DA 19-0682

In the Supreme Court of the State of Montana

JACK KRAMER and KEN KRAMER,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

FERGUS FARM MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County
Honorable Michael G. Moses, DV–19–0360

APPELLEES' RESPONSE BRIEF

Sean M. Morris
Jesse C. Kodadek
Martin Rogers
WORDEN THANE P.C.
321 W. Broadway, Ste. 300
Missoula, MT 59802
(406) 721-3400
smorris@wordenthane.com
jkodadek@wordenthane.com
mrogers@wordenthane.com

Attorneys for
Plaintiffs/Appellees

Matthew B. Hayhurst
Christopher L. Decker
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807–9199
(406) 543-6646
mhayhurst@boonekarlberg.com
cdecker@boonekarlberg.com

Attorneys for
Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

Fergus Farm Mutual's argument proceeds on the two-part theory that: (1) it presented "uncontroverted" and "unrefuted" evidence supporting its claim that it does not apply the three-trade rule, that "there is no contrary evidence," and therefore it has "conclusively established" its position that it does not apply the three-trade rule; and (2) no court has ever certified a class in a case like this.

Both theories are wrong.

First, the district court correctly recognized there is substantial evidence that FFM applies a three-trade rule when deciding whether or not to pay general contractor overhead and profit, and that evidence is in FFM's own words. Indeed, in its brief, FFM admits that it will only consider paying its insureds general contractor overhead and profit if the insured can first show that "three or more trades were involved" in the repairs.

Second, FFM's recurring argument that no court has ever certified a similar class is false, because other courts have affirmed certification of classes identical to the classes certified by the district court while rejecting arguments indistinguishable from those made by FFM.

Using this two-part theory as the baseline for its entire argument, FFM goes on to misapply the standard of review for class certification. It argues that the district court was "required to decide" one of the ultimate merits question at the certification stage, and that if any "factual dispute exists," then the district court "did not fulfill its obligation under Rule 23 and committed clear error."

This is not just incorrect, it is the *opposite* of a district court's obligation at the certification stage. Indeed, this Court has consistently held that courts must not make ultimate merits determinations when faced with a motion for class certification. Instead, a district court is required to decide whether there is an *evidentiary basis* sufficient to support the class allegations.

Here, in a careful and thorough order, the district court examined the evidence and made extensive findings that the answer to common questions will move the case forward, and concluded that a class action was the superior way to adjudicate the claims. It then certified two related classes. The district court should be affirmed because FFM has failed to show that it acted arbitrarily without conscientious judgment or exceeded the bounds of reason.

QUESTION PRESENTED

Did the district court properly exercise its broad discretion when it made detailed findings that the requirements of Rule 23(b)(3) were satisfied, certified two classes, and appointed the Kramers as class representatives?

ADDITIONAL BACKGROUND

FFM does not fully explain the two classes certified by the district court or the context in which the Kramers' claims arose. It also repeatedly claims that evidence supporting its position is "uncontroverted" and "unrefuted," but there is substantial evidence in the record that conflicts directly with the evidence set forth by FFM.

This part of the brief will first provide an overview of the concepts of general contractor overhead and profit ("GCOP") and how it relates to the facts of this case. It will then explain why the three-trade rule is relevant to FFM's claims handling and the facts of this case. Finally, before moving on to the argument, it will identify the two classes actually certified by the district court.

A. General contractor overhead and profit: a brief primer.

The Kramers' claim started much like any other residential

property loss. After the Kramers suffered a covered loss, FFM sent an adjuster to estimate the cost to repair or replace the damaged portions of the Kramers' property. The adjuster created a loss estimate, which described the necessary repairs and estimated costs for each line item. App.2.

The loss estimate includes a bottom line dollar amount for replacement cost value ("RCV"). App.2–3. It then lists the total depreciation, which is a deduction for factors such as age and wear and tear. It then includes the actual cash value ("ACV"). App.2–3. In insurance terms, the ACV is the value of the loss at the time of damage. App.2–3. So ACV is simply RCV minus depreciation. The equation looks like this:

Replacement cost value – depreciation = actual cash value.

Once the Kramers and FFM agreed on the scope of work, the Kramers were entitled to the ACV payment immediately, regardless of whether or not they ever completed the repairs.[1] After they completed the repairs and submitted proof to FFM, they were then entitled to the held-back depreciation, which means they were paid the total RCV

[1] FFM's Opening Brief at 4.

included on the loss estimate.[2] It is undisputed that FFM and all other residential property insurers generally handle claims this same way.

But, as the class alleges and the district court found, there is one major difference between how FFM handles claims versus most other Montana insurers. When FFM issued ACV payments totaling $35,996 to the Kramers, it did not include a payment for GCOP. App.4–5.

The purpose of a general contractor is to coordinate repairs. SA12.[3] So, for example, if an insured needs only a new roof, they might not need a general contractor. But if the repairs will require several trades, an insurer can assume the homeowner will likely require the services of a general contractor to hire competent subcontractors, organize and order materials, and handle the day-to-day workflow between the various trades. SA12. All of these tasks must happen in a specific order, and it is usually complicated enough that it is beyond the scope of an average homeowner capabilities. SA12.

General contractors also guarantee that all of the work will be done correctly, and if it is not, the homeowner need only deal with the

[2] FFM's Opening Brief at 4. There is also a reduction for the insured's deductible, but the deductible is not an issue in this case.
[3] References to SA are to the Kramers' Supplemental Appendix.

general contractor, rather than the subcontractors. This is why courts have universally held that GCOP is necessarily part of replacement cost value in cases where an insured is reasonably likely to require the services of a general contractor, and GCOP must therefore be paid at the ACV stage, less any amount allocated to depreciation. *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1306 (11th Cir. 2008).

Crucially, whether or not an insured actually goes on to the complete the repairs is irrelevant, because courts have universally held that where an insured is reasonably likely to require the services of a general contractor, the insured is entitled to GCOP at the ACV stage even if they never actually incur the costs. *Id.; see also Mee v. Safeco Ins. Co.*, 908 A.2d 344 (Pa. Super. 2006) (holding that an insured is entitled to overhead and profit when use of a general contractor would be reasonably likely, even if no contractor is used or no repairs are made); *Ghoman v. New Hampshire Ins. Co.*, 159 F.Supp.2d 928 (N.D. Tex. 2001) (holding that insured is entitled to GCOP even if the insured is able to repair or replace the property for less money than paid by the insurer); *Salesin v. State Farm Fire & Cas. Co.*, 581 N.W.2d 781 (Mich. App. 1998) (holding that insurers cannot deduct contractor's overhead and profit in paying actual cash value); *Gilderman v. State Farm Ins.*

Co., 649 A.2d 941, 945 (Pa. Super. 1994) (holding that repair or replacement costs "include any cost that an insured is reasonably likely to incur in repairing or replacing a covered loss ... includ[ing] use of a general contractor and his twenty percent overhead and profit.").

Here, the Kramers' home suffered damage that required, at minimum: roofing, gutters, window installation, siding replacement, and paint. SA11. Their general contractor, Big Sky Contractors,[4] testified that Big Sky uses different subcontractors for roofing, carpentry, gutters, and paint. SA11–12.

The Kramers' general contractor also testified that, based on his experience with dozens of different insurance companies, the way FFM handles GCOP is not standard practice in Montana. SA12. In his

[4] As they did below, FFM repeatedly attempts to smear Jon Hooley—an owner of Big Sky Contractors—by claiming he engaged in insurance fraud. Their evidence is a complaint and agency action against Hooley lodged by Commissioner of Securities and Insurance. But as FFM well knows, (1) the allegations had nothing to do with this case or even the same business entity, SA14–15, and (2) the Commissioner dismissed all of the claims with prejudice well before this case began. SA38. FFM's allegations are therefore both baseless and irrelevant, and the Kramers will not address them further. Regardless, this case is not about whether the Kramers' general contractor overcharged FFM. In fact, what the Kramers paid their contractor has absolutely nothing to do with the class allegations, because whether or not the insured ever hired or paid a general contractor is irrelevant to the questions posed by the class.

experience, almost all insurance companies in Montana include GCOP as part of the front-end ACV payment, and FFM is just one of two insurers in Montana who have ever asked for documentation of underlying costs. SA12–13.

By way of example, the general contractor submitted copies of insurer-prepared loss estimates for losses in Montana where other insurers included GCOP up-front. SA16–34. Insurers paying GCOP up-front include large entities such as State Farm and USAA, as well as much smaller entities such as Acuity Insurance Company. *Id*. Thus, FFM's claim that it presented "unrefuted evidence…that its practices conform to [the] industry standard in Montana" and that "[t]here is no contrary evidence" is patently false.

In fact, some insurers, like State Farm, actually include an explanation of GCOP when an insured suffers a covered loss, and the Kramers' general contractor included an example with his declaration. SA17. That guide explains that GCOP is simply a "general contractor's charge for coordinating your repairs." SA17. It includes an example of a loss estimate that shows an additional 10% each for general contractor overhead and profit, for a total of 20%. SA17. This example is consistent with an actual final page from a State Farm loss estimate in Montana,

which shows the addition of 20% GCOP on top of the entire line item total. SA18.

It gets worse. Big Sky Contractors uses the same software—Xactimate, created by Xactware—that FFM's adjusters do. Whether or not GCOP is included above and beyond each individual line item is controlled by a setting within Xactimate. SA14. In order to not include GCOP on its loss estimates, FFM's adjusters have to manually turn that feature off, SA14, as Xactware's own documentation explains that GCOP is "typically added to the estimate as a percentage of the total bid." SA36.

B. FFM repeatedly admits the three-trade rule is relevant to whether it pays GCOP.

During the Kramers' claim process, FFM twice told the Kramers that it would pay GCOP if they could make the threshold showing that at least three trades were involved in the repairs. The first was on a loss estimate prepared by a FFM-retained adjuster. On that loss estimate, the adjuster recounted a site visit that included the Kramers' representatives. He said:

> We advised that O&P is only allowable if 3 trades were involved and we would review their subcontractors' bids and Tax Id info before this would be allowable.

SA01.

Later, FFM's in-house claims representative sent an email to an independent adjuster retained by the Kramers, and wrote:

> I will need the paid invoices for at least three subcontractors before a determination of O&P will be paid.

SA07.

Then, in their opening brief, FFM admits that the only time it will pay GCOP is, in fact, when more than three trades are involved:

> FFM has paid GCOP as part of the RCV if: (1) **three or more trades were involved**, (2) the general contractor actually subcontracted the work itself, and (3) invoices are submitted from subcontractors to ensure the general contractor is seeking GCOP on the amount paid to subcontractors…[5]

Based on this evidence and by FFM's own admission, there is no question that FFM begins its GCOP inquiry with the question of whether at least three trades are required to complete the repair. So in FFM's view, the presence of three trades is a necessary but not a sufficient condition for the payment of GCOP.

But, to be sure, FFM admitted in discovery that it never pays GCOP at the ACV stage, regardless of how many trades might be required to complete the repairs:

---

[5] FFM Opening Brief at 9.

> **REQUEST FOR ADMISSION NO. 5:** Please admit that Fergus Farm Mutual does not pay insureds any general contractor overhead and profit as part of ACV payments to insureds even when the claim file indicates the anticipated involvement of three trades or more:
>
> **RESPONSE:** Admit.

SA06.

Despite this admission, FFM claims that, in the Kramers' case, "GCOP was not included in the ACV payments because FFM determined a general contractor was not reasonably necessary."[6] This, however, cannot be an accurate statement when FFM admits that it never actually pays GCOP at the ACV stage.

FFM's bottom-line argument about class certification is that because it makes determinations about GCOP on a case-by-case basis, there can be no common question. But FFM admits that it never actually conducts this analysis at the proper time, and its failure to do so is the exact conduct that the class alleges is unlawful.

C. The two classes certified by the district court.

Following briefing and argument, the district court certified these

[6] FFM Opening Brief at 6.

two[7] classes:

Class 1—The ACV Class: All FFM policyholders:

a. Who made an actual cash value claim (ACV) for residential and associated structural losses under a farm owner or homeowner policy;

b. From March 28, 2009 to the present;

c. Where FFM accepted liability, and its own records show that at least three subcontractors would be required to complete the repairs; but

d. Where the actual cash value payment did not include an additional 20% payment for general contractor overhead and profit, unless the insured was paid that full amount as part of the RCV payment.

Class 2—The RCV Class: All members of Class 1:

a. Who have replacement cost value (RCV) policies;

b. Received an initial actual cash value payment;

c. Went on to complete the identified repairs and were paid the previously held back replacement cost value payment; but who were not paid an additional 20% for general contractor overhead and profit as part of their replacement cost value payment.

[7] Doc 7. at 2. FFM did not challenge the Kramers' proposed class definitions below and does not do so on appeal.

STANDARD OF REVIEW

This Court affords trial courts "the broadest discretion" when reviewing a decision on class certification. *Houser v. City of Billings*, 2020 MT 51, ¶ 3, ___ Mont. ___, 458 P.3d 1031. This is because a trial court is in the best position to consider the fairest and most efficient procedure for conducting litigation. *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 25, 371 Mont. 393, 310 P.3d 452.

A lower court's decision to certify a class should not be reversed just because this Court would have reached a different conclusion. *Id.* Instead, review is limited to whether the district court "acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *Id.*

SUMMARY OF THE ARGUMENT

Multiple courts have certified classes functionally identical to the class certified by the district court in this case. Those cases have two things in common with this one. First, the class established that there was at least some evidence the insurer applied or should have applied an objective standard to determine whether the repairs showed a reasonable likelihood that a general contractor would be required. Typically, that standard is the three-trade rule—the same rule that FFM admits it applies as part of its decision about whether or not to

ultimately pay GCOP. The second common feature is that certified classes have, like the Kramers, agreed to use the insurer's own loss estimates to calculate the additional GCOP that the insurer owed to each class member.

Next, the district court properly exercised its broad discretion when it found that common questions could be answered on behalf of the class and would move the case forward, whatever their answer. Each of the district court's findings about the requirements for certifying a class under Rule 23(b)(3) is supported by the record, and the court properly recognized that it did not need to—and should not—resolve the merits of all disputed facts at this stage.

ARGUMENT

Whether FFM systematically breached its insurance contracts and violated the UTPA is not the issue in this appeal. Rather, the issue is whether the resolution of common questions of law and fact will resolve the dispute on behalf of the entire class at once. The district court properly found that it will.

At the outset, it is important to recognize the principles that are not in dispute:

- The parties agree that insureds with replacement cost coverage pay a premium that includes allowances for GCOP.
- The parties agree that actual cash value is just replacement cost value less depreciation.
- The parties agree that insureds are entitled to payment for the actual cash value of the damage regardless of whether or not they complete the repairs/replacement of damaged property.

One of the fundamental questions in this case is whether the class can establish that FFM uses, or should use, some objective measure to determine whether an insured will be reasonably like to require use of a general contractor on any given loss. If the class can establish there is some objective measure, then because FFM does not pay GCOP at the front-end, all the class needs to do is show that FFM was required to pay GCOP up-front on all claims satisfying that objective measure. That would end the inquiry for the ACV class. The next step is whether FFM owes insureds the held-back portion of GCOP at the time it makes the RCV payment, thus establishing liability for the RCV class.[8] All three questions can be answered on a class-wide basis, and the fact that there are disputes about the ultimate outcome of each question does not

[8] The RCV class is really a subclass of the ACV class, and everyone in the RCV class will have already qualified for the ACV class.

defeat class certification, because the class will "sink or swim together" on each question. *Mattson v. Montana Power Co.,* 2012 MT 318, ¶ 38, 368 Mont. 1, 291 P.3d 1209.

I. Courts have certified functionally identical classes when, like here, there was an objective standard for whether a general contractor was reasonably necessary and the class was willing to accept the insurer's own calculations of ACV and RCV except for unpaid GCOP.

FFM's overall theme is that no court has ever certified or affirmed certification of a class in this context. That is false. Multiple other courts have affirmed certification of functionally identical classes. Those cases have two things in common with this one.

First, each of the cases recognized that the class could establish some objective measure to determine whether a general contractor would be reasonably necessary—usually the three-trade rule. *See, e.g., Burgess v. Farmers Ins. Co.*, 151 P.3d 92, ¶ 14 (Okla. 2006); *Press v. La. Cit. Fair Plan Prop. Ins.*, 12 So. 3d 392, 396 (La. App. 2009).

Second, those cases recognize that concerns about manageability and calculating individual damages should not defeat certification when, like here, the class agrees to use the insurer's own loss estimates to calculate damages. *Mazzocki v. State Farm Fire & Cas. Corp.*, 1

A.D.3d 9, 14 (N.Y. App. 2003).

A. Evidence suggests that FFM applies a three-trade rule exactly like in other cases where GCOP classes have been certified.

In *Burgess*, the Oklahoma Supreme Court affirmed certification of a class functionally identical to the one here. *Burgess*, ¶ 1.[9] *Burgess* held that class certification was proper where the "entire…theory of recovery derives from allegations that insurer systematically failed to pay" 20% GCOP "when three or more trades were anticipated in repair[.]" *Burgess*, ¶ 14. Likewise, Louisiana courts have approved certification for a class seeking 20% GCOP when "the common issue that predominates" is whether "the adjustment identifies three or more trades involved in the repairs to the damaged property." *Press*, 12 So. 3d at 396. Even without a well-defined three-trade rule, courts have held that certification was proper when the district court concluded that

[9] The class definition in *Burgess* is almost identical the ACV class certified by the district court: "All Oklahoma citizens who were or are Farmers homeowners' policyholders who: (1) suffered a covered loss to their home from June 14, 1994 to the present; (2) whose loss was adjusted on an actual cash value (ACV) basis; (3) whose claim files indicate the anticipated involvement of three trades or more in the repair of the property at the time of the ACV adjustment; and (4) whose ACV adjustment did not include a 20% payment for [GCOP]."

a review of the insurer's own loss estimates could establish when a general contractor was likely to be required. *Mazzocki*, 1 A.D.3d at 14–15.

In contrast, the cases FFM relies on all have one thing in common: the class could not identify evidence that the insurer applied an objective metric to determine whether or not a general contractor would be reasonably required. So, for example, if the plaintiffs cannot show at the certification stage that the three-trade rule should apply, there might be a lack of predominance. *Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 676 (M.D. Fla. 2010). But in *Mills*, the plaintiff's three-trade-rule theory of liability hinged entirely on expert witness testimony, rather than on anything the insurance company did or did not do. 269 F.R.D. at 669. Likewise, in *Nat'l Sec. Fire & Cas. Co. v. DeWitt*, the Alabama Supreme Court's decision turned on the conclusion that the putative class had no evidence that the three-trade rule was part of the insurer's own policy. 85 So. 3d 355, 383–84 (Ala. 2011).

Here, however, FFM admits that the three-trade rule constitutes its threshold requirement for payment of GCOP. Like in *Press*, the class allegations related to the three-trade rule are premised on the theory that FFM is misapplying its own standard. *Press*, 12 So.3d at 396

(recognizing theory of recovery "derives from the defendant's systematic failure to follow its own policies and guidelines"). Just because FFM imposes additional standards beyond the threshold three-trade inquiry does not change the fact that FFM admits that it *begins* its inquiry into GCOP with that exact question. And the legality of its additional conditions are one of the common questions the class seeks to answer.

Of course, whether the class can establish that FFM must apply an objective standard like the three-trade rule is at the heart of the merits, and neither the district court nor this Court should assess the ultimate merits question when deciding whether to certify a class. *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 44, 366 Mont. 450, 288 P.3d 193. But the resolution of this dispute will provide the same answer for every single member of the class, and it will move the case forward.

B. The Kramers stipulate that FFM's own records will provide objective proof of each class members' damages, just like in other GCOP class actions.

FFM's own adjusters have already prepared documents setting out the agreed ACV and RCV for each class members' structural loss. The Kramers stipulated that those FFM-prepared calculations are the proper calculation of ACV and RCV for each class member, except for

the GCOP. And the only breach-of-contract damages the class seeks are an additional percentage of FFM's already created valuations, plus associated interest.

Based on these stipulations, if the class prevails on liability, the identity of and amount owed to each class member can be calculated with relative ease through basic forensic accounting principles using FFM's existing claims data. Other courts have affirmed certification where the class agreed to accept the insurer's own loss estimates as a measure of damages. *Mazzocki*, 1 A.D.3d at 14 (individualized damage assessment does not preclude certification when "amounts of unpaid profit and overhead could readily be ascertained from each member's loss estimate"). And this Court has repeatedly held follow-up inquiries into class members' individualized damages do not defeat certification where liability can be established on a class-wide basis. *Mattson*, ¶ 21; *Knudsen v. Univ. of Montana*, 2019 MT 175, ¶ 22, 396 Mont. 443, 445 P.3d 834.

II. The district court did not manifestly abuse its discretion when it concluded that the class satisfied each element required for certification under Rule 23(b)(3).

To certify a class under Rule 23(b)(3), the district court was

required to find that the class satisfied the four elements of Rule 23(a) and the two requirements of Rule 23(b)(3). *Mattson*, ¶ 19. FFM does not contest the first element of 23(a), which is numerosity. It therefore challenges the district court's findings as to the remaining five elements: commonality, typicality, adequacy of representation under Rule 23(a); and predominance and superiority under Rule 23(b)(3). But the district court's findings and the record support each element. The Kramers will generally address each of these elements in the same order that FFM raised them.

A. Predominance & Superiority: The district court did not manifestly abuse its discretion when it found that classwide questions about FFM's claims handling predominate over individual questions and that a class action was the superior way to resolve the controversy.

For a class action to proceed under Rule 23(b)(3), a district court must find that "questions of law or fact common to the class members predominate over any questions affecting individual members and that a class action is superior to other available methods for adjudicating their claims." *Houser*, ¶ 13. Certification is proper under these standards when the class members' claims depend on a common contention that is capable of classwide resolution. *Houser*, ¶ 13.

Rule 23(b)(3) sets out a series of factors relevant to findings of predominance and superiority, including: the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action.

1. There is significant evidence that FFM applies the three-trade rule and the resolution of that dispute is one of the predominate questions the class seeks to answer.

The district court's findings on predominance span 8 pages, and its conclusion is based on a number of findings. First and foremost, the district court found that the class allegations "revolve[d] around the legal duty of [FFM] to include payments for GCOP to its insureds at the ACV stage of claim settlement as well as the RCV stage." App.14. The district court went on to recognize that the Kramers' claim file includes repeated references to the three-trade rule. It agreed with the Kramers that those statements by FFM "point to the prominence the number of trades involved plays in [FFM's] settlement practices and presents a factual dispute" about whether FFM truly applies a three-trade rule.

App.19.

FFM relies heavily on *DeWitt*, a case from Alabama that reversed class certification where the plaintiff alleged that the insurer should apply the three-trade rule but presented no evidence that it did. According to FFM, *DeWitt* stands for the proposition that where an insurer presents evidence that it does not apply the three-trade rule, then certification is improper, and the Kramers "failed to cite a single case in which a class was certified where the insurer evaluated GCOP on a case-by-case basis."[10] But *DeWitt* is distinguishable because the plaintiff did "not allege that it was [the insurer's] policy to pay GCOP when three or more trades were involved," and instead, his contention was simply that the insurer "*should* pay GCOP when three or more trades are involved." *DeWitt*, 85 So.3d at 382 (emphasis in original).

FFM goes on to argue that other courts have found class certification improper in similar instances, but its arguments are often misplaced. For example, take *Mee v. Safeco*, which FFM cites for the proposition that "class certification [is] improper because whether a general contractor's services were reasonably necessary was not

[10] FFM's Opening Brief at 21.

resolvable by way of a 'bright line rule.'" But *Mee* stands for no such rule, and did not even address class certification. Instead, *Mee* reinstated the plaintiff's claims against the insurance company and remanded for further proceedings. *Mee*, ¶¶ 16–17.

In any event, the core of FFM's argument is that where an insurer evaluates "the necessity of a general contractor on a case-by-case basis, class certification of GCOP claims is not appropriate."[11] But because FFM admits that it never pays GCOP at the ACV stage, its claim that it evaluates the entitlement to GCOP on a case-by-case basis at the ACV stage is either an impossibility or an admission that FFM systematically engages in illegal trade practices. Whatever the answer to that question, the district court concluded that the answer to whether FFM actually does or should apply the three-trade rule is "capable of class-wide resolution." App.20.

To be sure, FFM's arguments are not novel. The insurer in *Burgess* made exactly the same arguments, claiming that it did not "operate pursuant to an across-the-board pattern of underpayment of claims, but rather, made individual assessments as to the propriety of

[11] FFM's Opening Brief at 18.

[GCOP] payments" and therefore class certification was improper. *Burgess*, ¶ 14. But the court disagreed, and taking no position on the ultimate outcome, held that whether the insurer was required to apply the three-trade rule was a question for the jury. *Burgess*, ¶ 16.

Here, FFM's claim that the Kramers "failed to cite a single case in which a class was certified where the insurer evaluated GCOP on case-by-case basis" requires this Court to accept that FFM actually evaluates GCOP on a case-by-case basis when substantial evidence suggests it never actually engages in that inquiry during the ACV stage. To the extent there are disputed facts about how FFM truly handles claims, those questions must be answered by a jury or by the district court, depending on what discovery reveals. Either way, the ultimate answer to that question is not before the court today, because courts are "not allowed to engage in analysis of the merits of the plaintiffs' claims in order to determine whether a class action may be maintained." *Mattson*, ¶ 61.

2. The district court was not required to resolve the factual dispute about whether or not FFM applies the three-trade rule after it recognized there was evidence that it does.

FFM alleges that the district court was "required to resolve the

factual dispute it claims exist" and therefore the district court was required to decide "whether FFM's emails established—contrary to all other evidence—that FFM applies the three-trade rule."[12] But this is not what district courts are required to do when considering a motion to certify a class.

Contrary to FFM's argument, Rule 23 does not require the district court to make ultimate merits findings on every issue of disputed fact.[13] Rather, a district court need only find make findings relevant to whether "a particular Rule 23 requirement ha[s] been established." *Jacobsen*, ¶ 29.

In other words, if there is a disputed factual issue relevant to certification, the district court is only obligated to find that the class allegations are supported *by some evidence* rather than merely accepting the allegations in the complaint as true. *Mattson*, ¶ 67; *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 17, 385 Mont. 396, 384 P.3d 455 (The "trial court must have *some evidentiary basis* for determining each Rule 23 requirement is satisfied." (emphasis in original)). And this is

[12] FFM's Opening Brief at 24–25 (emphasis in original).
[13] Nor could they, since only a jury is entitled to determine the ultimate merits of a factual dispute.

precisely what the district court found when it recognized that there was evidence that FFM applies a three-trade rule and concluded that FFM's arguments to the contrary did "not prevent class certification" under Rule 23(b). App.20.[14]

FFM's argument, if adopted, would rewrite the entire nature of class certification in this state for two reasons. First, FFM asks this Court to assume that everything it says at the certification stage should be accepted as true. But accepting one party's allegations as true is precisely what *Mattson* rejected when it held that district courts cannot assume that everything a plaintiff says is true for purposes of class certification. *Mattson*, ¶ 67.

---

[14] FFM also takes issue with two other questions the district court raised that might help settle the predominance inquiry, including whether FFM's policy language is so ambiguous as to be unfair and whether other Montana insurers' treatment of GCOP is relevant to the class UTPA claims. The Kramers do not believe this dispute is germane to the issues before the court, but the first question is related to the fact that FFM issued a new exclusion *after this case* started that it will no longer pay GCOP on wind and hail claims, SA8–10, but then refused to concede during argument that ambiguities in an insurance contract would be construed against the insurer. The second is because, at the certification hearing, FFM clung to its argument that it handles claims just like every other insurer despite straightforward evidence that it does not. While the Kramers do not necessarily believe either question raised by the district court is necessarily dispositive as to class-wide liability, both are relevant to the common questions posed by the class.

Second, if FFM was correct that the district court was "required to decide" whether FFM actually applies the three-trade rule, it would mean that district courts would also be "required to decide" the ultimate merits of every class action dispute at the certification stage. But that is the opposite of what a district court is supposed to do.

At bottom, that the district court recognized that the parties' disagreement on the ultimate resolution of the three-trade dispute does not mean that the district court was required to decide who was right. Instead, the district court was obligated to use its discretion to determine whether class requirements were met without allowing the certification stage to "become a pretext for a partial trial on the merits." *Jacobsen*, ¶ 29.

3. The district court's findings that FFM's practices are out-of-step with other Montana insurers are supported by the record.

The Kramers presented testimony and documentary evidence that other insurers in Montana pay GCOP at the ACV stage regardless of whether insureds ever complete the repairs. The Kramers also presented evidence that these same insurers pay the remaining GCOP at the RCV stage without the insured providing any proof beyond the

fact that the repairs were actually completed.

FFM admits that it does neither, because it refuses to pay GCOP at the ACV stage and imposes a series of non-standard and unlawful requirements at the RCV stage. So FFM's argument that "there is no contrary evidence" is curious.

FFM also concedes that "because ACV is paid in advance, some standard must govern whether GCOP is likely to be part of the cost to repair."[15] This is precisely correct, and it explains why the classes were properly certified—because FFM admits that, for its insureds, ACV is never paid in advance. Ultimately, the class seeks to answer what "standard" FFM applies and whether that standard is lawful. No matter what the answers are, they will be the same for the entire class.

4. The district court's findings that a class action is the superior method for fairly and efficiently adjudicating the controversy are supported by the record.

Rule 23(b)(3) allows certification when a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The district court found that "a class

[15] FFM's Opening Brief at 28.

action is the superior forum to litigate the question of [FFM's] liability or lack thereof." App.21. It recognized that there is no other pending litigation on this issue, and that a class action is the most efficient use of judicial resources. App.21. It also found that the individual damages claims of class members are generally small, and therefore the class would be better off pooling its resources. App.20–21. It was correct on both counts. Indeed, the Kramers' own claim for GCOP in this case is modest. Their ACV payment was $35,684, which would entitle them to approximately $7,536 in contract damages as part of the ACV class. The held back depreciation was $2384, which means their contract claim in the RCV class is worth just $476.[16]

FFM first returns to its argument that each class member would have to prove whether a general contractor was reasonably necessary under the specific facts of their repairs.[17] But again, this is incorrect, because the Kramers recognize that the class will first have to prove that there is an objective standard for how and when FFM should pay GCOP. If the class cannot do so, the district court will be free to decertify the class, leaving the Kramers to their own claim.

---

[16] Doc. 7 at 16. (Neither of these calculations includes interest.)
[17] FFM's Opening Brief at 31.

FFM further argues that it might have varying affirmative defenses available to different class members, such as statutes-of-limitation or settled party defenses.[18] But it fails to note that one of the issues before the district court was that FFM never pled a statute-of-limitations defense, never challenged the specific class definition proposed by the Kramers, and never attempted to amend its answer to assert any statute-of-limitations defenses. FFM also argues that some class members might have settled. But that is possible in any class action, and those class members who have truly entered binding settlements will not be part of the class.

Next, FFM argues that even if the class establishes the "mechanical application" of the three-trade rule, "class resolution would remain unworkable" because it would take "approximately 30 minutes" to determine who is in the class and what their damages are.[19] While the Kramers dispute the amount of time that would be required to calculate each class members' damages, even if FFM is correct, then 30 minutes to calculate damages for each class member is far preferable than hundreds of thousands of individual suits.

---

[18] FFM's Opening Brief at 32.
[19] FFM's Opening Brief at 32.

Even though each class members' damages might be different, that does not "negate certification as to *liability*." *Mattson*, ¶ 41 (emphasis in original). In *Mattson*, the district court declined to certify the class but this Court reversed, concluding that class treatment was preferable to the alternative. *Mattson*, ¶ 3. Compared to this case, the individualized nature of damages in Mattson were of a different order of magnitude altogether, because it involved disparate claims of property damage to 3,000 owners of different properties around Flathead Lake. *Mattson*, ¶ 20. If liability was found, it would have required a determination of damages on a property-by-property basis. *Mattson*, ¶ 38. Indeed, that individualized determination would have likely required individual jury trials for each class member. Still, that was not enough to defeat certification where the answer to a common question would determine liability.

Even if FFM is right that a review would take 30 minutes per claim file, that review could be undertaken by an independent adjuster—the same kind of adjuster that makes this call on a daily basis for any number of insurers in Montana that already include GCOP on every claim where the claim files shows that the repairs might require the services of a general contractor. This sort of damages

calculation would not be unduly burdensome, and instead, it is precisely the sort of damages calculation that will conserve the resources of the judiciary and the hundreds or thousands of class members situated just like the Kramers.

Because the resolution of liability is common to the class and will "move the case forward," certification is appropriate even if this case might later require individualized damages assessments. *Knudsen*, ¶ 24.

B. Commonality: This case presents questions of law and fact that are common to all members of the class.

Commonality is not a stringent threshold and its application is permissive. *Mattson*, ¶ 35. This requirement can be satisfied if there is just "a single common question." *Chipman*, ¶ 50.

Here, as the district court recognized, whether FFM's policies "conveyed a duty on the Defendant to include a payment for GCOP in the ACV and RCV payment present and will resolve a common issue at the heart of each claim raised by the class members." App.11. The district court is correct. The answer to these two questions are "capable of classwide resolution and will move the case forward." *Knudsen*, ¶ 21. Neither question involves any individualized questions of fact about

different class members.

In response to these findings, FFM claims—again—that presented "unrefuted evidence" that its practices "conform to industry standards."[20] But again, that is false. The district court recognized there is significant evidence that its practices are not consistent with industry standards, because many Montana insurers properly pay GCOP at the ACV stage. Those insurers then include the held-back portion in RCV payments after the insured shows that the repairs were actually completed. App.14.

The district court did not abuse its discretion when it found the commonality element was satisfied, even if it recognized that there might be ancillary issues that inform the answer to those common questions.

C. Typicality: The Kramers' claims are typical of the class because this case seeks to answer *when* GCOP is owed to insureds.

A named plaintiff's claim satisfies Rule 23(a)(3) if it "stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory." *Diaz*

[20] FFM's Opening Brief at 38.

v. Blue Cross/Blue Shield, 2011 MT 322, ¶ 35, 363 Mont. 151, 267 P.3d 756. This issue tends to merge with the commonality question, and like commonality, it is not a demanding standard. *Worledge v. Riverstone Residential Group*, 2015 MT 142, ¶ 34, 379 Mont. 265, 350 P.3d 39.

Here, the district court correctly recognized that the class "alleges that [FFM's] policy to not include GCOP in ACV payments and requiring claimants to take steps not expressed in their policies in order to secure GCOP in their RCV payment is at the heart of the class" claims. App.12. The district court went on to recognize that FFM's manner of handling GCOP "clearly involves the same practice or course of conduct." App.12.

FFM claims there is no common practice here, and that "FFM pays GCOP in advance whenever a general contractor is reasonably necessary."[21] Again, however, this statement of purported fact in FFM's brief is in direct conflict with FFM's express admission that it refuses to pay GCOP at the ACV stage.

In any event, the Kramers claims are identical to those other members of the class, and all class members will sink or swim together

[21] FFM's Opening Brief at 40.

on this issue.

D. Adequacy: The Kramers will adequately represent the class because it is irrelevant whether the class members ever hired a general contractor.

Rule 23(a)(4) requires the prospective lead plaintiffs to show that there is a lack of competing interests between the named parties and the rest of the class. *Jacobsen*, ¶ 58.[22] As a result, this element is closely related to commonality and typicality. *Id.* But "perfect symmetry" is not required, and "not every discrepancy among the interests of class members renders a putative class action untenable." *Jacobsen*, ¶ 59.

The district court recognized that the primary differences alleged by FFM were "the possible differences in damages and defenses," but it concluded that those potential differences did not "rise to the level of limiting Plaintiffs' ability to adequately represent the fundamental interests of the class." App.13.

FFM raises those same issues here, and claims that, in addition, the class members "coverages and policy languages would not be

[22] It also requires the plaintiffs to establish that their attorneys are competent and have the resources to litigate the issue to conclusion—something FFM did not challenge below and does not challenge now.

identical."[23] But FFM presents no evidence to support these claims. Beyond that, FFM raises the specter of class members who might have "conducted more extensive repairs" than the Kramers, and whose claim might therefore be extinguished. But, of course, class members will eventually be notified and given an option to opt-out if they would prefer to pursue their claims individually.

In the end, however, FFM's argument that the Kramers' claims are somehow different than the rest of the class misses the point. To be sure, the overall class claim is that insureds facing repairs that are reasonably like to require the services of a general contractor are entitled to GCOP whether or not they ever complete the repairs as part of the ACV payment. And if they do complete the repairs, they are entitled to the remaining portion of GCOP that was held back with the depreciation, regardless of whether they paid a general contractor or not. That is what every court to have considered the issue has held, and here, the disputed issues can be resolved on behalf of the entire class at once, and nothing about the Kramers' claim is different than any other class members' claim.

[23] FFM's Opening Brief at 41.

CONCLUSION

The Kramers respectfully request that this Court affirm the district court's order certifying this case as a class action and remand for further proceedings.

April 30, 2020.

WORDEN THANE P.C.
Attorneys for Appellants

/s/ Jesse Kodadek
Jesse Kodadek

CERTIFICATE OF COMPLIANCE

I certify that the body of this brief contains 7648 words, as calculated by Microsoft Word, and this brief is printed in double-spaced Century Schoolbook typeface at 14 points.

/s/ Jesse Kodadek

CERTIFICATE OF SERVICE

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-30-2020:

Christopher Lee Decker (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Fergus Farm Mutual Insurance Company
Service Method: eService

Matthew B. Hayhurst (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Fergus Farm Mutual Insurance Company
Service Method: eService

Sean M. Morris (Attorney)
Worden Thane PC
111 N Higgins Ave Ste 600
PO Box 4747
Missoula MT 59806
Representing: Jack Kramer, Ken Kramer
Service Method: eService

Martin Rogers (Attorney)
Worden Thane P.C.
111 North Higgins, Suite 600
P.O. Box 4747
Missoula MT 59806
Representing: Jack Kramer, Ken Kramer
Service Method: eService

Electronically Signed By: Jesse C. Kodadek
Dated: 04-30-2020