IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

RONALD JUVONEN, et al.,
Plaintiffs,

Case No. 502010CA002171XXXXMB
Civil Division: AI

v.

UNITED PROPERTY AND CASUALTY INSURANCE COMPANY,
Defendant.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

THIS CAUSE came before the Court on Plaintiffs' Motion for Class Certification filed on March 27, 2015. The Court, having conducted an evidentiary hearing, reviewed the parties' deposition designations, Plaintiffs' Motion for Class Certification and Defendant's memorandum on the issue of class certification, the arguments of all counsel, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law. As detailed herein, based on the Plaintiffs failure to satisfy their evidentiary burden to certify a class under the Florida Rules of Civil Procedure, this Court denies Plaintiffs' Motion for Class Certification.

I. PROCEDURAL BACKGROUND

In 2010, Plaintiffs, Ronald Juvonen, Diane Jones, and Steven Gordon, filed the instant action against Defendant, United Property and Casualty Insurance Company ("United"), seeking to recover for an alleged breach of contract.[1] United served as the insurer for Plaintiffs' respective homes and after their homes were damaged by storms in 2005 and 2008, Plaintiffs sought to recover under their respective insurance policies. (Fourth Am. Compl. 7-8). Plaintiffs brought the instant action, arguing that United wrongfully withheld payment of General

[1] Plaintiff Austin Ross was later added as a purported class representative.

Contractor's Overhead and Profit ("GCOP") when paying out Plaintiffs' claims. (Fourth Am. Compl. 17 ¶ 55). Plaintiffs seek relief not only on their own behalf, but also on behalf of all persons

> (1) who insured their Florida home with a residential property insurance policy issued or assumed by Defendant;
>
> (2) who submitted a damage claim pursuant to their policy from October 1, 2005 to the present;
>
> (3) whose initial damage estimate from Defendant includes more than one trade to repair the property;
>
> (4) who have not received payment for GCOP; and
>
> (5) who have not already agreed to release Defendant from any claims arising from the property damage.

(Fourth Am. Compl. ¶ 35).

Prior to the filing of the Fourth Amended Complaint, in November 2011, this Court, in reliance on controlling legal authority from the Third District in *Trinidad v. Florida Peninsula Insurance Co.*, 99 So. 3d 502, 504 (Fla. 3d DCA 2011), granted Defendant's Motion to Dismiss the Plaintiffs' Third Amended Complaint, or in the Motion for Final Summary Judgment. While that appeal was pending, the Florida Supreme Court quashed the Third District's *Trinidad* opinion. *See Trinidad v. Florida Peninsula Ins. Co.*, 121 So. 3d 433, 443 (Fla. 2013). Based on the Florida Supreme Court's ruling in *Trinidad*, the Fourth District Court of Appeal reversed the final judgment against Plaintiffs. *See Juvonen v. United Prop. & Cas. Ins. Co.*, 124 So. 3d 976, 978 (Fla. 4th DCA 2013). In *Junoven*, the Fourth District remanded to this Court for "a determination of whether the homeowners were reasonably likely to incur GCOP as part of their damages." *Id*

On remand, this Court entered an agreed order setting a class certification hearing, discovery and briefing schedule on Plaintiffs' Motion for Class Certification. After the close of fact discovery on class certification, Plaintiffs moved to amend the complaint. At that time, they added an additional putative class representative (Austin Ross), and sought to amend the class definition and other allegations. This Court granted Plaintiffs' motion to amend. Thereafter, United moved to dismiss the Fourth Amended Complaint and to strike the class action allegations. This Court denied Defendant's Motion to Dismiss the Fourth Amended Complaint, however, this Court deferred ruling on whether Plaintiffs had "articulated an incorrect standard, the 'more than one trade' rule, as to when a general contractor is 'reasonably likely' to be used to repair'" for purposes of payment of GCOP. *See* Order on Motion to Dismiss at p. 4. In short, this Court allowed the parties to proceed to the class certification hearing and reserved on Defendant's motion to strike class allegations such that they could be raised by Defendant at the class certification hearing. *See* Order on Motion to Dismiss at p. 6.

Plaintiffs filed the instant Motion for Class Certification on March 27, 2015. Defendant filed a Memorandum in Opposition to Plaintiffs' Motion on April 14, 2015. The Court held an evidentiary hearing on the Motion for Class Certification on April 22, 23, and 24, 2015. Based on the testimony and evidence presented at the hearing, the deposition designations and all documents received in evidence, this Court makes the following findings of fact and conclusions of law.

II. STANDARD OF REVIEW

Plaintiffs seek certification of their class pursuant to Florida Rule of Civil Procedure 1.220. "[T]he proponent of class certification carries the burden of pleading and proving the elements required under rule 1.220." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 106 (Fla.

2011). Such a "burden is only met if there is a sound basis in fact, not supposition, because the granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private suit." *Miami Auto Retail, Inc. v. Baldwin*, 97 So. 3d 846, 851 (Fla. 3d DCA 2012).

In evaluating the evidence presented during a class certification hearing, the trial court must conduct a "rigorous analysis" to ensure that the requirements of Rule 1.220 have been met. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 965 (Fla. 2d DCA 2006).

In order to succeed in certification, Plaintiffs must show that:

> (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

Fla. R. Civ. P. 1.220(a). Plaintiffs also must satisfy one of the three subparts of Rule 1.220(b). Plaintiffs specifically seek certification pursuant to Rule 1.220(b)(3), which provides that certification is appropriate when:

> [T]he questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

Fla. R. Civ. P. 1.220(b)(3). Plaintiffs carry the burden of proving the applicability of all of Rule 1.220's requirements in order to succeed in class certification. *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 106 (Fla. 2011). Each requirement's applicability to the instant case is discussed in turn below.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

Plaintiffs' Putative Class Representatives

1. In the Fourth Amended Complaint, Plaintiffs identify four putative class representatives. However, only two putative class representatives testified at the hearing: Ronald Juvonen and Austin Ross. Hrg. Tr. Vol. 5, 531:9-12.

2. First, Mr. Juvonen testified at the Hearing. The Court finds his testimony to be credible. Mr. Juvonen stated that he owned a property in Wellington, Florida, that was insured under a Dwelling policy issued by Citizens Property Insurance Company. Def. Exh. 1; Hrg. Tr. Vol. 3, 295:13-15. United later assumed Mr. Juvonen's policy. Hrg. Tr. Vol. 3, 295:16-18.

3. Mr. Juvonen does not know how many other putative class members had Citizens policies that were later assumed by Defendant. Hrg. Tr. Vol. 3, 296:7-18.

4. Mr. Juvonen's property was damaged on October 24, 2005. Pl. Exh. 8.

5. On cross-examination, Mr. Juvonen's conceded that his property was a small farm. Hrg. Tr. Vol. 3, 301:10-14 and it contained multiple structures. He expressed confusion as to whether the repairs reflected under the "Dwelling" section of his residential property damage estimate related to the dwelling or a barn located on the property. Hrg. Tr. Vol. 3, 292:1-22; Pl. Exh. 8.

6. Mr. Juvonen's Citizens policy excluded coverage for structures used in whole or in part for farming purposes. Hrg. Tr. Vol. 3, 301:25-302:4; Def. Exh. 1 at 4.

7. Mr. Juvonen does not know how many putative class members also had structures used for farming purposes or a farming exclusion in their insurance policy. Hrg. Tr. Vol. 3, 302:20-303:8.

8. Further, on cross-examination, Mr. Juvonen testified that he received a letter from Defendant with the following statement:

> The estimate to repair your dwelling does not include the licensed contractor's Overhead and Profit. If you hire a licensed contractor, have the work completed and if charged for Overhead and Profit, please forward the final repair bill for review and reimbursement.

Pl. Exh. 5; Hrg. Tr. Vol. 3, 289:9-15.

9. Mr. Juvonen also conceded that his property was fully repaired. Hrg. Tr. Vol. 3, 304:11-20.

10. During the course of conducting those repairs, Mr. Juvonen never contacted or hired a general contractor. Hrg. Tr. Vol. 3, 304:21-305:5. Moreover, Mr. Juvonen never contacted Defendant to request payment for GCOP before filing this lawsuit. Hrg. Tr. Vol. 3, 305:6-10.

11. Mr. Juvonen "believes" he was not paid for GCOP. Hrg. Tr. Vol. 3, 290:4-6.

12. However, Mr. Juvonen admitted that he did receive payment from Defendant for $320 **more** than the "Total Claim" amount listed on his estimate. Hrg. Tr. Vol. 3, 300:22-301:4. Neither Mr. Juvonen nor Plaintiffs' counsel proferred any evidence in the record to explain why Mr. Juvonen received payment exceeding the amount of the "Total Claim" reflected on his estimate.

13. Mr. Juvonen admits that he does not know how many of the putative class members also received payments from Defendant that exceeded the amount of the "Total Claim" on their respective estimates. Hrg. Tr. Vol. 3, 301:5-9.

14. Mr. Juvonen's Citizens policy contained an appraisal provision, which he elected not to invoke. Hrg. Tr. Vol. 3, 297:19-298:2. Mr. Juvonen does not know how many putative

class members have an appraisal provision in their insurance policy, or how many chose to invoke that provision. Hrg. Tr. Vol. 3, 298:4-16.

15. Next, Mr. Ross testified at the Hearing. Unlike Mr. Juvonen, Mr. Ross owned a property that was insured under a Homeowners Policy issued by United. Pl. Exh. 113.

16. Mr. Ross's property was damaged on August 22, 2008. Pl. Exh. 49.

17. In contrast to Mr. Juvonen, Mr. Ross hired a licensed general contractor to repair the damage to his property. Hrg. Tr. Vol. 3, 311:3-8. Mr. Ross's licensed general contractor negotiated payment directly with the field adjuster handling Mr. Ross's claim on Defendant's behalf. Hrg. Tr. Vol. 3, 312:16-25.

18. While Defendant was adjusting Mr. Ross's insurance claim, Mr. Ross wrote a letter to Defendant's desk adjuster, instructing him to close Mr. Ross's claim once Defendant issued a payment in the amount agreed to by Mr. Ross's general contractor and the field adjuster. Def. Exh. 31; Hrg. Tr. Vol. 3, 316:14-22.

19. Mr. Ross claims that he wrote this letter to Defendant because he wanted to get back into his home, receive a final payment, and pay his general contractor. Hrg. Tr. Vol. 3, 316:23-317:1.

20. Unlike Mr. Juvonen, Mr. Ross did **not** receive a letter from Defendant containing a paragraph that explained a payment process for GCOP (as outlined in Plaintiffs' Exhibit 5). Hrg. Tr. Vol. 3, 320:3-14; 321:19-24.

21. Instead, Mr. Ross received a letter that omitted that paragraph. Hrg. Tr. Vol. 3, 321:1-24; Def. Exh. 8.

22. Further, unlike Mr. Juvonen, Mr. Ross claims that an adjuster working for Defendant informed him that the Company had a "policy not to pay overhead and profit." Hrg. Tr. Vol. 3, 313:17-25.

Named Plaintiffs Not Offered as Putative Class Representatives at the Hearing

23. Plaintiffs offered **no** evidence regarding or testimony from Ms. Jones, f/k/a Ms. Fronczek. Similarly, Plaintiffs offered no evidence about or testimony from Mr. Gordon.

24. Defendant offered evidence regarding Mr. Gordon, through deposition designations. *See* United's Deposition Designations and Cross-Designations, dated April 21, 2015. During deposition, Mr. Gordon testified that he had filed for personal bankruptcy in 2011. *See* August 13, 2014, Deposition of Steven Gordon ("Gordon Dep.") at 107:11-108:6. At the time Mr. Gordon filed the petition, this case was pending and Mr. Gordon was a named plaintiff. Gordon Dep. at 110:3-8.

25. Even though the form bankruptcy petition required that the petitioner disclose, among other things, any contingent claims, Mr. Gordon failed to disclose his claim against Defendant in his sworn bankruptcy petition. Gordon Dep. at 108:17-109:6; 112:9-25; 117:4-10; 118:9-17.

The Remaining Putative Class Members

26. Plaintiffs offered the deposition of Defendant's Corporate Representative into evidence. Pl. Exh. 71. Defendant's corporate representative testified that from October 1, 2005, through the date of the deposition, over 50,000 residential property damage claims had been submitted by Defendant's insureds. Pl. Exh. 71, at 85:6-9.

27. No evidence was introduced about how many of those 50,000 residential property damage claims resulted in an initial damage estimate from Defendant that included more than one trade to repair the property. Further, no evidence was introduced about how many of the insureds who submitted residential property damage claims have not received payment for GCOP.

28. Plaintiffs offered the testimony of Stephen Ierulli, who is the founder of IMS. Hrg. Tr. Vol. 2, 95:23-96:15.

29. Although Mr. Ierulli testified that he believed a majority of the claims during the class period did not include payment for GCOP, on cross-examination he admitted that he had no way of knowing whether any individual payments to insureds included GCOP. Hrg. Tr. Vol. 2, 180:14-18; 205:17-22.

30. No evidence was introduced about how many insureds who submitted residential property damage claims during the class period have already agreed to release Defendant from any claims arising from the property damage.

31. During the evidentiary hearing, Plaintiffs offered no evidence about any putative class member's claim besides Mr. Juvonen's and Mr. Ross's.

Evidence About Defendant's Policies and Practices

32. At the Hearing, Plaintiffs introduced documents related to the Defendant's business practices, policies and procedures during the class period. Pl. Exhs. 1, 2, 3, 4, 6, 7, 39, 41, 53.

33. Defendant objected to the admission of such materials on the grounds that evidence of an insurance company's business practices or policies is irrelevant to an insured's breach of contract claim and to class certification issues. Hrg. Tr. Vol. 2, 104:16-105:8.

34. The Court sustained Defendant's objection, in part, and admitted Plaintiffs' Exhibits numbered 1, 2, 3, 4, 6, 7, 39, 41, and 53, but ruled that it would consider them only for purposes of determining the commonality element of class certification. Hrg. Tr. Vol. 1, 114:1-9; 115:3-11.

35. The Court finds that, based on the evidence presented over objection, Defendant had no consistent policy or practice for payment of GCOP that applied during the proposed class period.

36. Mr. Juvonen testified that he received a letter from Defendant in connection with his 2005 claim, indicating that Defendant would reimburse him if he incurred GCOP. Hrg. Tr. Vol. 3, 289:9-15; Pl. Exh. 5. In contrast, Mr. Ross indicated that he had not received that same letter in connection with his 2008 claim. Instead, he testified that he was informed that Defendant categorically did not pay for GCOP. Hrg. Tr. Vol. 3, 313:17-25; 320:3-14; 321:19-24.

37. Mr. Ierulli testified that, from 2005 to 2012, IMS was instructed not to include GCOP on its estimates for Defendant's insureds. Hrg. Tr. Vol. 2, 115:14-25; 127:2-17.

38. A "United Performance Expectation" used by IMS's adjusters and dated June 18, 2009, states that "[GCOP] will be considered only as a Supplemental Item by UNITED personnel." Pl. Exh. 50 at 5.

39. Notwithstanding the instruction that IMS adjusters not include GCOP on their estimates for Defendant's insureds, on cross-examination **Mr. Ierulli admitted that, during this time, thousands of insureds were paid GCOP**. Hrg. Tr. Vol. 2, 205:17-22.

40. Plaintiffs also offered into evidence three claims files for losses during the 2008 – 2009 timeframe where Defendant paid its insureds upfront and pre-repair payments for GCOP. Pl. Exhs. 110, 111, 112.

41. Apart from any instruction to IMS regarding the contents of its estimates, since at least 2009 Defendant had an internal written policy to pay its insureds GCOP when "it appears [the] insured may incur O&P." Pl. Exh. 1. at 14.

42. In 2012, IMS instructed its adjusters to "consider" GCOP on estimates for Defendant's insureds "where 3 or more trades [were] being utilized, OR if it [was] reasonably expected that a contractor [would] be used." Pl. Exh. 39 at 6.

43. In 2012, Defendant's internal written policy stated that "[GCOP] [was] to be included in the estimate if it [was] reasonably anticipated that the services of a general contractor [would] be needed." Pl. Exh. 7 at 17.

44. In 2013, IMS instructed its adjusters that "[t]he only time [Defendant] [did] not include [GCOP] [was] on estimates with one trade only, i.e., water mitigation or isolated temp/permanent repair." Pl. Exh. 53 at 5.

45. In 2013, Defendant's internal written policy remained that "[GCOP] [was] to be included in the estimate if it [was] reasonably anticipated that the services of a general contractor [would] be needed." Pl. Exh. 6 at 16.

46. Indeed, as summarized by Mr. Ierulli: the evidence shows that IMS's instructions regarding how to handle GCOP changed multiple times between 2005 and 2013, and, over time, those instructions became more and more generous to the insured. Hrg. Tr. Vol. 2, 189:17-190:4. In short, United had no consistent policy on GCOP during the relevant time period.

Evidence Regarding Plaintiffs' Proposed More-Than-One-Trade Rule and the Reasonably-Likely Standard

47. Plaintiffs' proposed class includes those insureds whose initial damage estimate from Defendant includes more than one trade to repair their property. (Fourth Am. Compl. ¶ 35.)

48. Plaintiffs offered the testimony of proposed expert Christopher Cobb to support their argument that "use of a more than one trade or multiple trades standard is a reasonable measure for determining when the services of a general contractor are reasonably likely to be needed." Hrg. Tr. Vol. 3, 245:17-246:21.

49. Mr. Cobb is a Florida-bar certified construction attorney, who serves on the State of Florida's Construction Industry Licensing Board. Hrg. Tr. Vol. 3, 230:5-13; 231:4-7.

50. Mr. Cobb conceded that he was not offering an opinion regarding insurance industry practices relating to payment of GCOP. Hrg. Tr. Vol. 3, 247:12-17.

51. Plaintiffs also offered Mr. Cobb's testimony regarding issues of unlicensed contracting allegedly related to circumstances when a homeowner does not use the services of a general contractor. Hrg. Tr. Vol. 3, 249:9-250:16; 251:4-252:19.

52. Mr. Cobb ultimately contradicted his proffered opinion and agreed that, under Florida law, a homeowner **could** hire two licensed trade contractors without requiring the services of a general contractor or acting under the owner-builder exemption to Chapter 489, Florida Statutes. Hrg. Tr. Vol. 3, 273:6-25; 277:8-19.

53. Mr. Cobb also admitted that, while the number of trades is an important factor in determining whether it is reasonably likely that a repair would require the services of a general contractor, it was not the **only** factor. Hrg. Tr. Vol. 3, 277:20-278:1.

54. Plaintiffs' witness Mr. Ierulli also agreed that a rule relying on a number of trades (three trades or more than one trade) was different from the reasonably likely standard. Hrg. Tr. Vol. 2, 190:5-14.

55. Mr. Ierulli testified that there would be circumstances involving only one trade, but where an insured would reasonably likely require the services of a general contractor such that GCOP payment should be included. Hrg. Tr. Vol. 2, 134:14-135:4; 190:15-19.

56. Mr. Ierulli testified that, even when under instruction to include GCOP on estimates for Defendant's insureds reflecting more than one trade, his adjusters could still make a recommendation that Defendant pay GCOP on repairs involving just one trade if warranted based on the adjuster's investigation. Hrg. Tr. Vol. 2, 135:15-136:6.

57. Defendant offered the opinion of Professor Jose Mitrani regarding when the services of a general contractor are reasonably likely to be required and to rebut Mr. Cobb's opinions. Hrg. Tr. Vol. 4, 338:7-17. This Court finds Professor Mitrani's testimony to be reasonable, credible and supported by the evidence.

58. Professor Mitrani has taught courses on construction engineering, construction management, structural engineering, building codes, and structural analysis for 40 years. Hrg. Tr. Vol. 4, 333:16-17; 333:25-334:8. Among other things, Professor Mitrani is a certified general contractor in the State of Florida, a licensed professional engineer, a licensed state-wide building plans examiner, and a licensed building inspector. Hrg. Tr. Vol. 4, 334:9-19. Professor Mitrani has worked for several municipal building departments and, in his capacity as a structural-plans reviewer, has had to determine whether the services of a licensed general contractor would be required. Hrg. Tr. Vol. 4, 336:20-337:3; 337:16-338:6. In short, Professor Mitrani is highly qualified as an expert witness in this matter.

59. In Professor Mitrani's opinion, it is simply not possible to determine whether the services of a licensed general contractor are reasonably likely to be required by looking only at the number of trades, or the number of licensed trade contractors, that would be involved in a repair. Making that decision based on a number-of-trades rule would be insufficient. Hrg. Tr. Vol. 4, 344:5-13; 357:8-15.

60. Instead, Professor Mitrani testified that there are many factors that must be evaluated to determine whether the services of a general contractor are reasonably likely to be required. Each situation is unique and would need to be analyzed individually. Hrg. Tr. Vol. 4, 340:18-341:16.

61. Those factors include, but are not limited to, the nature, scope, complexity, and potential danger of the work to be performed; and characteristics of the individual homeowner. Hrg. Tr. Vol. 4, 340:18-341:16.

62. Professor Mitrani confirmed that not every homeowner who hires two licensed trade contractors is necessarily acting as an owner/builder under Chapter 489, Florida Statutes. Hrg. Tr. Vol. 4, 345:24-346:3.

The Process to Identify Class Members and Examine Putative Class Members' Claims

63. Plaintiffs' trial plan contemplates that, sometime in the future, the Court will approve a protocol employing a trades-based approach that will then be applied to determine who the class members are and how to review those insureds' claims files to adjudicate their individual claims. Hrg. Tr. Vol. 5, 503:25-504:5; 515:5-9; 527:13-528:14.

64. At this time, Plaintiffs have not proposed any such protocol. Instead, Plaintiffs ask the Court to allow them to gather more evidence, propose a protocol, and then review the

Defendant's insureds' claims files to determine class membership. Hrg. Tr. Vol. 5, 527:13-528:14.

65. Plaintiffs did not offer any expert testimony about the data available from Defendant's business records, or other sources, to determine who is a class member.

66. Plaintiffs' witness Mr. Ierulli testified generally about the records that IMS maintains for the claims it handled for Defendant. Hrg. Tr. Vol. 2, 168:9-20; 190:23-25.

67. Mr. Ierulli testified that he could run certain reports of the data IMS maintained for the estimates IMS prepared for Defendant's insureds from 2005 to 2012. Hrg. Tr. Vol. 2, 154:18-155:1.

68. No evidence was introduced about whether or how the data IMS maintains regarding Defendant's insureds could be searched to identify class members under the criteria set out in Plaintiffs' proposed class definition.

69. Mr. Ierulli testified that it would take him less than one minute to review an estimate prepared by one of his adjusters to determine whether the repair called for more than one trade. Hrg. Tr. Vol. 2, 139:7-11.

70. But Mr. Ierulli also testified that even though IMS maintains estimates within its files related to Defendant's insureds, he has no way of knowing whether the estimate he is reviewing is the final estimate. Hrg. Tr. Vol. 2, 191:1-192:5.

71. Mr. Ierulli also admitted that he has no way of knowing whether any individual insured received a payment for GCOP from Defendant. Hrg. Tr. Vol. 2, 179:16-22; 180:14-18.

72. During the hearing, Plaintiffs' counsel conceded that ascertaining class members and adjudicating claims would require a review of each individual insured's claims file. Hrg. Tr.

Vol. 1, 31:23-32:16 ("In addition, they would have to look at the claim file. . . . There is [no] getting around that.").

73. Plaintiffs offered no evidence or testimony about the time it would take to manually review each insured's file from the records maintained by either IMS or Defendant.

74. Plaintiffs designated deposition testimony from their proposed expert, Matthew Pohl.

75. Mr. Pohl is a class-action administrator. *See* March 18, 2015, Deposition of Matthew Pohl ("Pohl Dep.") at 8:14-22.

76. Mr. Pohl opined that, if he was provided a protocol containing objective criteria to ascertain class members, he could review each claims file to ascertain members of the class. Pohl Dep. at 70:5-19.

77. Mr. Pohl has never seen that protocol, has no opinion about whether objective criteria could be developed to ascertain class members, and concedes that he would not be qualified to draft any such protocol. Pohl Dep. at 72:16-24; 78:12-79:11; 90:9-22; 128:4-7.

78. Mr. Pohl also testified that his opinion was not final, and that any opinions he did offer in this case were subject to change based on "how the facts go." Pohl Dep. at 84:2-7; 140:17-141:2; 153:22-154:3.

79. Mr. Pohl has never been involved in administering a class action in a GCOP case. Pohl Dep. at 18:24-19:7. The Court considers this factor in the weight to give to Mr. Pohl's testimony.

80. Defendant offered the testimony of two experts: a data analytics specialist, Bradley J. Pinne, and an insurance claims file auditor, Dale Frediani, Sr. This Court finds Mr. Pinne and Mr. Freidiani's testimony to be credible and well-supported by the evidence.

81. Mr. Pinne is a Director at Navigant Consulting who specializes in analyzing large scale corporate databases for litigation and investigative matters. Hrg. Tr. Vol. 4, 378:1-13.

82. Mr. Pinne interviewed Defendant's employees regarding Defendant's computer systems to determine whether queries could be developed to narrow the field of insureds to those who submitted claims after October 1, 2005 and whose claims involved a certain number of trades. Hrg. Tr. Vol. 4, 378:24-379:15; 381:10-16; 383:7-386:2.

83. Mr. Pinne opined that the only way to identify putative class members was to manually review each individual claims file within the Defendant's computer system. Hrg. Tr. Vol. 4, 380:7-10.

84. Mr. Pinne testified that a manual review was required because there was no way to query the structured data of Defendant's systems to identify putative class members. Hrg. Tr. Vol. 4, 383:1-6; 383:17-384:3; 384:24-385:3; 385:14-386:2.

85. Similarly, Mr. Pinne opined that a manual review of each claims file would also be required to quantify damages for any of the putative class members. Hrg. Tr. Vol. 4, 380:11-16; 387:13-388:2.

86. Defendant's other expert witness, Mr. Frediani, is a co-founder of RMG Consulting, Inc., who performs large-scale auditing of insurance claims files for litigation and investigative matters for insurance companies. Hrg. Tr. Vol. 5, 419:16-421:2; 422:1-8.

87. Mr. Frediani testified that to review each claims file in this case would take between 20 to 40 minutes. Hrg. Tr. Vol. 5, 427:18-24.

88. Mr. Frediani has reviewed and audited tens of thousands of residential property damage claims files to determine whether additional payments were owed, including several thousand Florida residential property damage claims files. Hrg. Tr. Vol. 5, 421:3-8; 422:9-17.

89. While Mr. Frediani only reviewed a small sample of Defendant's claims files, the files that he reviewed were consistent with the thousands of Florida residential property damage claims files that he has reviewed throughout his career. Hrg. Tr. Vol. 5, 426:23-427:12.

90. Mr. Frediani testified that the entire claims file needs to be reviewed to determine what was paid to each insured and on what basis because, in his experience, claims are settled in a variety of different ways. Hrg. Tr. Vol. 5, 427:25-428:3; 433:11-434:1.

91. Mr. Frediani testified that claims files often need to be re-reviewed beyond the initial review. Hrg. Tr. Vol. 5, 427:18-428:3; 434:10-435:1.

92. Mr. Frediani also testified that additional time would be needed to implement re-review and quality control measures. Hrg. Tr. Vol. 5, 427:18-428:3; 434:10-435:1.

93. Mr. Frediani testified that applying a more-than-one-trade standard for payment of GCOP would result in "overpaying a great number of claims." Hrg. Tr. Vol. 5, 444:17-445:1.

B. CONCLUSIONS OF LAW

1. Plaintiffs Fail to Satisfy the Numerosity Requirement.

Rule 1.220(a)(1) requires that "members of the class [be] so numerous that separate joinder of each member is impracticable." "[A] plaintiff is precluded from relying on speculation as to class size" when attempting to satisfy Rule 1.220(a)(1). *Toledo v. Hillsborough Cnty. Hosp. Auth.*, 747 So. 2d 958, 961 (Fla. 2d DCA 1999); *see also Sosa*, 73 So. 3d at 114 (noting a plaintiff may not base a class size on speculation). Further, the numerosity prong also "requires a class definition that allows a court to reasonably ascertain if a person or entity is a member of the class." *Canal Ins. Co. v. Gibraltar Budget Plan, Inc.*, 41 So. 3d 375, 377 (Fla. 4th DCA 2010).

At the hearing, Plaintiffs' witness Stephen Ierulli testified up to 50,000 people had submitted a claim to Defendant since 2005. Ierulli further testified "**maybe** 2,000" of the claims had GCOP actually paid on them. Ierulli was an employee of Defendant's adjuster, however, and therefore Ierulli has "**no idea**" whether Defendant paid any putative class members GCOP on its own and, if it did so, how many class members received such payment. In short, he concluded that there was "**no way**" to know if any of the individual payments included GCOP. Additionally, he acknowledged that Defendant's policies and guidelines had changed several times for the time period at issue, 2005-2013, further complicating the numerosity analysis. Therefore, there is insufficient evidence before the Court to establish the number of putative class members.[2]

In addition, Nichole Haupt, Defendant's corporate designee, testified in a deposition that she did not know how many of Defendant's claim payments actually did not include GCOP during the class period and that such information could only be deduced from review of all the claim files. (Haupt Dep. 85, July 22, 2014). Moreover, Defendant's expert Brad Pinni testified that it would not be possible to identify class members from the structured data in the Defendant's system.

Further, Plaintiffs also fail to satisfy the second component of numerosity, which requires a class definition that allows the Court to reasonably ascertain the putative class members. In those instances where a "prolonged and individual analytical struggle" is required to ascertain

[2] The only specific number in evidence is the total number of claims to United from Oct. 1, 2005 through the date of the Defendant's corporate representative deposition, which number exceeds 50,000. However, this number only indicates how many individual insureds meet the first two prongs of the proposed class. There is no evidence before the Court of the number of these 50,000 purported claimants who (1) had an initial damage estimate including more than one trade to repair their property; (2) have not yet received payment for GCOP, or (3) have not agreed to a release Defendant from additional claims. As such, this Court cannot determine, without speculation, that the putative class is sufficiently numerous.

class membership, a Plaintiff fails to satisfy this prong. *See Gilman v. John Hancock Variable Life Ins. Co.*, 2003 WL 23191098 at *5 (Fla. 15th Cir. Ct. Oct. 20, 2003). Upon inquiry from this Court as to the difficulties in determining the putative class members, Plaintiffs stated that this information is ascertainable from a review of individual estimates from each claim file to determine whether or not the repairs called for more than one trade. Such a process would mandate manual review of each individual claim file and as detailed *infra*, this Court cannot use Plaintiff's more-than-one-trade standard as a proxy for that "reasonably likely" standard for payment of GCOP mandated by the Florida Supreme Court.[3] As a result, adopting Plaintiffs' class definition would result in a class that contains a wholly undeterminate number of uninjured class members.

2. <u>Plaintiffs Have Satisfied the Commonality Requirement</u>.

Under Rule 1.220(a)(2), the claims of the representative plaintiffs must be shown to "raise[ ] questions of law or fact common to the questions of law or fact raised by the claim . . . of each member of the class." Under this requirement, representative plaintiffs must show their claims "arise[ ] from the same practice or conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory." *Sosa*, 73 So. 3d at 107. The burden for satisfying the commonality requirement is "not high," as representative plaintiffs must only show

[3] In addition to the fact that the more-than-one-trade standard may not be merely substituted for the "reasonably likely" standard, witness testimony at the class certification hearing raised concerns about such a standard. First, Mr. Ierulli testified that when his adjusters were instructed to include GCOP on estimates for United insureds that called for more than one trade, the adjusters would have included a recommended payment for GCOP on repairs involving only one trade when it was reasonably likely that the insured would use the services of a general contractor. (Hrg. Tr. 134:14-135:4, 135:15-135:6; 190:15-19). Moreover, Defendant's expert, Mr. Frediani testified that using Plaintiffs' proposed more-than-one-trade standard would result in "overpaying a great number of claims." (Hrg. Tr. 444:17-445-1). Finally, even Plaintiff's own expert, Mr. Cobb, conceded upon cross-examination that the number of trades involved was not the sole factor in determining whether the services of a general contractor would be required. (Hrg. Tr. 277-20-280:1).

that "resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of common or general interest." *Id.* (emphasis omitted). Further, this question of general interest "must be in the Object of the action, in the Result sought to be accomplished in the proceedings, or in the Question involved in the action." *Imperial Towers Condo., Inc. v. Brown*, 338 So. 2d 1081, 1084 (Fla. 4th DCA 1976) (capitalization in original). This standard was satisfied where a putative class raised a question of entitlement to statutory interest due on late PIP payments and where the putative class sought relief in the form of said payments. *Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I*, 694 So. 2d 852 (Fla. 3d DCA 1997).

Plaintiffs have satisfied the commonality requirement. Plaintiffs claim Defendant systematically withheld GCOP payments from the putative class and that therefore Defendant breached its contracts with the putative class members. Just as in *Colonial Penn*, Plaintiffs raise a common question of entitlement to certain payments and seek to receive such payments upon resolution of this question. Plaintiffs have therefore satisfied the commonality prong of Rule 1.220(a).

3. <u>Plaintiffs Fail to Satisfy the Typicality Requirement</u>.

Rule 1.220(a)(3) requires that a representative plaintiffs' claims be "typical of the claim[s] . . . of each member of the class." The typicality requirement asks "whether the class representative possesses the same legal interest and has endured the same legal injury as the class members." *Sosa*, 73 So. 3d at 114. This requirement is not satisfied where a defendant has a defense unique to a class representative that would "preoccupy a named plaintiff to the detriment of the interest of absent class members." *Miami Auto. Retail, Inc. v. Baldwin*, 97 So. 3d 846, 854-55 (Fla. 3d DCA 2012).

Plaintiffs failed to satisfy the typicality requirement. During the evidentiary hearing, Plaintiffs offered no evidence of any other putative class members' claims other than Mr. Juvonen's and Mr. Ross's. As detailed above, these two claims are factually distinct from each other. At first blush, Plaintiffs may allege the same legal interest and have purportedly endured same legal injury at the putative class. United, however, has raised unique several defenses against certain representative plaintiffs that are unique among the representative plaintiffs, let alone the putative class. For example, Defendant raises the defense of judicial estoppel from a bankruptcy proceeding against Plaintiff Steven Gordon. Defendant raises the defenses of accord and satisfaction and release against Plaintiff Austin Ross. Defendant has raised colorable defenses against two of the Plaintiffs that are unique among the four Plaintiffs and therefore could be unique among the putative class. These defenses would preoccupy the two Plaintiffs to the detriment of the class and accordingly Plaintiffs have not satisfied Rule 1.220(a)'s typicality requirement.

4. <u>Plaintiffs Satisfy the Adequacy Requirement</u>.

Rule 1.220(a)(4) requires each representative plaintiff be able to "fairly and adequately protect and represent the interests of each member of the class." This requirement serves to check the class against potential conflicts of interest. *Sosa*, 73 So. 3d at 115. In order to satisfy the adequacy prong, a representative plaintiff must show (1) class counsel has the "qualifications, experience, and ability" to conduct the litigation and (2) that the class representative's interests are not antagonistic to the other members of the class. *Id.*

Plaintiffs have satisfied the adequacy prong. Plaintiffs' counsel is experienced in class litigation and would be able to adequately represent the interests of the class. Similarly, Plaintiffs through testimony at the hearing and depositions have all expressed a willingness and

desire to represent the interests of the class as a whole. The prerequisites for a finding of adequacy have thus been satisfied. The Court also does not find that the class representative's interests would be antagonistic to the other members of the class. In short, the evidence produced at the hearing revealed no indication of a conflict of interest and accordingly the adequacy prong is satisfied.

5. Plaintiffs Fail to Satisfy the Predominance Requirement.

Rule 1.220(b)(3) requires "questions of law or fact common to the claim . . . of the representative party and the claim . . . of each member of the class predominate over any question of law or fact affecting only individual members of the class." "[A] class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact." *Sosa*, 73 So. 3d at 112. A "reasonable methodology" is shown when a representative, "by proving his or her own individual case, *necessarily* proves the cases of the other class members." *Id.* (emphasis in original). If resolution of each individual class member's claim would involve a "mini-trial," this requirement has not been satisfied. *Id.* at 114.

a. Individualized inquiries for each class member are required to determine whether GCOP should have been paid.

Plaintiffs have failed to show that resolution of the class action is manageable without conducting individualized "mini-trials" for each class member's claim. First, Plaintiffs have failed to show that by proving their own cases, Mr. Juvonen and Mr. Ross *necessarily* prove the cases of each of the other class members. *Sosa*, 73 So. 3d at 112. As discussed above, Mr. Juvonen and Mr. Ross cannot prove each other's cases, let alone the claims of potentially 50,000 other putative class members whom they claim to represent.

The heart of Plaintiffs' class action involves when an insured is entitled to payment of GCOP. The Florida Supreme Court articulated the standard for when an insured must be paid GCOP in *Trinidad v. Florida Peninsula Insurance Co.* (*Trinidad II*), 121 So. 3d 433 (Fla. 2013). In *Trinidad II*, the Florida Supreme Court determined GCOP "must be included within the scope of a replacement cost policy where it is *reasonably likely a general contractor would be needed for the repairs."* 121 So. 3d at 439 (emphasis added).[4] By the very nature of a "reasonably likely" standard, common questions cannot predominate on this issue. Each situation for each putative class member would need to be individually examined to determine if use of a general contractor was reasonably likely to be necessary. Similarly, a representative plaintiff may have a situation in which use of a general contractor was reasonably likely to be needed, but such a finding would not "necessarily" prove the case of other class members without a further inquiry. A finding of predominance is inappropriate under such facts.

b. Plaintiffs' proposed "multiple trades" approach is rejected.

Plaintiffs seek to satisfy the predominance requirement by advocating for a "multiple trades" approach to determining when a general contractor is reasonably likely to be needed under *Trinidad II*. Under this standard, the need for a "mini-trial" is removed by a *per se* approach in which a general contractor is determined to *always* be reasonably likely to be needed when a project calls for more than one trade. No Florida court has applied such a *per se* approach, but other jurisdictions have addressed similar standards and are instructive.

(i) Out-of-state decisions regarding "multiple trade" approaches.

In *National Security Fire & Casualty Co. v. DeWitt*, the Supreme Court of Alabama considered application of a *per se* "three or more trades" approach in the context of a class action

[4] *Trinidad II* is silent as to when a general contractor will be "reasonably likely" to be needed.

seeking payment of GCOP. 85 So. 3d 355 (Ala. 2011).[5] The *DeWitt* court declined to apply such a standard and determined common questions did not predominate the putative class, stating

> [a]lthough this case will involve issues that are common to all class members, it is highly likely that *it will also involve individualized evidence regarding whether it was reasonably foreseeable that the services of a general contractor would be necessary in each of those claims.* Also, it is likely that the case will also involve evidence as to whether some of the estimates actually indicate that three or more trades would be involved in the repairs.

Id. at 384 (emphasis added). The U.S. District Court for the Western District of Louisiana considered application of Plaintiffs' "more than one trade" approach in *John v. National Security Fire & Casualty Co.*, No. 06-1407, 2006 WL 3228409 (W.D. La. Nov. 3, 2006). The *John* court determined application of such a standard was inappropriate, noting

> there still has to be a factual inquiry into whether needing more than one trade contractor warrants a general contractor. Also, a factual inquiry would have to be made as to whether each putative class member's damages involves more than one trade.

Id. at *4. Plaintiffs provide two cases from sister jurisdictions in which multiple-trade approaches were accepted. In *Burgess v. Farmers Insurance Co., Inc.*, the Supreme Court of Oklahoma determined a trial court did not abuse its discretion when it certified a class based on a "three or more trades" rule. 151 P. 3d 92, 99 (Okla. 2006). Similarly, in *Press v. Lousiana Citizens Fair Plan Property Insurance Corp.*, the Louisiana Court of Appeal, Fourth Circuit determined a "three or more trades" approach was appropriate in certifying a class action. 12 So. 3d 392, 396 (La. Ct. App. 2009).

ii) <u>Use of a multi-trade rule is inappropriate.</u>

[5] In Alabama, GCOP must be paid "when it is reasonably foreseeable that the services of a general contractor will be necessary." *DeWitt*, 85 So. 3d at 371.

The Court declines to apply Plaintiffs' multi-trade approach. Cases such as *DeWitt* and *John* are persuasive, as use of a multi-trade rule would not answer whether use of a general contractor was reasonably likely to be necessary for each claim. A standard evoking reasonableness involves a consideration of multiple factors. *See, e.g., Rawls v. Leon Cnty.*, 974 So. 2d 543, 547 (Fla. 1st DCA 2008) (considering multiple factors when considering whether there was a "reasonable necessity" for taking property); *Collins v. Wilkins*, 664 So. 2d 14, 14 (Fla. 4th DCA 1995) (considering multiple factors when determining whether attorney's fee was "reasonable"). Number of trades is but one such factor. Individualized inquiries are required to answer the standard posed by *Trinidad II* and therefore use of a multi-trade rule is inappropriate.

Plaintiffs' cited cases are distinguishable. As a threshold matter, both *Burgess* and *Press* involve a "three or more trades" rule, one which is more stringent than Plaintiffs' proposed rule which uses two or more trades. Plaintiffs' proposed rule was rejected in *John*. 2006 WL 3228409 at *4. Further, neither jurisdiction permits the trial court to consider merits issues in certifying a class whereas Florida expressly allows such consideration. *See Sosa*, 73 So. 3d at 105 ("[I]f consequential to its consideration of whether to certify a class, a trial court may consider evidence on the merits of the case as it applies to the class certification requirements."). Most critically, it is not clear that any of Plaintiffs' cited authority stems from a jurisdiction that uses a "reasonably likely" standard such as Florida's.[6] Whether use of more than one trade or more than two trades in and of itself renders use of a generally contractor reasonably likely to be

[6] The *Press* case cited by Plaintiffs also was decided prior to the Supreme Court of Louisiana's decision in *Dupree v. Lafayette Insurance Co.*, 51 So. 3d 673, 691 (La. 2010). The *Dupree* court held that under the case's facts, a finding of predominance was inappropriate because "the determination of whether the services of a general contractor would be reasonably likely to be required is a fact question that will be different for every insured." 51 So. 3d at 691. The Court finds *Dupree* to be more persuasive to the instant set of facts then *Press*.

necessary is unclear. The Court finds Professor Jose Mitrani's testimony persuasive in this regard, as he testified number of trades is but one factor in making such a determination. (*See* Hr'g Tr. 344). Alabama uses a similar standard to that of *Trinidad II* and the *DeWitt* court determined number of trades does not in and of itself render use of a general contractor to be "reasonably foreseeable." 85 So. 3d at 384. A multi-trade rule is inappropriate here, as a general contractor may not be reasonably likely to be needed despite use of two or more trades. Plaintiffs' arguments otherwise are rejected.

Plaintiffs also argue use of a multi-trade rule is appropriate because Defendant itself uses a multi-trade standard when determining whether to pay GCOP. Even assuming this to be true, Plaintiffs are not permitted to rely on Defendant's business practices to certify their class. *See Rollins, Inc. v. Butland*, 951 So. 2d 860, 873-74 (Fla. 2d DCA 2006) (noting allowing a representative plaintiff to certify a class based on a defendant's business practices would impermissibly prohibit defendant from defending against individual claims where there may be no liability). Defendant's business practices also do not answer whether or not use of a general contractor was reasonably likely to be necessary in each putative class member's case. The Court rejects Plaintiffs' arguments regarding Defendant's GCOP payment practices.

Because the Court finds that Plaintiffs' multi-trade standard is inappropriate, individualized inquiries would be required to determine whether GCOP should have been paid to every class member. Accordingly, Plaintiffs have failed to satisfy Rule 1.220(b)(3)'s predominance requirement.

6. <u>Plaintiffs Fail to Satisfy the Superiority Requirement</u>.

Rule 1.220(b)(3) also requires "class representation [be] superior to other available methods for the fair and efficient adjudication of the controversy." This superiority requirement involves consideration of the following three factors:

> (1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable.

Sosa, 73 So. 3d at 116. A finding that individual questions predominate a class "make[s] any class action trial unmanageable." *Humana, Inc. v. Castillo*, 728 So. 2d 261, 266 (Fla. 2d DCA 1999).

Plaintiffs have failed to satisfy the superiority prong of Rule 1.220(b)(3). It is uncontroverted that examination into each and every individual claims file will be necessary in order to determine whether GCOP should have been paid to an insured, even if Plaintiffs' multi-trade standard was applied. As noted by Defendants expert, Professor Mitrani, determining whether use of a general contractor in each case was reasonably likely to be necessary involves consideration of multiple factors. In fact, Professor Mitrani concluded that each situation would be "unique" and involve the consideration of "many factors", including the nature of the work, scope, complexity of work, evaluation of the dangers in the work, the capacity of the homeowner to hire the contractor, the homeowner's time and where the homeowner was located when the work was to be performed. Such could obviously be a time-consuming process that, in light of the nearly 50,000 claims at issue here, renders a class action inappropriate.[7]

[7] Plaintiffs claim this process would take only seconds for each claim, but do so under the assumption that its multi-trade rule would apply. As noted above, the multi-trade rule is inapplicable and therefore an individualized inquiry would be required into each and every

IV. CONCLUSION

Class action certification is inappropriate in this case. Plaintiffs have failed to satisfy Rule 1.220's requirements of numerosity, typicality, predominance, and superiority. Failure to satisfy any one of these requirements prohibits class certification, let alone all four. The instant set of facts renders resolution by class action inappropriate. Accordingly, it is hereby,

ORDERED that Plaintiffs' Motion for Class Certification is **DENIED** and the class allegations in the Fourth Amended Complaint are hereby stricken. Further, because the individual amount in controversy for Mr. Juvonen, Mr. Ross and Ms. Jones fall below the circuit court jurisdictional threshold, their claims are hereby transferred to the County Court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, on this 2nd day of June, 2015.

MEENU SASSER, CIRCUIT JUDGE

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claims file. The Court rejects the Plaintiffs' characterization for the length of time it would take to determine whether use of a general contractor was "reasonably likely" to be necessary.

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