court of Appeals for the Eighth Circuit

Thomas F. Eagleton Courthouse

Room 24.329

111 South 10th Street

St. Louis, MO 63102

Re: *In re: State Farm Fire and Casualty Company, No. 16-3185*

Dear Mr. Gans:

Appellee-Respondent writes in response to Appellant-Petitioner's Fed. R. Civ. App. P. 28(j) letter regarding a Nebraska Supreme Court opinion, *Henn v. American Family Mutual Insurance Co.*, 295 Neb. 859, 2017 WL 658792 (Neb. Feb. 17, 2017).

The *Henn* decision has no bearing on any issue before the Court as it does not address class certification or the proportionality of discovery. The only issue *Henn* addresses is whether, under Nebraska law, a property insurer breaches its contract by depreciating the cost of labor in calculating actual cash value ("ACV"). The issues on appeal here relate solely to class certification and discovery issues - not the ultimate merit question. As such, *Henn* offers no value to the Court in deciding the current appeal.

Moreover, *Henn* is applying Nebraska law to the merits. Therefore, even if the merit question was at issue, the opinion offers no value to this Court as Missouri law will govern the policy interpretation in this case. Under Nebraska law, a court determining actual cash value applies the "broad evidence rule," which allows the use of any evidence tending to formulate a correct estimate of value.

Henn, 2017 WL 658792 at *4. Missouri, however, does not follow the broad evidence rule.

In contrast, this Court's recent decision in *McKeage v. TMBC, LLC*, No. 15-3191, slip op. (8th Cir. Feb. 13, 2017), is directly relevant to the issues on appeal and supports a finding that class certification was appropriate. In *McKeage*, the Court found that because plaintiffs and class members all entered into "identical or substantially similar" contracts with the defendant, the case was "a classic case for treatment as a class action." *McKeage*, No. 15-3191, slip op. at 9 (quotation marks omitted; citation omitted). The Court also found the class members were identified by a file-by-file review of defendant's documents based on objective criteria and that this process to identify class membership worked and resulted in customers without claims being appropriately excluded from the class. *Id.* at 8-9. These findings are directly relevant to our argument that class certification in this case is appropriate.

Sincerely,

GUSTAFSON GLUEK PLLC

s/Daniel E. Gustafson
Daniel E. Gustafson

DEG/
cc: Counsel of Record (via ECF)

I hereby certify that the body of the above letter is 345 words, and therefore complies with the 350-word limit contained in Federal Rule of Appellate Procedure 28(j).

s/Daniel E. Gustafson
Daniel E. Gustafson