

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. DAR - _____

Appeals Court

Appeals Court No.:

2021-P-0718

MICHELLE PUOPOLO, and others,

Plaintiffs / Appellants

v.

THE COMMERCE INSURANCE COMPANY, and another,

Defendants / Appellees

On Appeal from Judgment of the Trial Court
Department of the Suffolk Superior Court
Ca No. 1984-cv-00977-BLS

**APPELLANTS' APPLICATION FOR DIRECT APPELLATE REVIEW
BY THE SUPREME JUDICIAL COURT**

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I. REQUEST FOR DIRECT APPELLATE REVIEW

Appellants, Michelle Puopolo; Victor Pagan; and Jessica Nohmy (collectively "Appellants"), pursuant to Mass. Appellate Procedure Rule 11(b), hereby request direct appellate review by the Supreme Judicial Court ("SJC") of the narrow issues set forth herein.

The questions presented are appropriate for direct appellate review as they are matters of first impression wherein the public interest is paramount. See, Mass. R. App. P. 11.

The precise questions of law that are presented by this appeal are:

1. Whether the Superior Court erred in granting Summary Judgement in favor of Appellee, The Commerce Insurance Company;
2. Whether an automobile insurer may pay what it deems to be an unreasonable third-party liability, (without consent, objection, or protest), and later unilaterally reduce its insured's total loss payment by the same amount;
3. Whether an insurer may disclaim coverage after making a liability payment on behalf of its insured; and
4. Whether the Court erred in decertifying this consumer class action.

A copy of the Trial Court's order on appeal ("Order") is appended hereto as **Exhibit A**. Copies of the Docket entries for the case is appended to this application as **Exhibit B** (Puopolo Docket).

In the matter *sub judice*, the issues of state law relevant to this appeal should be heard by the Commonwealth's high Court because: (1) there is a strong public interest in determining the liabilities and manner in which a Massachusetts Automobile Insurer adjusts first party total loss claims wherein the insured's vehicle is towed to a storage/repair facility; (2) these are novel questions of first impression; and (3) the Court's final determination will simplify and expedite appellate procedure avoiding potentially inconsistent lower court decisions in similar cases.

II. STATEMENT OF PRIOR PROCEEDINGS

On October 23, 2017, Puopolo filed a putative class action in the Essex County Superior Court. See, Docket Ref. No. 1.¹ On or about December 7, 2017, Puopolo filed her First Amended Complaint. On or about March 28, 2019,

¹ Plaintiffs note that the docket reflects many matters as being docketed on March 28, 2019, which is the date upon which this action was transferred from Essex County Superior Court to Suffolk County Superior Court, Business Litigation Session.

this matter was transferred to the Business Litigation Session of the Suffolk County Superior Court. See, *Docket Ref. No. 9*.

On April 26, 2019, Puopolo moved for class certification. See, *Docket Ref. No. 9*. On June 7, 2019, after a hearing, and over Defendant's opposition, the Trial Court certified the class as follows ("Certified Class"):

All persons who made a claim under the Limited Collision, Collision, or Comprehensive provisions of their automobile insurance policy with Commerce and whose total loss claim payments were reduced by any amount Commerce contends it paid to a storage facility in relation to the claim.

See, *Docket No. 20, Memorandum and Order on Plaintiff's Motion for Class Certification* (June 7, 2019, Salinger, J.).

On February 26, 2020, Puopolo moved, without opposition, to amend the First Amended Complaint to add Pagan as an additional claimant and Class Representative. See, *Docket Entry No. 25*. On March 4, 2020, this Court allowed *Plaintiff's Motion to Amend*; and thereafter, docketed the *Second Amended Complaint*. *Docket Entry No. 25*. Thereafter on April 16, 2020, Plaintiffs moved to amend the complaint and add Nohmy as an additional Plaintiff and Class Representative. See,

Docket Entry No. 28. On April 22, 2020, this Court allowed Plaintiffs' Motion to Amend; and thereafter, docketed the Third Amended Complaint.

On January 19, 2021, Plaintiffs filed their motion for partial summary judgment; and further, Commerce filed its *Motion for Summary Judgment* and *Motion to Decertify*. See, Docket Nos. 47-59.

On February 23, the Court heard arguments on the pending motions. Thereafter, on May 21, 2021, the Court issued its order and memorandum denying *Plaintiff's Motion for Partial Summary Judgment* and allowing *Commerce's Motion for Summary Judgment* and *Motion to Decertify*. See, Docket No. 60; and **Exhibit A**. On May 26, 2021, Final Judgment was entered. Id. at 61.

On June 15, 2021, Plaintiffs filed their Notice of Appeal. Id. at 62.

III. SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

All formerly certified Class Members' maintained automobile insurance contracts with Commerce, wherein Commerce agreed to provide coverage for first-party towing and storage charges. In fact, since at least May of 2015, Commerce has represented to insureds that Commerce will pay first-party towing and storage charges. See, Docket No. 59 at J.A. 3.

1. Puopolo's Claims

On July 22, 2017, Puopolo was involved in a motor vehicle collision resulting in damage to her vehicle. See, Docket Entry No. 32, *Answer to Third Amended Complaint* ("Answer") at ¶ 11. Puopolo's vehicle was towed to Commonwealth Auto Body after the collision for storage, appraisal, and potential repair. See, Id. ¶ 14. Following the loss, Puopolo made a collision claim under her Policy of insurance with Commerce. See, Id. ¶ 16. Commonwealth Auto Body billed \$1,700.00 for the storage of Ms. Puopolo's vehicle. See, Id. ¶ 17.

Commerce determined that it provided coverage for the storage claim under the Puopolo Policy. See, Docket Entry No. 32. Commerce paid Commonwealth Auto Body ("CAB") \$1,700.00 for the storage of Puopolo's vehicle without dispute. See, Docket Entry No. 32, ¶¶ 18-23.

Commerce made the payment to CAB without consent. See, Docket Entry No. 22, *Memorandum in Support of Commerce's Motion for Rule 16 Conference*, at 7 (admitting that "Commerce (through its salvage vendor) paid [CAB] for 17 days of storage ... Commerce then continued to negotiate Puopolo's total loss claim ..."). Commerce did not attempt to reduce or resist the storage charges assessed by CAB. See, Docket No. 59 at J.A. Ex.

5, at 11. Commerce did not pay the storage charges under protest. See, Id. at 16. Commerce never sent either Puopolo (or CAB) a reservation of rights letter indicating that Commerce believed some of the storage charges were not covered under the Policy. See, Docket No. 59 at J.A. Ex. 5, at 15.

Commerce later declared Puopolo's vehicle a total loss and assessed an Actual Cash Value ("ACV") of the vehicle in the amount of \$8,121.67 plus \$507.60 for sales tax reimbursement. Puopolo had a \$1,000.00 deductible under her Policy. See, Id. at ¶ 37-41. As such, the amount due to Puopolo as consideration for the total loss collision claim under the Policy was \$7,629.27. See, Id. at ¶ 37-41.

However, instead of paying Puopolo the ACV (\$7,629.27), Commerce unilaterally reduced her claim payment by \$485.00; and thus, tendered only \$7,144.27. See, Id. at ¶ 42. Commerce refused to pay Puopolo the full ACV because Commerce asserted that it had overpaid CAB by \$485.00 for storage charges. See, Docket No. 59, J.A. Ex. 5, at 15; and 18.

2. Pagan's Claim

On October 14, 2019, Pagan was involved in a motor vehicle collision resulting in damage to his vehicle.

See, Docket Entry No. 32, at ¶ 47. At the time of the accident, Pagan maintained a Policy of insurance with Commerce; which Policy stated, "[w]e will also pay reasonable and necessary expenses for towing, recovery and storage of your auto. Id. at ¶¶ 49-52.

Pagan's vehicle was towed to and stored at J&G Transmission Auto Repair. Id. at ¶¶ 53-54. Commerce paid J&G Transmission \$2,280.00 (a rate of \$95/day) for the storage of Pagan's vehicle without attempting to negotiate, resist, or reduce the storage charge. Id. at ¶¶ 59-69. Thereafter, Commerce determined Pagan's vehicle to be a total loss with an ACV of \$3,458.97. Id. at 79. Commerce unilaterally reduced Pagan's ACV payment by \$960.00 as contribution/reimbursement for the purported unreasonable storage charges paid to J&G Transmission. Id. at ¶ 81.

3. Nohmy's Claim

On January 10, 2015, Nohmy was involved in a motor vehicle collision resulting in damage to her vehicle. See, Docket Entry No. 32, at ¶ 86. At the time of her collision, Nohmy was insured under a Policy of insurance issued by Commerce; which Policy included coverage for a vehicle's towing and storage after an accident as to prevent further damage or loss. See, Docket No. 59 at

J.A. Ex. 4, at 41:5-11; 56:23-24; 57:1-24; 58:1-24; 59-16-24; and 60:1-7; see also, J.A. Ex. 1, p. 34; and J.A. Ex. 2, p. 17; and J.A. Ex. 6, p. 5.

Nohmy's vehicle was first towed to Biondi's Service Center; and thereafter, towed and stored at Susi Auto Body. See, Docket No. 32, at ¶ 98. Susi Auto Body charged \$65.00/day for the storage of Nohmy's vehicle. Id. at ¶ 100. Commerce paid Susi Auto Body \$790.00 for the storage of Nohmy's vehicle. Id. at ¶ 105. Commerce did not inform Susi Autobody that it believed its storage charges were unreasonable or attempt to resist the payment of the purported unreasonable storage charges. Id. at ¶¶ 106-110. Commerce did not pay Susi Auto Body under protest. Id. at ¶ 112. Thereafter, Commerce determined the vehicle to be a total loss and assessed an ACV of \$14,522.25. Id. at ¶ 127. Commerce then unilaterally reduced Nohmy's ACV claim payment by \$350.00 (paying the full amount demanded by Susi Auto Body despite Commerce's contention that the storage charge was unreasonable; and thereafter, Commerce reduced the ACV by that amount). Id. at ¶ 132.

**IV. STATEMENT OF ISSUES OF LAW RAISED BY APPEAL,
TOGETHER WITH A STATEMENT INDICATING WHETHER THE
ISSUES WERE RAISED AND PROPERLY PRESERVED**

The questions presented by way of this appeal represent matters of first impression as to the ability of an Automobile Insurer to unilaterally reduce its insured's total loss claim payments by a purportedly unreasonable cost of a third-party liability that it had already paid in full - without protest or permission from the insured/policyholder. Appellants submit that direct appellate review is warranted on the following issues:

- (1) Whether an automobile insurer may pay what it alone deems to be an unreasonable third-party liability, (without objection or protest), and later unilaterally reduce its insured's total loss claim payment by the same amount;
- (2) Whether an insurer may disclaim liability after making a liability payment on behalf of its insured; and
- (3) Whether the Court erred in decertifying this consumer class action.

Appellants properly raised these issues on cross motions for summary judgment, which decision attached here as **Exhibit A.**

V. BRIEF ARGUMENT IN SUPPORT OF APPELLANT'S POSITION

The Suffolk Superior Court's decision on the cross-motions for Summary Judgment, determined that a Massachusetts Automobile Insurer may permissibly abdicate its responsibility to protect its insureds by fully paying a third-party liability (without protest or objection); but nevertheless, later the insurer may unilaterally deduct amounts that the insurer itself deemed to be unreasonable from the insureds Actual Cash Value total loss claim payment. See, Exhibit A.

The decision of the trial court departs from the well understood concept that bars a Massachusetts insurer from seeking reimbursement from its insured for any third-party liability claim payment which it has made on behalf of the insured, unless the insurer has obtained consent from the insured prior to making the payment. See e.g., Med. Malpractice Joint Underwriting Ass'n of Massachusetts v. Goldberg, 425 Mass. 46, 58-59 (1997); and Lexington Ins. Co. v. CareCore Nat., LLC, 2014 WL 7477718, at *4 (Mass. Super. July 18, 2014).

That is, the Court's ruling allows an insurer to reduce its contractually obligated total loss claim payments to its own insureds by an amount it purports to have paid for an unreasonable third-party liability.

As above, Massachusetts common-law recognizes that an insurer cannot require an insured to contribute to a third-party liability claim payment after the payment has been made without the express prior consent of the insured. Id. Specifically, the Goldberg Court held that an insurer must communicate with the insured and reach an agreement regarding contribution to, or for, the third-party liability payment prior to the insurer paying the liability. Id. at 56-57.

Furthermore, the trial Court's order fails to recognize that in every instance, Commerce paid each class member's towing/storage charges; and therefore, any argument that towing and/or storage was not covered under either iteration of the Massachusetts Standard Automobile Policy should have been barred. See, Merrimack Mut. Fire Ins. Co. v. Nonaka, 414 Mass. 187 (1993) (The purpose of reserving the right to disclaim coverage (or limit coverage) is to permit an insurer to fulfill its duty to defend without forfeiting any subsequent right to disclaim).

Here no reservations of rights were ever issued in connection with any of the Class Member's storage payments; but instead, Commerce simply paid the full amount it contended was unreasonable knowing full well

that it would later simply reduce its own insured's claim payment by that amount.

Thus, the Superior Court's decision was in error because the court failed to: (1) recognize the fact that in each instance Commerce had already accepted liability and waived its coverage argument when it paid the disputed third-party liability in full without a reservation of rights; (2) recognize that Commerce owed a duty to its insureds to, at the very least attempt to resist and/or attempt to reduce what it considered an "unreasonable" storage charge; and (3) follow the established common-law which concludes that an insurer may not seek contribution or reduce a claim payment by an amount it previously paid regarding a third-party liability without the insured's express consent. See, Med. Malpractice Joint Underwriting Ass'n of Massachusetts v. Goldberg, 425 Mass. 46, 58-59 (1997); and Lexington Ins. Co. v. CareCore Nat., LLC, 2014 WL 7477718, at *4 (Mass. Super. July 18, 2014).

In Goldberg, supra, an insurer filed a declaratory action seeking a judgment that the liability insurance policy it issued to its insured did not serve to cover a third-party liability claim made against its insured. Id. at 53. Ultimately, a judgment was rendered against

the insured; and thereafter, the insurer paid the claim in full. Id. at 52.

Subsequently, like here, the insurer sought reimbursement from its insured for the amount the insurer paid to satisfy the financial obligation owed by the insured. Id. at 47.

In its decision, this Court ruled that, *regardless of whether there was coverage for the underlying claim*, the insurer was not entitled to reimbursement because the policy at issue did not contain a provision for reimbursement and the insurer never obtained "specific authority to reach a particular settlement [pay the insureds obligation] which the insured agree[d] to pay." Id. at 58-59 (emphasis added).

Therefore, the court determined that the insurer was not entitled to reimbursement from its insured. Id. at 61. As the Goldberg Court instructs, an insurer cannot require an insured to contribute to a third-party liability claim payment after the payment has been made without the express prior consent of the insured. Id. Specifically, Goldberg held that an insurer must communicate with the insured and reach an agreement regarding contribution to, or for, the third-party liability payment prior to the insurer paying the

liability. Id. at 56-57.

Here, Commerce admits that its settlement practice is to pay the full storage bill before obtaining consent from its insureds to contribute to the payment of that third-party liability claim. See, Docket No. 59, J.A. Ex. 7, 50:18-24 ("So if it's a total loss, obviously speaking in the breath of these claims, we pay it. We pay to get the vehicle out of there and then what we do is once we go to settle with the claim and we're having our discussions with the insured, we advise them that we only pay 35 a day and that we would deduct any overage from their settlement."); and 51:2-14; see also, Docket 59 at J.A. Ex. 4, 98:13-18 (testifying that Commerce does not notify its insureds of their opportunity to contest the charges before Commerce instructs its agent to pay the storage bill); and 99:3-16 (testifying that Commerce's vendor likewise pays the charge for Commerce without notifying the insured of its right to directly negotiate with the storage facility) .

A. Direct Appellate Review will determine the obligations of an insurer under the Massachusetts Standard Automobile Policy.

Appellants argue the SJC's final determination on this matter is necessary because the decision of the Trial Court will unfairly prejudice Massachusetts

automobile insurance customers because it shall set the permissible adjustment practices for first-party total loss claims, as well as the insurers ability to disclaim coverage after making a disputed third-party liability in full.

The Court should define the insurers obligation in this regard under both the 2008 and 2016 iterations of the Massachusetts Standard Automobile Policy.

B. These are novel questions of first impression

The issue of the permissibility of unilateral claim payment reductions by an automobile insurer for third-party liability payments has not been answered. Appellants seek to bring this novel question to the SJC for final determination.

C. This determination will simplify and expedite appellate procedure.

Because this case involves novel questions of Massachusetts Common Law, as well as an interpretation of the Standard Massachusetts Automobile Policy, the issues presented herein are ripe for direct appellate review of the Massachusetts Supreme Court so as to avoid potentially inconsistent decisions in the Massachusetts Courts and make an efficient appeals process in accordance with the goals of direct appellate review.

Tisei v. Bldg. Inspector of Marlborough, 3 Mass. App. Ct. 377, 378 (1975). That is, the lower Court's decision creates a conflict as other decisions of law issued by this Court. See e.g., Goldberg, supra.

Finally, direct appellate review of these issues will promote the efficient conduct related to other Massachusetts State litigation.

VI. CONCLUSION

This case shall determine whether tens of thousands of Massachusetts claimants are entitled to the full amount of their respective Actual Cash Value claim payments for their totaled vehicles as required by law. This is a novel question which has remained unanswered in the Commonwealth.

Accordingly, Appellant respectfully request that the SJC grant direct appellate review to address this critical issue.

Respectfully Submitted,
Appellants ,
By their Attorney,

/s/ Michael Forrest

DATED: 8.26.21

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CERTIFICATE OF SERVICE

I, Michael C. Forrest, Esq., attorney for Appellants, hereby certify that I served two (2) copies of the attached Appellant's Application for Direct Appellate Review via First Class Mail, postage prepaid, as well as a copy through the electronic service system to all parties of record this 26th day of August 2021.

/s/ Michael Forrest

Michael C. Forrest, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify, under the penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of direct appellate review applications, including, but not limited to:

- A. Rule 11(b) (applications for direct appellate review); and
- B. Rule 20 (form and length of briefs, appendices, and other documents);

This brief was written in Courier New, 12-point font, and created on Microsoft Word (v. Office 365).

The number of non-excludable words contained in this application for direct appellate review is 1,197.

/s/ Michael Forrest

Michael C. Forrest, Esq.

Exhibit A

MICHELLE PUOPOLO, VICTOR PAGAN, AND JESSICA NOHMY,
ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

COMMERCE INSURANCE COMPANY

**MEMORANDUM AND ORDERS ON
DEFENDANT'S MOTION TO DECERTIFY THE CLASS AND
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The three named plaintiffs each owned a motor vehicle that was insured by Commerce Insurance Company and then damaged in a collision. They each had their vehicle towed to a repair shop that was not a "referral shop," and thereby agreed to pay higher storage charges than Commerce has negotiated with shops in its referral network. Commerce declared each vehicle to be a total loss and offered to pay the actual cash value ("ACV") in exchange for taking title to the vehicle, as provided in the standard Massachusetts automobile insurance policy. Plaintiffs' repair shops would not release the vehicles until they were paid in full for all storage charges agreed to by each plaintiff. So Commerce paid the outstanding storage charges and deducted from each ACV payout the amount by which these storage charges exceeded a reasonable rate, or some smaller amount that only partly covered the excess storage charges owed by the plaintiffs but paid by Commerce.

Plaintiffs contend that Commerce violated the standard policy and committed an unfair trade practice in violation of G.L. c. 93A by deducting an amount by which storage charges exceeded reasonable levels. Before discovery, the Court certified a plaintiff class.¹ Discovery is now complete.

The Court will **allow in part** Commerce's motion to decertify the class, with respect to the contract claim in Count I and the G.L. c. 93A claim in Count II. The breach of contract claim cannot be resolved on a class basis because liability turns on whether each class member agreed to Commerce deducting

¹ The class is "[a]ll persons who made a claim or claims under the Limited Collision, Collision or Comprehensive provisions of their automobile policy with Commerce and whose claim payments were reduced by any amount Commerce contends it paid to the storage facility in relation to the claim."

unreasonable storage charges from its ACV payout, such that their claim is barred by an accord and satisfaction. Class certification is inappropriate under G.L. c. 93A with respect to the claim that Commerce unfairly reduced insurance payouts to offset its payment of unreasonable storage charges that an insured voluntarily incurred because, for much the same reasons, the class members are not similarly situated and did not suffer similar injuries.

The Court will **allow** Commerce's motion for summary judgment as to all claims because (i) Commerce had no contractual obligation to pay storage fees that exceed reasonable levels and, having paid the entire storage charge agreed to by its insured, was entitled to recoup the excess above reasonable levels, (ii) it is not an unfair trade practice for Commerce, under these circumstances, to pay a non-referral shop the storage fee agreed to by a policy holder and then pay the insured the vehicle's actual cash value less a deduction equal to the amount by show that storage fee exceeds the highest reasonable amount that Commerce has negotiated with its referral shops, (iii) Commerce did not violate applicable performance standards, and (iv) the various assertions of unfair claims handling cannot succeed because Commerce acted in a manner consistent with the terms of the standard Massachusetts automobile insurance policy. The Court will therefore **deny** Plaintiffs' cross-motion for partial summary judgment on the claims for breach of contract and declaratory judgment. It will order the entry of judgment dismissing the claims for monetary relief and declaring the rights of the parties.

1. Decertification of Class. Although the Court previously certified a plaintiff class, it is now convinced that liability cannot be decided on a class basis because Commerce's "accord and satisfaction" defense to the breach of contract claim must be resolved individually as to each class member, and the named plaintiffs cannot show that all members of the class are similarly situated and suffered similar injuries with respect to the claimed violations of G.L. c. 93A.

The Court will therefore exercise its discretion to decertify the class. "A judge has broad discretion to certify or decertify a class." *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 361 (2008). A decision to certify a class "is not immutable;" if it becomes apparent "at any time" that class certification is not appropriate, then "class status may be withdrawn or appropriately modified." *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381, 389 n.22 (2004), quoting *School Comm. of Brockton v. Massachusetts Comm'n Against Discrim.*, 423 Mass. 7, 14 n.12 (1996).

1.1. Contract Claim. Class certification is not appropriate for common law claims for breach of contract if the questions of law or fact common to all class members do not “predominate over any questions affecting only individual members,” or if a class action is not “superior to other available methods for the fair and efficient adjudication of the controversy.” See Mass. R. Civ. P. 23(b). Where the issue of liability requires individualized proof and cannot be decided on a class wide basis, common issues are unlikely to predominate over individual ones, a class action is unlikely to be superior to individual adjudication of claims, and denial of class certification—or decertification of an existing class—is therefore appropriate. See *Fletcher v. Cape Cod Gas Co.*, 394 Mass. 595, 603–604 (1985).

Commerce has shown that, when it determines that a damaged vehicle is a total loss, it tells the insured what ACV it will pay as compensation and, if the vehicle is being stored at a non-referral shop, what amount Commerce will deduct to cover excess storage fees. It has also shown that in many and perhaps most cases, the insured agrees to settle their claim on this basis. The sample case files provided by Commerce bear this out, except they also shown that Michelle Puopolo did not agree to Commerce’s proposed deduction for storage charges. These case files show that:

- **Jessica Nohmy’s** vehicle was damaged in January 2015, and Commerce deemed it to be a total loss five days later. Commerce offered to pay Nohmy an ACV of \$13,668, with a deduction for excess storage charges and with Commerce taking the vehicle. Nohmy accepted the offer and received the payment.
- **Michelle Puopolo’s** vehicle was damaged in July 2017. At first Commerce offered to pay an ACV of \$6,916.17, with a deduction for excess storage charges and with Commerce taking the vehicle. Then Attorney Yasi began negotiating on Puopolo’s behalf. Commerce then increased its offer to an ACV of \$8,121.67, and reduced the storage charge deduction from \$970 to \$485. Puopolo said she would accept the higher ACV amount, but objected to any storage fee deduction. Commerce paid that amount, deducting half the excess storage fee over Puopolo’s objection.
- **Victor Pagan’s** vehicle was damaged in October 2019. Four days later Commerce told Pagan that the vehicle was a total loss. It noted that Pagan was accumulating storage charges of \$95 per day, and offered

to move the vehicle at its cost to a secure facility to stop these charges. Pagan did not authorize the transfer. Commerce offered to pay Pagan an ACV of \$3,255.50 plus sales tax, with a deduction for excess storage charges and with Commerce taking the vehicle. Pagan did not accept at first; some days later Commerce informed Pagan that the storage deduction was up to \$960. Pagan then accepted the settlement offer, with that deduction, and received the payment.

- o An unidentified insured submitted **Claim #KYVA83** in February 2016. Commerce deemed the vehicle to be a total loss. The insured objected to any deduction for storage fees. Commerce offered to pay an ACV of \$7,900.54 and to reduce the storage deduction from \$1,000 to \$500. The insured accepted the settlement offer, with that deduction, and received the payment.

Class members cannot sue for breach of contract if (like Nohmy, Pagan, and the insured on Claim #KYVA83) they willingly stored their vehicles at a non-referral shop that charges excessive storage fees, agreed with Commerce that their vehicle was a total loss, and knowingly accepted a payment based on the vehicle's ACV with a deduction for part or all of the excess storage fees that Commerce paid in order to get the shop to relinquish its lien on the vehicle. Such insureds accepted an accord and satisfaction that operates as a complete defense to their contract claim under the insurance policy.

"The defense of accord and satisfaction is premised on the principle that '[i]f a creditor, having an unliquidated or disputed claim against his debtor, accepts a sum smaller than the amount claimed in satisfaction of the claim, he cannot afterwards maintain an action for the unpaid balance of his original claim.' " *Cuddy v. A & E Mechanical, Inc.*, 53 Mass. App. Ct. 901, 902 (2001) (rescript), quoting *Chamberlain v. Barrows*, 282 Mass. 295, 299 (1933). "The defense of accord and satisfaction may be used to defeat a claim for breach of contract if the defendant demonstrates: (1) an accord or settlement of the disputed claim, and (2) satisfaction, i.e. performance of the settlement agreement." *Murray v. M.Z.O. Architectural Grp.*, Middlesex Sup. Ct. civ. action no. 08-2753, 2009 WL 4282125, at *2, 26 Mass. L. Rptr. 282 (Mass. Super. Sept. 15, 2009) (Billings, J.); accord *Sherman v. Sidman*, 300 Mass. 102, 106 (1938).

Since the issue of a possible accord and satisfaction will have to be analyzed and litigated separately for each class member, the claim for breach of contract is not amenable to resolution on a class basis. For this claim, the common

questions of law or fact do not predominate over the accord and satisfaction issue that affects each class member in different ways based on individual facts, and a class action will not be more efficient than individual adjudication of each class member's potential claim.

1.2. Chapter 93A Claim. "To bring a class action under c. 93A, the plaintiff must show that he seeks relief for an unfair or deceptive act or practice, that the act or practice 'caused similar injury to numerous other persons similarly situated,' and that he would 'adequately and fairly represent[]' such persons." *Morgan v. Massachusetts Homeland Ins. Co.*, 91 Mass. App. Ct. 1, 5 (2017), quoting G.L. c. 93A, § 9(2). Thus, class certification is inappropriate where the class members were not subjected to similar unfair or deceptive conduct and the alleged misconduct did not cause similar injuries. See *Kwaak v. Pfizer*, 71 Mass. App. Ct. 293, 300–302 (2008) (vacating class certification).

It is evident from the four claims files summarized above that the class members are not similarly situated with respect to the alleged unfair trade practices by Commerce. Some insureds, like Ms. Nohmy, promptly released their vehicle to Commerce and stopped incurring storage charges after learning that their vehicle was a total loss. Others, like Mr. Pagan, Ms. Puopolo, and the insured on Claim #KYVA83, kept their vehicle in storage at a non-referral shop for many weeks after receiving an ACV offer from Commerce, and in some cases after learning that the storage charge would have to be paid and would not be covered—or not be covered in full—by Commerce.

Whether any insured could show that Commerce acted unfairly toward them in violation of c. 93A by reducing its total payout (the claim in Count II) will turn on the particular circumstances in which insureds accrued and were legally responsible for unreasonable storage charges that had to be paid before the insured could release their vehicle to Commerce in exchange for an ACV payout.

2. Summary Judgment.

2.1. Contract Claim. Commerce is entitled to judgment in its favor as a matter of law on the claim for breach of contract.

The Plaintiffs' vehicles were deemed to be a total loss, meaning that the cost to repair the vehicles exceeded their pre-collision actual cash value. Under these circumstances, Commerce had a contractual obligation to pay its insured the actual cash value of the vehicle before it was damaged (in exchange for

receiving possession of and title to the vehicle) plus the reasonable cost to store the vehicle in the interim.²

Plaintiffs each had their vehicle towed to a non-referral shop after it was damaged, and as result agreed and were bound to pay storage charges that substantially exceeded the reasonable levels Commerce had negotiated with its referral shops. And each Plaintiff agreed to accept Commerce's final estimate of their vehicle's actual cash value to settle their claim, and let Commerce take title to and possession of the vehicle, as it is entitled to do under the policy.

But none of the Plaintiffs made any arrangement to pay the storage fees they owed. Until the repair shop was paid, it had a lien on the vehicle and would not release it until it was paid in full.

Under these circumstances, it was reasonable for Commerce to pay the storage fees, and then pay its insured the vehicle's ACV less a deduction equal to (or less then) the amount by which the actual storage charge exceeded reasonable levels.

Commerce did not commit any breach of contract by doing so. Commerce made all the payments required under its policy. And it had an express contractual right to take title to the vehicle upon payment of the ACV. Plaintiffs could have paid the storage charges themselves, but instead left it Commerce to do so. Commerce was therefore entitled to set off storage fees it paid that were in excess of amounts covered under the standard policy against the ACV payout. Plaintiffs have not identified any policy provision that Commerce breached by doing so.

2.2. Chapter 93A Claims. Commerce is also entitled to judgment in its favor as a matter of law on all of Plaintiffs' claims under G.L. c. 93A.

Count II asserts that Commerce acted unfairly by deducting excessive storage charges, or a portion of them, from ACV payouts on totaled vehicles. This claim fails as a matter of law for the reasons discussed above. Where an insured brings a damaged vehicle to a non-referral shop, thereby agrees to pay storage

² The 2016 standard automobile insurance policy expressly provides that Commerce will pay reasonable storage costs. The 2008 policy provides, at page 34, that Commerce will pay for any reasonable expenses incurred in protecting the automobile from further damage or loss. Commerce's Rule 30(b)(6) designee conceded that Commerce was obligated to, and routinely did, pay reasonable storage charges under that provision.

charges that exceed reasonable levels, then accepts an ACV payout for a totaled vehicle in exchange for giving Commerce possession of and title to the vehicle, yet fails to pay outstanding storage charges, there is nothing unfair or deceptive about Commerce paying those charges and deducting the amount by which they exceed reasonable levels from the ACV payout.

Count III asserts that Commerce violated performance standards established by the Commonwealth Automobile Reinsurers to control storage charges. This claim fails as a matter of law because the relevant CAR standards only required Commerce to have appropriate plans, and the summary judgment record establishes that Commerce did so. The relevant CAR standards provide that Commerce and similar insurers:

- “must have a plan to ensure that non-regulated towing and storage charges are reasonable, or to resist and reduce said charges if unreasonable,” and
- “must have a plan to control storage costs including the prompt disposition of salvage.”

Commerce has and implements at least two plans that satisfy these CAR standards. Under its direct payment plan, Commerce has established a statewide network of referral shops that do not impose unreasonable storage charges and may be used by insureds. In addition, Commerce has an “early tow program” under which it offers to tow and store an insureds total loss vehicle at Commerce’s expense while resolving a total loss claim. Nothing in the CAR regulations requires Commerce to challenge, resist, or reduce unreasonable storage charges imposed by non-referral repair shops chosen by insureds. Nor could they. Commerce does not control such shops and has no contractual relationship with them.

Counts IV through VII assert that Commerce violated various provisions of G.L. c. 176D, and thereby committed unfair trade practices in violation of G.L. c. 93A, by setting off its payment of excessive storage charges on its insured behalf against an ACV payment for a totaled vehicle. Plaintiffs concede that these claims fail as a matter of law if Commerce did not breach the policy terms by making such a setoff. To use Plaintiffs’ words:

Whether Plaintiffs’ claims for violations [of] c. 176D, § 3(9) should survive, is wholly dependent upon this court’s ruling with respect to the disputes concerning the underlying claims practices. If those

practices are found to be lawful, of course, the c. 176D claims fail as a matter of law.

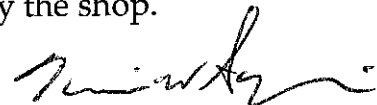
As discussed above, Commerce's claims practices in setting off excessive storage charges against ACV payouts were and are lawful. So the claims based on an alleged violation of c. 176D all fail as a matter of law.

ORDERS

Defendant's motion to decertify the class is **allowed in part** as to Counts II and III. Defendant's motion for summary judgment is **allowed** as to all claims. Plaintiffs' motion for partial summary judgment is **denied**.

Final judgment shall enter dismissing counts I through VII with prejudice, ordering that the three named Plaintiffs shall recover nothing and that the other Plaintiff Class Members shall recover nothing on Counts III through VII, and declaring that:

- where the owner of an automobile insured in Massachusetts by Commerce Insurance Company entrusts their damaged vehicle to a non-referral repair shop, and thereby agrees to pay storage fees at the rate charged by that shop;
- Commerce Insurance Company declares the vehicle to be a total loss, offers to pay the insured the actual cash value of the vehicle, and exercises its contractual right under the standard Massachusetts automobile insurance policy to take title to the vehicle; and
- the repair shop refuses to release the vehicle until it is paid the full storage charge that was agreed to by the insured;
- then Commerce Insurance Company may, consistent with the terms of the standard policy and Massachusetts law, pay the full storage charge agreed to by the insured, take possession of and title to the damaged vehicle, and deduct from its actual cash value payment to the insured the difference between (i) a reasonable storage charge for the time the vehicle was at the non-referral repair shop, and (ii) the excessive storage charge actually imposed by the shop.



Kenneth W. Salinger

Justice of the Superior Court

13 May 2021

Exhibit B



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

1984CV00977 Michelle Puopolo on behalf of Herself and all others similarly situated vs. Commerce Insurance Company

CASE TYPE: Business Litigation	FILE DATE: 03/28/2019
ACTION CODE: BH2	CASE TRACK: B - Special Track (BLS)
DESCRIPTION: Complex Unfair Trade Practices	
CASE DISPOSITION DATE: 05/26/2021	CASE STATUS: Open
CASE DISPOSITION: Judgment after Finding on Motion	STATUS DATE: 05/26/2021
CASE JUDGE:	CASE SESSION: Business Litigation 2

PARTIES

Plaintiff Nohmy (as amended), Jessica	Attorney 644480 Kevin John McCullough Mazow/McCullough, P.C. Mazow/McCullough, P.C. 10 Derby Square 4th Floor Salem, MA 01970 Work Phone (978) 744-8000 Added Date: 04/17/2020 Attorney 681401 Michael C Forrest Forrest, Mazow, McCullough, YasiandYasi, PC Forrest, Mazow, McCullough, YasiandYasi, PC 2 Salem Green Suite 2 Salem, MA 01970 Work Phone (877) 599-8890 Added Date: 04/17/2020
Plaintiff Pagan (as amended), Victor	Attorney 644480 Kevin John McCullough Mazow/McCullough, P.C. Mazow/McCullough, P.C. 10 Derby Square 4th Floor Salem, MA 01970 Work Phone (978) 744-8000 Added Date: 03/04/2020 Attorney 681401 Michael C Forrest Forrest, Mazow, McCullough, YasiandYasi, PC Forrest, Mazow, McCullough, YasiandYasi, PC 2 Salem Green Suite 2 Salem, MA 01970 Work Phone (877) 599-8890 Added Date: 03/04/2020



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

<p>Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated</p>	<p>Attorney 644480 Kevin John McCullough Mazow/McCullough, P.C. Mazow/McCullough, P.C. 10 Derby Square 4th Floor Salem, MA 01970 Work Phone (978) 744-8000 Added Date: 03/28/2019</p> <p>Attorney 556904 John Richard Yasi Yasi and Yasi Yasi and Yasi Two Salem Green Salem, MA 01970 Work Phone (978) 741-0400 Added Date: 03/28/2019</p> <p>Attorney 681401 Michael C Forrest Forrest, Mazow, McCullough, YasiandYasi, PC Forrest, Mazow, McCullough, YasiandYasi, PC 2 Salem Green Suite 2 Salem, MA 01970 Work Phone (877) 599-8890 Added Date: 03/28/2019</p>



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

Defendant Commerce Insurance Company	Attorney 549734 Lawrence Martin Slotnick Morrison Mahoney LLP Morrison Mahoney LLP 250 Summer St Boston, MA 02210-1181 Work Phone (617) 439-7500 Added Date: 06/20/2019 Attorney 205920 John Philip Graceffa Morrison Mahoney LLP Morrison Mahoney LLP 250 Summer St Boston, MA 02210-1181 Work Phone (617) 439-7500 Added Date: 06/20/2019 Attorney 503340 Kevin M Truland Morrison Mahoney LLP Morrison Mahoney LLP 250 Summer St Boston, MA 02210-1181 Work Phone (617) 737-8813 Added Date: 03/28/2019 Attorney 052680 Lawrence F Boyle Morrison Mahoney LLP Morrison Mahoney LLP 250 Summer St Boston, MA 02210 Work Phone (617) 439-7500 Added Date: 03/13/2020
	Attorney 664281 David Viens Morrison Mahoney LLP Morrison Mahoney LLP 250 Summer St Boston, MA 02210 Work Phone (617) 439-7566 Added Date: 03/28/2019 Attorney 669008 Joseph G Yannetti Morrison Mahoney LLP Morrison Mahoney LLP 250 Summer St Boston, MA 02210 Work Phone (617) 439-7585 Added Date: 03/13/2020 Attorney 684332 Corey T Mastin Morrison Mahoney LLP



COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Morrison Mahoney LLP
250 Summer St
Boston, MA 02210
Work Phone (617) 737-8869
Added Date: 03/13/2020

Attorney

684614

Bridget A Lopez
Morrison Mahoney LLP
Morrison Mahoney LLP
250 Summer St
Boston, MA 02210
Work Phone (617) 439-7500
Added Date: 04/27/2020

Attorney

694020

Brian J Manikowski
Hall Booth Smith PC
Hall Booth Smith PC
191 Peachtree St Suite 2900
Atlanta, GA 30303
Work Phone (404) 954-5000
Added Date: 03/13/2020



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
03/28/2019		Attorney appearance On this date John Richard Yasi, Esq. added for Plaintiff Michelle Puopolo	
03/28/2019		Case assigned to: DCM Track F - Fast Track was added on 03/28/2019	
03/28/2019		Case transferred from another court. Transferred from Essex Superior [1777CV01642]: accepted into the Suffolk Superior Civil Court Business Litigation Session (See P#12)	
03/28/2019	1	Complaint and Jury Demand	
03/28/2019	2	Civil action cover sheet re: complaint (\$1,250,000.00)	
03/28/2019	3	Amended: amended complaint filed by Michelle Puopolo on behalf of Herself and all others similarly situated and Jury Demand	
03/28/2019	4	Service Returned for Defendant Commerce Insurance Company: Service through person in charge / agent; in hand to Mary Bielik, on 12/14/17	
03/28/2019	5	Received from Defendant Commerce Insurance Company: Answer to amended complaint;	
03/28/2019		Attorney appearance On this date Kevin M Truland, Esq. added for Defendant Commerce Insurance Company	
03/28/2019		Attorney appearance On this date David Viens, Esq. added for Defendant Commerce Insurance Company	
03/28/2019		Attorney appearance On this date Kevin John McCullough, Esq. added for Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated	
03/28/2019		Attorney appearance On this date Michael C Forrest, Esq. added for Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated	
03/28/2019		Attorney appearance On this date David Relethford, Esq. added for Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated	
03/28/2019	6	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated's Joint Motion for Entry of Stipulated Protective Order - After review, the motion is ALLOWED. This motion and protective order shall apply to information and documents exchanged by the parties only. This shall not apply to any document filed with court which would require a finding after hearing pursuant to the Uniform Rules of Impoundment.	Tabit
03/28/2019	7	Defendant Commerce Insurance Company's Motion to Transfer case to Suffolk County Business Litigation Session - Pursuant to Superior Court Administrative Directive No. 17-1, DENIED.	Karp



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

03/28/2019	8	Plaintiff(s) Michelle Puopolo on behalf of Herself and all others similarly situated motion filed to compel Discovery (w/opposition) Upon review this motion is ALLOWED. Compliance to take place 30 days after the plaintiff agrees to a reasonable protective order. Please not that the case file indicates that the motion to transfer was denied on 12/19/18. It appears that the defendant knows this but not the plaintiff.	Lu
03/28/2019	9	Commerce Insurance Company's MOTION for reconsideration of Court Order dated 12/19/2018 re: paper #7.0. (w/opposition)	
03/28/2019	10	Defendant Commerce Insurance Company's Motion for Ruling on Applicability of Commonwealth Automobile Reinsurer Standards (w/opposition) - Upon review this motion is DENIED. the court expects compliance with discovery obligations and with the deadlines set in this case. No motions for reconsideration may be filed on this issue without advance approval.	Lu
03/28/2019	11	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated's Motion to Extend the Tracking Order (w/limited opposition)	
03/28/2019		Endorsement on Motion for Reconsideration (#9.0): ALLOWED After thorough review of the parties' submissions and Plaintiff's Complaint, the Motion for Reconsideration is ALLOWED and the request to transfer this case to the BLS is ALLOWED, subject to Superior Court Administrative Directive No. 17-1.	Karp
03/28/2019	12	General correspondence regarding NOTICE OF ACCEPTANCE INTO BUSINESS LITIGATION SESSION "BLS2" (See P#12 for complete notice)	Sanders
03/28/2019	13	Copy of docket entries received from Essex Superior Court	
03/28/2019		Civil action cover sheet mailed re: BLS	
04/04/2019	14	Civil action cover sheet returned re: BLS (n/a)	
04/05/2019	15	General correspondence regarding Notice of Suffolk Business Litigation Session Number This case is assigned to BLS 2 (dated 4/3/19) notice sent 4/5/19	
04/12/2019		The following form was generated: Notice to Appear - BLS Sent On: 04/12/2019 12:18:58	
04/22/2019		Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 05/15/2019 02:00 PM Has been: Rescheduled For the following reason: Request of Defendant Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Salinger
04/22/2019		The following form was generated: Notice to Appear - BLS Sent On: 04/22/2019 10:58:51	



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

04/26/2019	16	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated's Motion for Class Certification (w/opposition)	
04/30/2019		The following form was generated: Notice to Appear - BLS Sent On: 04/30/2019 14:45:27	
04/30/2019		Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 04/30/2019 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Salinger
04/30/2019		Event Result:: Motion Hearing scheduled on: 04/30/2019 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Salinger
05/02/2019	17	ORDER: scheduling order; all fact discovery completed by 11/8/19; further rule 16 scheduling conference will be held on 11/20/19 at 2 p.m.; (dated 5/1/19) notice sent 5/2/19	Salinger
05/02/2019	18	Defendant Commerce Insurance Company's Motion for Protective Order pertaining to Subpoena Duces Tecum directed to Commonwealth Automobile Reinsurers (w/opposition)	
05/08/2019	19	Defendant Commerce Insurance Company's Memorandum in support of Motion of the Defendant, The Commerce Insurance Company, for a Protective Order pertaining to deposition subpoena directed to Commonwealth Automobile Reinsurers. DENIED. Commerce has not shown any good reason for the Court to reconsider the previous denial of an almost identical motion. In any case, the subpoena seems reasonably calculated to lead to the discovery of admissible evidence, and Commerce lacks standing to assert that a subpoena to a third party will be unduly burdensome as to the third party. Date denied: 5/7/19. Notice sent: 5/7/19.	
06/10/2019		Endorsement on Motion for class certification; (#16.0): ALLOWED see memorandum and order; (dated 6/7/19) notice sent 6/10/19	Salinger



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

06/10/2019	20	MEMORANDUM & ORDER: allowing plaintiff's motion for class certification; Plaintiff's motion to certify a class is ALLOWED and the proposed class is hereby certified; (dated 6/7/19) notice sent 6/10/19 Judge: Salinger, Hon. Kenneth W	Salinger
06/10/2019	21	ORDER: on plaintiff's motion for class certification; (dated 6/7/19) notice sent 6/10/19	Salinger
06/20/2019		Attorney appearance On this date Lawrence Martin Slotnick, Esq. added for Defendant Commerce Insurance Company	
06/20/2019		Attorney appearance On this date John Philip Graceffa, Esq. added for Defendant Commerce Insurance Company	
08/22/2019	22	Defendant Commerce Insurance Company's Motion for Rule 16 Conference for the purpose of Entering a Structured Discovery Order and for Scheduling Summary Judgment and Class-Related Motions (w/opposition)	
08/26/2019	23	Plaintiff(s) Michelle Puopolo on behalf of Herself and all others similarly situated motion filed to compel Discovery (Second Motion) (w/opposition)	
09/04/2019		Endorsement on Motion for (#22.0): ALLOWED rule 16 conference Allowed rule 16 conference scheduled for 11/20/19 Notice sent 9/5/19	Sanders
09/05/2019		The following form was generated: Notice to Appear Sent On: 09/05/2019 10:19:30	
11/18/2019	24	Defendant Commerce Insurance Company's Motion to compel (w/opposition)	
11/20/2019		The following form was generated: Notice to Appear Sent On: 11/20/2019 15:47:25	
11/20/2019		The following form was generated: Notice to Appear Sent On: 11/20/2019 15:48:44	
11/20/2019		The following form was generated: Notice to Appear - BLS Sent On: 11/20/2019 15:50:09	



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

11/20/2019		Event Result:: Motion Hearing to Compel scheduled on: 11/20/2019 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Sanders
11/20/2019		Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 11/20/2019 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Sanders
11/26/2019		Endorsement on Motion to Compel Discovery (#23.0): ALLOWED only as to a portion of claims files requested as outlined in open court; Motion otherwise DENIED (dated 11/21/19) notice sent 11/25/19	Sanders
12/19/2019		Event Result:: Motion Hearing to Compel scheduled on: 12/19/2019 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Sanders
02/26/2020	25	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated's Motion to amend the amended complaint and Appoint Victor Pagan as an Additional Class Representative; Memorandum in Support (w/o opposition)	
03/04/2020		Endorsement on Motion to Amend First Amended Complaint and Appoint Victor Pagan as an Additional Class Representative (#25.0): ALLOWED without opposition. The clerk's office shall docket the Second Amended Complaint (dated 2/28/20) notice sent 3/3/20	Salinger
03/04/2020		Attorney appearance On this date Kevin John McCullough, Esq. added for Plaintiff Victor Pagan (as amended)	
03/04/2020		Attorney appearance On this date Michael C Forrest, Esq. added for Plaintiff Victor Pagan (as amended)	
03/04/2020		Attorney appearance On this date David Relethford, Esq. added for Plaintiff Victor Pagan (as amended)	
03/04/2020	26	Amended: Second amended complaint filed by Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended) and jury demand (filed 2/28/20)	
03/11/2020		Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 03/11/2020 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Salinger



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

03/11/2020		The following form was generated:	
		Notice to Appear	
		Sent On: 03/11/2020 14:34:26	
03/11/2020		The following form was generated:	
		Notice to Appear	
		Sent On: 03/11/2020 14:36:17	
03/12/2020	27	ORDER: further scheduling order; (dated 3/11/20) notice sent 3/12/20	Salinger
03/13/2020		Attorney appearance On this date Lawrence F Boyle, Esq. added for Defendant Commerce Insurance Company	
03/13/2020		Attorney appearance On this date Joseph G Yannetti, Esq. added for Defendant Commerce Insurance Company	
03/13/2020		Attorney appearance On this date Brian J Manikowski, Esq. added for Defendant Commerce Insurance Company	
03/13/2020		Attorney appearance On this date Corey T Mastin, Esq. added for Defendant Commerce Insurance Company	
04/16/2020	28	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended)'s Motion to Amend the Second Amended Complaint and Appoint Jessica Nohmy as an Additional Class Representative (with opposition)	
04/17/2020		Endorsement on Motion to Amend the Second Amended Complaint and Appoint Jessica Nohmy as an Additional Class Representative (#28.0): ALLOWED The clerk's office shall docket the Third Amended Complaint	Salinger
04/17/2020	29	Amended: Third amended complaint filed by Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)	
04/17/2020		Attorney appearance On this date Kevin John McCullough, Esq. added for Plaintiff Jessica Nohmy (as amended)	
04/17/2020		Attorney appearance On this date Michael C Forrest, Esq. added for Plaintiff Jessica Nohmy (as amended)	
04/17/2020		Attorney appearance On this date David Relethford, Esq. added for Plaintiff Jessica Nohmy (as amended)	
04/22/2020		Endorsement on Motion to amend the Complaint (#28.0): ALLOWED	Salinger
		Judge: Salinger, Hon. Kenneth W	



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

04/27/2020		Attorney appearance On this date Bridget A Lopez, Esq. added for Defendant Commerce Insurance Company	
05/15/2020	30	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated's Joint Motion for Extension of Scheduling Order	
05/22/2020		Endorsement on Motion for Extension of Scheduling Order (#30.0): ALLOWED See revised tracking order (dated 5/20/20) notice sent 5/22/20	Salinger
05/22/2020	31	ORDER: Revised Tracking Order (see P#31) (dated 5/20/20) notice sent 5/22/20	Salinger
06/10/2020	32	Received from Defendant Commerce Insurance Company: Answer to amended complaint;	
07/03/2020	33	Plaintiffs Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)'s Motion to quash and for a Protective Order for the Deposition of Paul F.X. Yasi, Esq. and Memorandum in Support of Motion	
07/03/2020	34	Opposition to Plaintiff's Motion (P#33) to Quash the Deposition of Paul Yasi, Esq. filed by Commerce Insurance Company	
07/03/2020	35	Plaintiffs Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)'s Reply in Support of Plaintiffs' Motion to Quash and for a Protective Order for the Deposition of Paul F.X. Yasi, Esq.	
07/16/2020		Endorsement on Motion to Quash Protective Order (#33.0): DENIED See Memorandum and Order (dated 7/15/20) notice sent 7/16/20	Sanders
07/16/2020	36	MEMORANDUM & ORDER: on Plaintiffs' Motion for a Protective Order for the Deposition of Paul FX Yasi Esq Judge: Sanders, Hon. Janet L (see P#36 for decision) (dated 7/15/20) notice sent 7/16/20	Sanders
07/16/2020	37	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated's Request for Hearing: DENIED (dated 7/15/20) notice sent 7/16/20	Sanders
08/11/2020		Event Result:: Rule 56 Hearing scheduled on: 09/17/2020 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate	Sanders



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

08/11/2020	<p>Event Result:: Motion Hearing scheduled on: 09/17/2020 02:00 PM</p> <p>Has been: Rescheduled For the following reason: By Court prior to date Hon. Janet L Sanders, Presiding</p> <p>Staff: Richard V Muscato, Assistant Clerk Magistrate</p>	Sanders
08/11/2020	<p>The following form was generated:</p> <p>Notice to Appear Sent On: 08/11/2020 10:18:09 Notice Sent To: John Richard Yasi, Esq. Yasi & Yasi Two Salem Green , Salem, MA 01970 Notice Sent To: Kevin John McCullough, Esq. Mazow/McCullough, P.C. 10 Derby Square 4th Floor, Salem, MA 01970 Notice Sent To: Michael C Forrest, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, PC 2 Salem Green Suite 2, Salem, MA 01970 Notice Sent To: David Viens, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Kevin M Truland, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181 Notice Sent To: Lawrence Martin Slotnick, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181 Notice Sent To: John Philip Graceffa, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181 Notice Sent To: Lawrence F Boyle, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Joseph G Yannetti, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Brian J Manikowski, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Corey T Mastin, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Bridget A Lopez, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: David Relethford, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, 2 Salem Green Suite 2, Salem, MA 01970</p>	



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

08/11/2020

The following form was generated:

Notice to Appear

Sent On: 08/11/2020 10:19:43

Notice Sent To: John Richard Yasi, Esq. Yasi & Yasi Two Salem Green, Salem, MA 01970

Notice Sent To: Kevin John McCullough, Esq. Mazow/McCullough, P.C. 10 Derby Square 4th Floor, Salem, MA 01970

Notice Sent To: Michael C Forrest, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi&Yasi, PC 2 Salem Green Suite 2, Salem, MA 01970

Notice Sent To: David Relethford, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, 2 Salem Green Suite 2, Salem, MA 01970

Notice Sent To: David Viens, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Kevin M Truland, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: Lawrence Martin Slotnick, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: John Philip Graceffa, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: Lawrence F Boyle, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Joseph G Yannetti, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Brian J Manikowski, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Corey T Mastin, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Bridget A Lopez, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: David Relethford, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, 2 Salem Green Suite 2, Salem, MA 01970

08/17/2020

Event Result:: Motion Hearing scheduled on:
09/29/2020 02:00 PM

Sanders

Has been: Canceled For the following reason: By Court prior to date
Comments: parties adopted a new scheduling order-new date is 1/5/2021
Hon. Janet L Sanders, Presiding
Staff:

Richard V Muscato, Assistant Clerk Magistrate

08/17/2020

Event Result:: Rule 56 Hearing scheduled on:
09/29/2020 02:00 PM

Sanders

Has been: Canceled For the following reason: By Court prior to date
Comments: parties adopted new tracking order-hearing now scheduled for 1/5/2021
Hon. Janet L Sanders, Presiding
Staff:

Richard V Muscato, Assistant Clerk Magistrate



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

08/17/2020

The following form was generated:

Notice to Appear

Sent On: 08/17/2020 14:58:16

Notice Sent To: John Richard Yasi, Esq. Yasi & Yasi Two Salem Green, Salem, MA 01970

Notice Sent To: Kevin John McCullough, Esq. Mazow/McCullough, P.C. 10 Derby Square 4th Floor, Salem, MA 01970

Notice Sent To: Michael C Forrest, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi&Yasi, PC 2 Salem Green Suite 2, Salem, MA 01970

Notice Sent To: David Relethford, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, 2 Salem Green Suite 2, Salem, MA 01970

Notice Sent To: David Viens, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Kevin M Truland, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: Lawrence Martin Slotnick, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: John Philip Graceffa, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: Lawrence F Boyle, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Joseph G Yannetti, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Brian J Manikowski, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Corey T Mastin, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Bridget A Lopez, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

09/22/2020

38

Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended)'s Joint Motion for Extension of Scheduling Order

10/13/2020

Endorsement on Motion for Extension of Scheduling Order (#38.0):
ALLOWED
(dated 10/6/20) notice sent 10/13/20

Sanders

10/16/2020

39

ORDER: revised tracking order
(dated 10/6/20) notice sent 10/13/20

Sanders

10/22/2020

Endorsement on Motion for Extension of Scheduling Order (#38.0):
ALLOWED
(dated 10/13/20) notice sent 10/20/20

Sanders

10/22/2020

40

ORDER: Revised Tracking Order
(see P#40) (dated 10/13/20) notice sent 10/20/20

Sanders

12/02/2020

41

Defendant Commerce Insurance Company's Request to exceed Rule 9A page limit on commerce's memorandum in support.

12/02/2020

42

Defendant Commerce Insurance Company's Request to exceed rule 9A page limit on memorandum in support of its motion to decertify



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
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12/16/2020		Endorsement on Request to Exceed Page Limit (#42.0): ALLOWED (dated 12/3/20) notice sent 12/14/20	Sanders
12/16/2020		Endorsement on Request to Exceed Page Limit (#41.0): ALLOWED (dated 12/3/20) notice sent 12/14/20	Sanders
		Judge: Sanders, Hon. Janet L	
12/18/2020	43	Defendant Commerce Insurance Company's Motion to Impound Exhibit 19 to defendant's motion for summary judgment	
12/18/2020	44	Exhibits/Appendix	
12/18/2020		Defendant Commerce Insurance Company's Submission of Certificate of Compliance with Superior Court Rule 9A	
12/28/2020	45	Plaintiffs Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)'s Request to Exceed Mass. R. Cup. Ct. R. 9A Page Limit for Plaintiffs' Opposition to the Commerce Insurance Company's Motion for Summary Judgment	
12/28/2020	46	Plaintiffs Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)'s Request to Exceed Mass. R. Sup. Ct. R. 9A Page Limit for Plaintiffs' Opposition to the Commerce Insurance Company's Motion to Decertify the Class	
01/04/2021		Event Result:: Rule 56 Hearing scheduled on: 01/05/2021 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Kenneth W Salinger, Presiding	Salinger
01/19/2021	47	Defendant Commerce Insurance Company's Motion for summary judgment, MRCP 56	
01/19/2021	49	Defendant Commerce Insurance Company's Motion for summary judgment, MRCP 56 Consolidated Statement of Facts	
01/19/2021	50	Plaintiff Commerce Insurance Company's Motion for summary judgment, MRCP 56 Joint Appendix of Exhibits	
01/19/2021	53	Plaintiff Commerce Insurance Company's Motion for summary judgment, MRCP 56 Unpublished Case Law Appendix	
01/19/2021	54	Defendant Commerce Insurance Company's Motion to Decertify the Class	
01/19/2021	55	Defendant Commerce Insurance Company's Memorandum in Support of Motion to Decertify the Class	
01/19/2021	56	Defendant Commerce Insurance Company's Submission of Exhibits in support of Motion to Decertify the Class	
01/19/2021	57	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)'s Submission of Opposition to Commerce Insurance Company's Motion to Decertify the Class	



**COMMONWEALTH OF MASSACHUSETTS
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01/19/2021	58	Defendant Commerce Insurance Company's Reply to Plaintiffs' Opposition to Motion to Decertify the Class
01/19/2021	48	Commerce Insurance Company's Memorandum in support of Motion for Summary Judgment
01/19/2021	51	Opposition to Commerce Insurance Company's Motion for Summary Judgment filed by Michelle Puopolo on behalf of Herself and all others similarly situated, Jessica Nohmy (as amended), Victor Pagan (as amended)
01/19/2021	52	Plaintiff Commerce Insurance Company's Reply to the Plaintiff's Opposition to Commerce's Motion for Summary Judgment
01/19/2021	59	Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated, Victor Pagan (as amended), Jessica Nohmy (as amended)'s Partial Motion for summary judgment (w/ opposition and reply).
01/26/2021		<p>The following form was generated:</p> <p>Notice to Appear Sent On: 01/26/2021 10:41:38 Notice Sent To: John Richard Yasi, Esq. Yasi & Yasi Two Salem Green, Salem, MA 01970 Notice Sent To: Kevin John McCullough, Esq. Mazow/McCullough, P.C. 10 Derby Square 4th Floor, Salem, MA 01970 Notice Sent To: Michael C Forrest, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi&Yasi, PC 2 Salem Green Suite 2, Salem, MA 01970 Notice Sent To: David Relethford, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, 2 Salem Green Suite 2, Salem, MA 01970 Notice Sent To: David Viens, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Kevin M Truland, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181 Notice Sent To: Lawrence Martin Slotnick, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181 Notice Sent To: John Philip Graceffa, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181 Notice Sent To: Lawrence F Boyle, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Joseph G Yannetti, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Brian J Manikowski, Esq. Hall Booth Smith PC 191 Peachtree St Suite 2900, Atlanta, GA 30303 Notice Sent To: Corey T Mastin, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: Bridget A Lopez, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210</p>
01/28/2021		<p>Event Result:: Rule 56 Hearing scheduled on: Salinger 02/02/2021 02:00 PM Has been: Not Held For the following reason: Request of Defendant Hon. Kenneth W Salinger, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate</p>



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report**

01/28/2021

The following form was generated:

Notice to Appear

Sent On: 01/28/2021 11:30:46

Notice Sent To: John Richard Yasi, Esq. Yasi & Yasi Two Salem Green, Salem, MA 01970

Notice Sent To: Kevin John McCullough, Esq. Mazow/McCullough, P.C. 10 Derby Square 4th Floor, Salem, MA 01970

Notice Sent To: Michael C Forrest, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi&Yasi, PC 2 Salem Green Suite 2, Salem, MA 01970

Notice Sent To: David Relethford, Esq. Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, 2 Salem Green Suite 2, Salem, MA 01970

Notice Sent To: David Viens, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Kevin M Truland, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

Notice Sent To: Lawrence Martin Slotnick, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210-1181

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Notice Sent To: Corey T Mastin, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

Notice Sent To: Bridget A Lopez, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210

02/23/2021

Event Result:: Rule 56 Hearing scheduled on:
02/23/2021 12:00 PM

Salinger

Has been: Held via Video/Teleconference

Hon. Kenneth W Salinger, Presiding

Staff:

Philip Drapos, Assistant Clerk Magistrate

03/02/2021

Attorney appearance

On this date David Relethford, Esq. dismissed/withdrawn for Plaintiff Jessica Nohmy (as amended)

03/03/2021

Attorney appearance

On this date David Relethford, Esq. dismissed/withdrawn for Plaintiff Michelle Puopolo on behalf of Herself and all others similarly situated

03/03/2021

Attorney appearance

On this date David Relethford, Esq. dismissed/withdrawn for Plaintiff Victor Pagan (as amended)



**COMMONWEALTH OF MASSACHUSETTS
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05/21/2021	60	MEMORANDUM & ORDER:	Salinger
		on Defendant's Motion to Decertify the Class and Cross Motions for Summary Judgment: Defendant's Motion to decertify class is ALLOWED in Part as to Counts II and III. Defendant's Motion for Summary Judgment is ALLOWED as to all claims. Plaintiffs' Motion for Partial Summary Judgment is DENIED	
		Judge: Salinger, Hon. Kenneth W	
		(see P#60 for full Decision and Order) (dated 5/13/21) notice sent 5/18/21	
05/26/2021	61	JUDGMENT It is Ordered and Adjudged Final Judgment shall enter Dismissing Counts I through VII with prejudice ordering that the three named plffs shall recover nothing and that the other plff Class Members shall recover nothing on Counts III through VII (see Judgment p#61) entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	Salinger
		Judge: Salinger, Hon. Kenneth W	
05/26/2021		Disp for statistical purposes	
06/15/2021	62	Notice of appeal filed.	
		Notice sent 6/15/21	
		Applies To: Michelle Puopolo on behalf of Herself and all others similarly situated (Plaintiff); Pagan (as amended), Victor (Plaintiff); Nohmy (as amended), Jessica (Plaintiff)	
06/21/2021	63	Certification/Copy of Letter of transcript ordered from Court Reporter 02/23/2021 12:00 PM Rule 56 Hearing Transcript ordered on June 17, 2021	

I HEREBY ATTEST AND CERTIFY ON

June 29, 2021, THAT THE
FOREGOING DOCUMENT IS A FULL,
TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN MY OFFICE,
AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY:


First Asst. Clerk