IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMAR JONES and SHANNON WHITEHEAD, individually and on behalf of all others similarly situated, Plaintiffs, v. USAA GENERAL INDEMNITYCOMPANY, GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, and USAA CASUALTY INSURANCE COMPANY, Defendants.	CASE NO: CI 20-9724

PLAINTIFFS' UNOPPOSED PETITION FOR ATTORNEYS' FEES AND COSTS AND SERVICE AWARDS

Plaintiffs Omar Jones and Shannon Whitehead ("Plaintiffs" or "Class Representatives"), individually and as representatives of the Settlement Class, hereby submit this Unopposed Petition for Attorneys' Fees and Costs and Service Awards to Named Plaintiffs. This Petition is filed is accordance with Paragraph 7 of this Court's Order Preliminarily Approving Class Action Settlement (dated February 6, 2023). This Petition will be presented for this Court's consideration at the Final Approval Hearing on June 28, 2023.

I. STATEMENT OF THE BASIS FOR THE REQUEST

The Parties reached a Settlement Agreement for the purpose of providing to members of a Settlement Class the payment of sales tax and vehicle regulatory fees, which this Court preliminarily approved on February 6, 2023. Therein, Defendant agreed to pay attorneys' fees and

costs of up to $850,000.00 and to pay Service Awards of up to $5,000.00 to each of the Named Plaintiffs. Such payments are separate from and do not in any way impact the payments made to Class Members. The requested fees, costs, and service award comport with Nebraska guidance on class action fee awards.

II. MEMORANDUM OF LEGAL AUTHORITY

As a general rule in Nebraska courts, prevailing parties can recover attorney's fees only if there is a statutory authorization for or a recognized, uniform course of procedure of awarding them. *See, e.g., Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 325 (2019); *D.I. v. Gibson*, 295 Neb. 903, 906, 890 N.W.2d 506, 510 (2017); *Labenz v. Labenz*, 291 Neb. 455, 459, 866 N.W.2d 88, 92 (2015); *Wolter v. Fortuna*, 27 Neb. App. 166, 184, 928 N.W.2d 416, 429 (2019). There is no statute that authorizes the award of attorney fees in class actions in general. If there is no statutory authorization but there is a monetary recovery, attorney fees may be awarded pursuant to the common fund doctrine. *See Blankenship v. OPPD*, 195 Neb. 170, 179, 237 N.W.2d 86, 91 (1976); *Gant v. City of Lincoln*, 193 Neb. 108, 109, 225 N.W.2d 549, 550 (1975).

Courts historically utilize two main approaches to analyzing a request for attorneys' fees: the lodestar approach, and the percent-of-benefit approach. *Johnston v. Comerica Mortg. Corp*., 83 F. 3d 241, 244 (8th Cir. 1996). Under the lodestar approach, the hours expended by an attorney are multiplied by a reasonable rate, which is adjusted given the characteristics of a particular action. *Id.* The percent-of-benefit (or percent-of-fund) approach permits an award of fees that is equal to some fraction of the common fund the attorneys were successful in procuring during the course of litigation. *Id.* In the Eighth Circuit, courts regularly award fees between 25% and 36% of the total combined benefit to the class. *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865–66 (8th Cir. 2017).

It is within the discretion of the Court to determine what approach to use and if a requested fee is reasonable in a given case. *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017). However, whereas the lodestar approach is viewed as appropriate in statutory fee shifting cases, the percent-of-benefit method is widely endorsed in common fund cases. *Johnston v. Comerica Mortg. Corp*., 83 F. 3d at 245; *see also Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246–49 (1985) (concluding that the percent-of-recovery fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig*., 736 F. Supp. 1007, 1009 (E.D. Mo. 1990) (adopting what the court called the "healthy trend" of applying the percent-of-fund approach over the lodestar analysis); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig*., 55 F. 3d 768, 821 (3d Cir.1995).

While the use of the lodestar approach is sometimes used to crosscheck the result of the percent-of-benefit method, it is not required. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865–66 (8th Cir. 2017); *citing Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (finding no reason to examine the lodestar crosscheck carried out by the district court where the percent-of fund approach yielded a reasonable result); *see also In re U.S. Bancorp Litig*., 291 F.3d 1035, 1038 (8th Cir. 2002).

A. The Attorneys' Fees Requested Are Reasonable.

i. This Court should apply the percent-of-fund method for determining fees.

The increasing use of the percent-of-fund approach in common fund cases likely flows from the fact that the lodestar method has been roundly criticized as "increase[ing] the workload of an already overtaxed judicial system, . . . [being] insufficiently objective and produc[ing] results that are far from homogenous, . . . creat[ing] a sense of mathematical precision that is unwarranted

in terms of the realities of the practice of law, . . . le[ading] to abuses such as lawyers billing excessive hours, . . . creat[ing] a disincentive for the early settlement of cases, . . . not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, . . [and being] confusing and unpredictable in its administration. *Ryan v. City of Chicago*, 274 Ill.App.3d 913, 923 (1995) (summarizing findings of the Third Circuit task force appointed to compare the respective merits of the percent-of-recovery and lodestar methods).

On the other hand, "The percentage of the fund method has a number of advantages: it is easy to calculate; it establishes reasonable expectations on the part of plaintiff['s] attorneys as to their expected recovery; and it encourages early settlement, which avoids protected litigation." *Rawlings v. Prudential-Bache Props*., 9 F.3d 513, 516 (6th Cir. 1993). In addition to being far simpler, awarding a percentage of the fund "directly aligns the interests of the class and its counsel . . . ." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005). This method further incentives class counsel to obtain the largest possible recovery in the most efficient manner possible. *Id.*; *Rawlings*, 9 F.3d at 516. The percent-of-fund approach allows attorneys who have brought about a benefit to a class to recover fees commensurate with that benefit. *See Elliott v. Sperry Rand Corp*., 680 F.2d 1225, 1227 (8th Cir.1982) (per curiam). The doctrine stems from the Court's inherent equitable powers; by awarding fees and costs payable (or measured) from the fund created for the benefit of the class the court can spread the cost of litigation proportionately among those who will benefit from the fund. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 167 (1939); *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980).

The suitability of the percent-of-fund or percent-of-benefit approach in common fund cases is broadly accepted. Eighth Circuit Courts regularly endorse the "percent of the fund" or "percent-of-benefit" method of determining attorneys' fees in class action settlements. *Johnston v.*

Comerica Mortg. Corp., 83 F. 3d at 244; *see also In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Petrovic v. Amoco Oil Co.*, 200 F.3d at 1156; *West v. PSS World Med., Inc.*, No. 4:13-cv-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014); *Ramsey v. Sprint Commc'ns Co.*, No. 4:11-cv-3211, 2012 WL 6018154, at *4 (D. Neb. Dec. 3, 2012). Accordingly, this Court should utilize the percent-of-benefit approach in assessing the fee request submitted by Plaintiffs.

ii. Class Counsel's request for less than 25% of the benefit negotiated for the class is reasonable and well below the range of fees accepted by Eighth Circuit Courts.

Settlement Class Counsel here seek $850,000.00 in fees and costs. It is well established that counsel who create a common benefit are entitled to reimbursement of litigation costs and expenses. Fed. R. Civ. P. 23; *Boeing v. Van Gemert*, 444 U.S. at 478.

In applying the percent-of-fund or percent-of-benefit approach, Eighth Circuit Courts look at the entirety of the settlement package to determine the value of the "fund" or "benefit"—including such items as potential compensation to Settlement Class Members, attorneys' fees and costs, and costs of settlement administration—even where the fund created for class members exists independently from the fees agreed to be paid by a defendant. *Johnston v. Comerica Mortg. Corp.*, 83 F. 3d at 246; *see also Caligiuri v. Symantec Corp.*, 855 F.3d at 865-66; L*ife Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017); *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017).

In this case, the combined benefit negotiated for the class is immense, easily totaling over $6,400,000. This benefit available includes: (1) payment, to settlement class members for sales tax, CRA sales tax, and Vehicle Regulatory Fees[1]; (2) separate payment of attorneys' fees and costs in an amount that shall not exceed $850,000.00; (3) separate payments of Service Awards of

1 The average sales tax owed according to USAA's business records is $721.67. With 7,750 claims at issue, sales tax payment alone is equal over $5,500,000.

up to $5,000.00 for each of the named Plaintiffs; and (4) payment of the costs of the Class Administration and the costs of mediation.

iii. The Johnson Factors Weigh in Favor of Approving the Modest Requested Fee.

In determining the reasonableness of a requested fee, Courts look to the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717-719 (5th Cir. 1974), though they need not exhaustively address every factor. *See Jenkins v. Pech*, No. 2016 WL 715780 (D. Ne. Feb. 22, 2016), *citing Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001); *see also Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (addressing only the *Johnson* factors the Court found relevant). Plaintiffs address the relevant *Johnson* factors below.

1. The amount involved and the results obtained support approval of Class Counsel's fee request.

The most important inquiry pertains to the results obtained for the class. *Hensley v. Eckerhart*, 461 U.S. 422, 436 ("the most critical factor is the degree of success obtained"). Class Counsel here have delivered a significant benefit to Settlement Class Members. Each class member will be entitled to payment of sales tax. Plaintiffs and their counsel were able to secure the full damages sought, which represented 100% of the amount owed to each class member. These are real tangible benefits—that without the efforts of Plaintiffs and Class Counsel, and their willingness to take on the attendant risks, would not have been available. Thus, this factor weighs in favor of granting the fee request.

2. The contingent nature of the case, preclusion of other employment by Class Counsel, risks of litigation, and desirability of the case all weigh in favor of approval of Class Counsel's fee request.

Class Counsel took this case on a purely contingent basis. *See* Declaration of Amy Judkins at ¶ 5, attached hereto as **Exhibit A**. As such, they assumed significant risk of nonpayment or underpayment. *Id.* Class Counsel took on these risks knowing full well their efforts may not bear

fruit. Fees were not guaranteed—the retainer agreement Counsel has with Plaintiff did not provide for fees apart from those earned on a contingent basis, and in the case of class settlement, approved by the court. *Id.* ¶ 6.

Here Settlement Class Counsel took on significant risk. While Plaintiffs believed they could prevail on their claims against Defendants, they were also aware that they would likely face several strong legal defenses and difficulties. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits.

"Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). Accordingly, these factors weigh in favor of approval of the attorneys' fees request. *See e.g. Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (approving requested fees of 33% of the settlement fund where all attorneys worked on a contingent basis).

3. The skill required to litigate this matter and Class Counsel's extensive experience in class action litigation support their request for attorneys' fees.

The skill required to litigate these class action cases is great and Class Counsel have decades of experience in class actions generally. Class Counsel have been appointed class counsel in a number of class action cases, including: *Wagner v. Safeco Insurance Co. of Ill.*, Case No. CI20-10735 (Douglas County. NE 2022), a case in which a Nebraska court approved settlement of on a materially identical theory of liability; *Roth v. GEICO*, Case No. 16-cv-62942-WPD (S.D. Fla., filed 2016) (Dimitrouleas, J.), a case in which final judgment was entered in favor of a certified class of 3,677 members, and which was the first total-loss case concerning leased vehicles asserting similar claims as the present case, and the first one to claim that the failure to pay title

transfer fees was a breach of contract; *Sos v. State Farm Mutual Insurance Company*, Case No. 6:17-cv-890-orl-18KRS (M.D. Fla., filed 2017) (Byron, J.), in which a class of over 3,000 insureds was certified and final judgment entered in favor of the named plaintiff, and which also concerned leased-vehicle total-loss insureds claiming failure to pay sales tax and title transfer fees; and *Jones v. Geico*, Case No.: 6:17-cv-891-orl-40KRS (M.D. Fla., filed 2017) (Byron, J.), in which summary judgment was entered in favor of a certified class of over 220,000 total-loss insureds for GEICO's failure to pay title and tag transfer fees after a total-loss (and the case subsequently settled and final approval and judgment was granted in July, 2020). *See* Declaration of Amy Judkins at ¶ 9. Class Counsel's experience is further detailed in the declaration.

4. The requested fee falls well below fees granted in similar cases.

And finally, the fee sought here is well within the range of customary, market rate fees requested by attorneys in class action settlements in the State of Nebraska and granted by courts across the country. The fee requested here also falls well below the 25% to 36% of common fund fees regularly approved by Eighth Circuit Courts. *Caligiuri v. Symantec Corp.*, 855 F.3d at 865–66; *see also In re Xcel Energy, Inc., Sec. Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (awarding 36% of a common fund of $3.5 million); *West v. PSS World Med., Inc.*, No. 4:13-cv-574, 2014 WL 1648741, at *1 (approving attorneys' fees of 33%); *Harris v. Republic Airlines, Inc.*, No. 4-88-1076, 1991 WL 238992 at *2 (D. Minn. Nov. 12, 1991) (awarding "a sum slightly in excess of 30% of the common fund"). The fee request here is only 15% of the total value of the settlement. As such, Class Counsel's request should be granted.

B. Plaintiff's Request for a Service Award is Reasonable and Should be Granted.

For their efforts on the case, Plaintiffs seek an award of $5,000 each, to be paid by Defendants

separate and apart from the fund made available to Settlement Class Members. See Declaration of Amy Judkins at ¶ 16. The service award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class. Id. ¶ 17. Here, in addition to lending their names to this matter, and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this Action. Among other things, Plaintiffs maintained contact with counsel, assisted in the pre-suit investigation of the case, reviewed the Complaint, participated in discovery, including discovery related to the motion for judgment on the pleadings, motion for summary judgment, and drafting of the motion for class certification, remained available for consultation throughout the mediation, answered counsel's many questions, and reviewed the Settlement Agreement. *Id.* ¶ 18.

Service awards to class representatives are appropriate and regularly awarded by Courts in class action litigation. The awards, provided in addition to any individual claims-based recovery, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits, and reward the class representatives for working to bring a benefit to a larger group of people. The requested reward is reasonable and falls well below the range of service awards that have been approved by courts in Nebraska and in the Eighth Circuit. *See, e.g., Wagner v. Safeco*, Case No. CI20-10735 (approving $5,000 for the named class member as service award); *Powers v. Credit Management Services, Inc.*, No. 8:11cv436, 2016 WL 6994080 (D. Nebr. Nov. 29, 2016) (approving $7,000 to each of the lead plaintiffs as service awards); *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *25 (awarding $26,625 compensatory award to lead plaintiff); *In re Aquila ERISA Litig*., 2007 WL 4244994, at *3 (W.D. Mo. Nov. 29, 2007) (awarding $25,000 incentive award); *Wineland v. Casey's Gen. Store s, Inc*., 267 F.R.D. 669, 677 (S.D. Iowa 2009) (awarding $10,000).

CONCLUSION

Plaintiffs respectfully request that the Court approve the requested amounts in attorneys' fees and costs and for the Service Awards.

Dated: May 8, 2023

Respectfully submitted,

/s/ Shane C. Mecham

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically filed the foregoing document with the Clerk of Court by using the Nebraska Justice online docketing system, which will send a notice of electronic filing to the following counsel of record:

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EXHIBIT A

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMAR JONES and SHANNON WHITEHEAD, individually and on behalf of all others similarly situated, Plaintiffs, v. USAA GENERAL INDEMNITYCOMPANY, GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, and USAA CASUALTY INSURANCE COMPANY, Defendants.	CASE NO: CI 20-9724

JUDKINS AFFIDAVIT

1. My name is Amy Judkins. I am over the age of majority, provide this declaration voluntarily, and it is based on personal knowledge.

2. I am an attorney in the law firm Normand PLLC, and am one of the counsel of record representing the Plaintiffs in the above-styled lawsuit.

3. I am a member of the Federal Bar, the Florida, Bar, and am certified to practice in the 11th and 5th Circuits, the Middle Southern, and Northern Districts of Florida, and numerous federal district courts, including this one, *pro hac vice*.

4. This declaration is submitted in support of the Plaintiffs' Unopposed Motion for Attorneys' Fees and Costs of $850,000 and a Service Award of $5,000 to each Named Plaintiff.

5. Class Counsel is comprised of me, of Normand PLLC, and Shane C. Mecham of Levy Craig Law Firm.

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6. Class Counsel took this case on a purely contingent basis, as such, we assumed significant risk of nonpayment or underpayment.

7. Class Counsel took on these risks knowing full well their efforts may not bear fruit. Fees were not guaranteed—the retainer agreement Counsel has with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and in the case of class settlement, approved by the court.

8. Normand PLLC and Levy Craig Law Firm are experienced and successful class action litigators at the trial and appellate level, including in similar total-loss litigation.

9. Normand PLLC is a consumer class-action and complex litigation firm. While Normand PLLC is involved in a variety of different types of litigation at the trial and appellate level, NORMAND PLLC specializes in complex, class action insurance litigation and unfair and misleading practices in the car rental industry.

10. Ed Normand (founder and senior partner) and I have extensive experience successfully litigating class actions, including ones similar to the present case. Cases in which Normand PLLC has been appointed class counsel include *Wagner v. Safeco* (Douglas County, NE), a case brought under a materially identical theory of liability. The *Wagner* court found that a substantially similar settlement was appropriate and approved an attorney fee award of approximately 25% of the total available damages to the class; *Romaniak v. Esurance Prop. & Cas. Ins. Co.*, No. 1:20-cv-02773, 2021 U.S. Dist. LEXIS 173787, at *11-12 (N.D. Ohio Sep. 14, 2021); and *Yancey v. Turnbull*, Case No. 2021CH4848 (Cooky Cty, Ill).

11. Other cases that Normand PLLC have been appointed class counsel include *Roth v. GEICO*, Case No. 16-cv-62942-WPD (S.D. Fla., filed 2016) (Dimitrouleas, J.), a case in which final judgment was entered in favor of a certified class of 3,677 members, and which was the first

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total-loss case concerning leased vehicles asserting similar claims as the present case, and the first one to claim that the failure to pay title transfer fees was a breach of contract; *Sos v. State Farm Mutual Insurance Company*, Case No. 6:17-cv-890-orl-18KRS (M.D. Fla., filed 2017) (Byron, J.), in which a class of over 3,000 insureds was certified and final judgment entered in favor of the named plaintiff, and which also concerned leased-vehicle total-loss insureds claiming failure to pay sales tax and title transfer fees; and *Jones v. Geico*, Case No.: 6:17-cv-891-orl-40KRS (M.D. Fla., filed 2017) (Byron, J.), in which summary judgment was entered in favor of a certified class of over 220,000 total-loss insureds for GEICO's failure to pay title and tag transfer fees after a total-loss (and the case subsequently settled and final approval and judgment was granted in July, 2020).

12. We estimated the total monetary value of the Settlement to approximate $6.4 million. Defendants' data shows there were approximately 7,750 claims and that the average sales tax amount was $721.67. The estimated outstanding tax payments for those members is over $5,500,000. Additional amounts include damages for CRA Sales Tax and Vehicular Regulatory Fees, the costs of attorneys' fees and costs, and the cost of settlement administration.

13. An award of attorneys fees of $850,000.00 is less than 15% of the total of the total monetary value of the Settlement.

14. For their efforts in this case, Plaintiffs seek an award of $5,000 to be paid by Defendants separate and apart from the fund made available to Settlement Class Members.

15. The service award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class.

EXHIBIT A

16. In addition to lending their names to this matter, and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this action. Among other things, Plaintiffs maintained contact with counsel, assisted with the investigations of their cases, reviewed the complaints, remained available for consultation throughout the mediation, answered counsel's many questions, and reviewed the Settlement Agreement.

17. The proposed settlement agreement secures virtually full relief for the Class. The amount of recovery is the full amount of damages that could have been secured in a litigated judgment.

18. It is my opinion that securing 100% of the total possible damages that could have been recovered at trial is an excellent result for the Settlement Class.

Further declarant sayeth not.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 8th day of May 2023.

s/ Amy Judkins
Amy L. Judkins

EXHIBIT A

FLORIDA NOTARY ACKNOWLEDGMENT

STATE OF FLORIDA

COUNTY OF Orange

The foregoing instrument was acknowledged before me by means of ✓ physical presence or ____ online notarization on this 8th day of May, 2023, by Amy L. Judkins

(Seal)

MICHELLE R. MONTECALVO
Notary Public - State of Florida
Commission # HH 49599
My Comm. Expires Oct 11, 2024
Bonded through National Notary Assn.

Michelle R. Montecalvo
Notary Public

Personally known: ✓

OR Produced Identification: _____

Type of Identification Produced: _____

Certificate of Service

I hereby certify that on Tuesday, May 09, 2023 I provided a true and correct copy of the App-Atty Fees/Reimburse Expenses to the following:

Whitehead,Shannon, service method: Constructive Service

USAA General Indemnity Company represented by Brooke McCarthy (Bar Number: 25077) service method: Electronic Service to brooke.mccarthy@kutakrock.com

U.S. Automobile Assoc. service method: Constructive Service

USAA Casualty Insurance Comp. service method: Constructive Service

Garrison Prop.& Casualty Ins. Comp. service method: Constructive Service

Signature: /s/ MECHAM, SHANE C (Bar Number: 26529)