**IN THE SUPREME COURT OF FLORIDA**

**Case No.: SC09-1849**

LAZARO E. SOSA, in his own right and on behalf of all persons similarly situated

Petitioner,

vs.

SAFEWAY PREMIUM FINANCE COMPANY, a Florida corporation,

Respondent.
_____/

LOWER TRIBUNAL CASE NO(S).
3D06-2579, 03-28811

# ANSWER BRIEF OF RESPONDENT

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## INTRODUCTION

The instant case involves a putative class action claim in which Sosa sought to establish that Safeway had liability under the Florida Premium Finance laws when it mistakenly overcharged him a $20 service fee in addition to the fees authorized by statute.[1] The law in question, however, only allows for a private cause of action against Safeway if the statutory violation was intentional. The trial court granted certification and Safeway filed an interlocutory appeal. On April 8, 2009, the Third District Court of Appeal reversed the trial court's erroneous certification of the class in this case because Sosa could not allege, let alone prove, that Safeway had "intentionally" violated Florida Statute Section 627.840(b) when it mistakenly overcharged him the $20 fee.

In his Initial Brief, Sosa attempts to rectify this fatal error by raising inferences not argued below and imputing nefarious intentions to Safeway that have no factual basis. Notably absent in the brief, however, is any real discussion as to how the Third District's opinion in this case is in conflict with any other district court or supreme court opinion. Absent such conflict, the opinion of the Third District Court of Appeal must be upheld.

[1] Throughout this Answer Brief, Respondent, Safeway Premium Finance Company will be referred to as "Safeway" or "Defendant." Petitioner, Lazaro E. Sosa, will be referred to as the "Plaintiff" and/or "Sosa." Record references are to the tab and page and/or paragraph number of the Appendices filed with the Third District Court of Appeal.

## STATEMENT OF THE CASE AND FACTS

### A. STATEMENT OF THE FACTS

During all times relevant to the instant case, Safeway was a Florida premium finance company, engaged in the business of financing automobile insurance premiums for consumers through Premium Finance Agreements ("PFAs"). (App. Tab B, 1 ¶1). Safeway has never been an automobile insurance company. Rather, Safeway had common ownership with United Automobile Insurance Company and shared some of its employees. (App. Tab F, 26:18-29:13). In early 2001, Safeway was notified by the Department of Insurance that pursuant to Florida Statute 627.840(3)(b) it could not charge clients a $20 service charge more than once in a 12 month period. (Sup-App Tab. 2, p. 3). Specifically, the Department's Report of Examination stated:

> Our examination disclosed numerous accounts where insureds were inappropriately charged the additional service charge twice during a 12-month period. Accordingly, management ***should ensure controls are established to prevent this from reoccurring.***

*Id.* (Emphasis supplied).

Within days of receipt of the Department's findings, Safeway informed the Department that it had imposed a corrective action plan, wherein contract renewals from February 1, 2001 forward would be reviewed for billing errors and any consumer that was overcharged would receive a credit. (Supp-App. Tab 1). The

Department did not require Safeway to take retroactive measures to reimburse prior overcharges as part of Safeway's corrective action (Sup-App. Tabs 1, 2) Safeway's CFO was unaware until the instant lawsuit was filed of the need to do so. (App. Tab F, 21:6 - 22:5, 24:4-7).

To comply with both the Department's instructions and the statute going forward, Safeway implemented a manual system, which was the best available safeguard in the industry at the time. (App. Tab B, ¶¶17, 29); (App. Tab E, ¶¶29–30); (App. Tab F, 17:3–6; 64:19-21).[2] Thus, as an established business practice, upon receipt of either a new or renewed[3] contract application, a Safeway employee performed a manual records check by customer name to determine whether the applicant was a former customer and, if so, had been previously charged the $20 finance charge within the preceding six-month period. (App. Tab B, ¶¶18–19); (App. Tab E, ¶¶6–8). If the applicant was in fact a former customer, a second Safeway employee performed an additional records check to determine whether the insurance contract was cancelled for nonpayment. (App. Tab B, ¶20); (App. Tab E, ¶9). If the customer had been previously charged the $20 fee, and the contract was not cancelled for non-payment, the application was processed through

[2] A computerized system was implemented after the software vendor, UNICORP, informed Safeway that such a system was available. This was after the instant class action litigation was filed. (App. Tab F, 17:15 – 18:2).

[3] In general, the majority of Safeway's customers entered into six-month insurance contracts and upon expiration, the customer had to either renew the insurance contract or obtain a new policy with another insurance company. (App. B, 3 ¶10).

computer software, known as UNICORP, with directions to waive the $20 charge. *See* § 627.840(3)(b), Fla. Stat.; (App. Tab B, ¶¶21–22); (App. Tab E, ¶¶ 10–12); (App. Tab F, 17:20-21); (App. Tab G, 34:7-10). At the conclusion of this process, Safeway sent a letter of confirmation to the customer setting forth the customer's account balance in compliance with section 627.845, Florida Statutes. (App. Tab B, ¶23); (App. Tab E, ¶13).

The manual system to waive the $20, which was put in place in early 2001, had been in use by Safeway for approximately three years at the time that Plaintiff filed his putative class action complaint. (App. Tab F, 16:5-19, 20:5-17, 48:1-6)(Sup-App. Tab 6, p.4). During this time approximately 50 to 100 waivers and/or credits were being issued to Safeway customers on a weekly basis. (App. Tab G, 41:1-8).

Although the company took proactive measures to reduce and eliminate mistakes, no system could be entirely free of error. (App. B, 6 ¶26); (App. Tab E, ¶15, ¶¶28–29). For example, if an insured changed their name, marital status, or address, the Safeway employee's search of the database would not reveal that the applicant was a former customer and had been previously charged the $20 fee within the 12 month period. (App. Tab B, ¶27); (App. Tab E, ¶15); (App. F, 40:7–14). Moreover, if the applicant provided incorrect or incomplete information to the independent agent, or the independent agent incorrectly recorded it as such, this

misinformation would adversely affect the accuracy of Safeway's system. (App. Tab B, ¶27); (App. Tab E, ¶15); (App. Tab F, 40:7–14). Finally, a Safeway employee could theoretically make a mistake, and inadvertently charge a customer twice, or in the converse, fail to charge a customer when appropriate. (App.Tab B, ¶28); (App. Tab E, ¶15); (App. Tab F, 40:7–14). Nevertheless, the program was believed to be an adequate safeguard and accepted by the Department of Insurance as an acceptable way to prevent billing mistakes. (App. Tab B, ¶29); (App. E, Tab ¶¶29–30); (App. Tab F, 17:5–6); (Supp-App. Tabs 1-3).

From February 1, 2001 until the time that it received the class action complaint and conducted an audit, Safeway was unaware of these errors. (App. Tab E, ¶25, 29). No complaints had been received by Safeway's accounting department prior to this time and the CFO was unaware of any errors. (App. Tab G, 31:14-17); (App. Tab E, ¶29). The audit, which was conducted after the lawsuit was filed, encompassed a six year period prior to the filing of the lawsuit (from January 1998 through December 2003) and found that approximately 8,000 customers had been charged twice within a twelve month period. (App. Tab F, 19:9-20). The 8,000 overcharges, however, did not all occur during the time in which the manual system was in place. Rather, this six year audit period included

three years in which Safeway had no manual system in place, from 1998 through February 2001.[4] *Id.*

As such, after receiving the class action lawsuit and conducting the audit, Safeway either credited the accounts of current customers and/or issued a refund check to the individuals who had been overcharged and who no longer had accounts. (App. Tab E, ¶24). Furthermore, as soon as it was made available by its software vendor, UNICORP, Safeway implemented a computerized system to lessen the error rate. The computerized system was unavailable prior to the filing of the class action lawsuit. (App. Tab F, 17:25 – 18:2). Whether manual or computerized, however, no system can ever be free of all error as information provided by customers and/or insurance agents is sometimes incorrect or subject to change.[5] (App. Tab F, 40:4-14) (App. Tab E, ¶15).

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[4] Nothing in the record below delineates how many of the 8,000 overcharges occurred during the time the manual system was in place - from February 2001 through the date of the audit in January 2004. The record does reveal, however, that during this three year time frame some 7000 to 15,000 waivers were given to Safeway customers as a result of the manual system (50 to 100 waivers per week for approximately 3 years). (App. Tab G, 41:1-8).

[5] For the first time in this case, Sosa argues that Safeway could have tracked these contracts by social security number. There is nothing in the record before the trial court to show whether such a system was feasible and this cannot be considered for the first time on appeal. It is unknown, for example, whether Safeway received social security numbers for all PFA applicants, whether such information was entered into any readily accessible database for comparison, and/or whether privacy concerns would even allow such data collection. "[A]ppellate review is only possible when resolution of the issues does not require factual

In fact, it is an independent insurance agent who makes the initial contact with a potential premium finance customer "in the field," and likewise, processes the initial financing application. (App. Tab B, ¶3); (App. Tab F, 53–54:25–8); (App. Tab G, 34:1–6). Importantly, these individual insurance agents are neither employees nor agents of Safeway, and are under no written contractual agreement to do business or provide services to or with Safeway. (App. Tab B, ¶4); (App. Tab F, 53–54:25–8). If an insured needs to finance their insurance premium, the independent agent will select a premium finance company, which may or may not be Safeway, and print out a boilerplate contract for the customer to sign.[6] (App. Tab B, ¶¶ 6–7).

Quite significantly, because these insurance agents are not agents or employees of Safeway, the agents had no access to Safeway's computer systems or company files. (App. Tab B, ¶3); (App. Tab F, 54:1–8; 56:19–20; 57:1–5). Moreover, because the application process involves only the independent insurance agent and the potential customer, Safeway had no knowledge of when a contract was presented to, and signed by, an applicant until the independent agent sent

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determinations." *Florida Farm Bureau Cas. Ins. Co. v. Mathis,* 33 So.3d 94, 98 (Fla. 1st DCA 2010). Moreover, undersigned counsel is concerned that Mr. Sosa's social security number has been made a public record and would ask this Court for permission to have said information redacted from the Appendix in this Court. Prior to receipt of the Initial Brief in this cause, undersigned counsel was unaware that such confidential information was contained in the record.

[6] Safeway's PFA form was approved by the DOI and the OIR. *See* § 627.839, Fla. Stat.

Safeway the completed application. (App.Tab B, ¶8); (App. Tab F, 55:6–11); (App.Tab G, 34:1–6).[7] Once received, a Safeway/UAIC employee reviewed the contract, applied any applicable waivers, and only if approved, the document became a binding finance agreement between the applicant and Safeway which would require the customer to pay any amounts charged. (App. Tab B, ¶¶8–9); (App. Tab H, ¶7).

Mr. Sosa had three PFA's with Safeway, all during the time that Safeway had a manual review process in place. (App. Tab E, ¶¶ 17-21). Safeway's manual review process failed to catch the first $20 overcharge by Safeway during Mr. Sosa's second PFA but worked as designed when it credited Mr. Sosa with $20 upon receipt of his third PFA. *Id.* Specifically, on December 2, 2002, Sosa's first PFA was received in Safeway's mailroom. The application indicated there was no prior insurance and was not isolated for review. *Id.* On June 3, 2003, Mr. Sosa's second PFA was received in the mailroom. This policy should have been isolated for review, but it was not. *Id.* On November 10, 2003 Mr. Sosa's third PFA was received in the Safeway mailroom. Noting the existence of a prior six month policy, the contract was isolated for review and a determination was made to waive

[7] As pointed out by Judge Shepherd's concurring opinion: "For this reason each proposed financing agreement states, "This contract shall not become effective until accepted by the finance company by payment of its draft [for the amount of the premium the insured elects to finance] to the agent or to the insurance company." *Safeway Premium Finance Company v. Sosa,* 15 So.3d 8, 12 (Fla. 3d DCA 2009).

the $20 charge. (App. Tab E, ¶¶ 21-23). Significantly, Safeway's manual process credited Mr. Sosa's account the amount of $20 on November 17, 2003, 29 days before the class action complaint was filed in this case. (App. Tab E, 4 ¶ 24) (App. Tab J, 1-3). During the refund process which occurred pursuant to the audit after his class action complaint was filed, Sosa was refunded another $20 —he, however, refused to cash the check. (App.Tab B, ¶40); (App.Tab K, 95–96:15–5; 97:9–12).[8]

## B. STATEMENT OF THE CASE

On December 16, 2003, Sosa filed his class action complaint claiming that Safeway had violated Section 627.840, Florida Statutes, by assessing an "additional charge in excess of twenty dollars ($20) in a 12 month period." (App. Tab D, ¶ 1). The action was brought pursuant to Section 627.835, Florida Statutes, which provides a private cause of action for intentional violations of the premium finance laws. (App. Tab D, ¶ 19). The relevant statutory provision states as follows:

[8] Sosa argues in his Initial Brief that this repayment was an attempt to "pick off" the class representative. This is not the case. The second payment of $20 to Mr. Sosa occurred because he had three consecutive six month policies. As stated above, policy one was appropriately charged the $20 fee. (App. Tab E, 3 ¶¶ 17-18). Policy two should have had a waiver, but it did not. (App. Tab E, 3 ¶¶ 19-20). This is what the computerized audit would have picked up. It was not set to pick up the fact that Mr. Sosa had already been issued a waiver on policy 3 which negated the need for the refund on policy 2. (App. Tab F, 9 ¶¶ 4-16); (App. Tab J, ¶¶ 5-7); (App. Tab E, ¶¶ 25-26).

> Any person, premium finance company, or other legal entity who or which **knowingly** takes, receives, reserves, or charges a premium finance charge other than that authorized by this part shall thereby forfeit the entire premium finance charge to which such person, premium finance company, or legal entity would otherwise be entitled; and any person who has paid such unlawful finance charge may personally or by her or his legal or personal representative, by suit for recovery thereof, recover from such person, premium finance company, or legal entity twice the entire amount of the premium finance charge so paid.

§ 627.835, Fla. Stat. (emphasis added); *Id.*

Defendant Safeway filed an Amended Motion to Dismiss and to Strike Attorney's Fees, arguing *inter alia,* that the complaint failed to plead an essential element of the claim <u>because it did not allege</u> that Safeway's alleged violation of Section 627.840 was a knowing violation. Safeway also argued that Sosa lacked standing to bring a putative class action case as he had been reimbursed for the mistaken overcharge prior to the time the class action complaint was filed and thus had suffered no injury. (Sup-App. Tab 7, ¶¶ 4,5,11). These arguments were raised once again by the Defendant in its Motion for Summary Judgment. (Sup-App. Tab 9) (App. Tab M, 34-36).

The parties engaged in discovery and depositions were taken by Sosa of various Safeway employees including Juan Ferrer, the Chief Financial Officer and Jim Machul, the individual who processed the waivers for Safeway. (App. Tabs F, G). The deposition of Mr. Sosa was also taken by Safeway. (App. Tab K). At no

time was the discovery limited to "non-merits" discovery by the court or by the parties. Indeed, the questions posed by Plaintiff's counsel in the two Safeway depositions filed with the court demonstrate that they were asked specific questions regarding Mr. Sosa's underlying claim as well as the policies and practices of Safeway. (App. Tabs F, G).[9]

On February 6, 2006, more than two years after Sosa filed his class action complaint, he sought certification of the class. (App. Tab B, ¶37). In opposition to certification, Defendant Safeway once more raised the issues of scienter and standing. (App. Tab M, 34:17 – 36:21); (App.Tab B, 8-18). After a non-evidentiary hearing held on July 11, 2006, the trial court granted Sosa's motion and certified the class.[10] (App.Tab C). At the hearing, Mr. Sosa offered no evidence to contradict three pivotal facts: 1) that he had been credited $20 by Safeway once it realized the billing error through its manual system; 2) that he was refunded an

[9] Plaintiff's counsel deposed the chief financial officer, Juan Ferrer, and inquired extensively about Safeway's internal processes, as well as application-handling personnel and software. (App. Tab F, 17, 37, 40). Plaintiff also deposed several other Safeway employees, including, for example, Jim Machul, who had personal knowledge of Safeway's systems intended to prevent section 627.850(b) violations. (Appendix to Appellant's Initial Brief "G"). Thus, Plaintiff's suggestion that his ability to uncover some intentional "scheme" to overcharge clients was somehow thwarted is unfounded and not supported by the record below.

[10] Safeway's counsel offered to place Mr. Ferrer on the stand, however, the Court determined it was not necessary. *See,* (App. Tab M, 44:18 – 45:12). Sosa's counsel did not place any witnesses on the stand. (App. Tab M).

additional $20 by Safeway shortly after his lawsuit was filed; and 3) that the $20 overcharge on his second PFA was made in error. (App. Tab A); (App. Tab M, 12:20–25; 15:2–12; 23:8–13; 24:18–22; 36:13–21; 38:23–3). In fact, Mr. Sosa admitted receipt of both the $20 credit and the $20 check (for a total of $40) from Safeway in an affidavit he filed in opposition to Safeway's Motion for Summary Judgment. (App. Tab O, ¶¶10–11).[11]

As was correctly determined by the Third District Court of Appeal, the order granting certification plainly failed to make necessary findings of fact, or offer any supporting law demonstrating that Sosa met the rigorous requirements of Florida Rule of Civil Procedure 1.220. *See* Fla. R. Civ. P. 1.220(d)(1); (App. C); *Safeway Premium Finance Company v. Sosa,* 15 So.3d 8, 14-15 (Fla. 3d DCA 2009). The factually and legally deficient order states as follows:

I. STANDING

> The court finds that Plaintiff *may have* a redressable injury. The question of whether or not Defendant's actions were done knowingly is a jury question and not to be taken into consideration to determine standing.

[11] Mr. Sosa's account does differ with Safeway's in that he claims he receives the credit "after" the class action was filed. The date that he learned of the credit (which is nowhere disclosed in his affidavit) however, is not the same as the date in which Safeway issued the waiver in its computer system, which was indisputably before the class action was filed. (App. Tab J, ¶¶ 6, 12).

## II. NUMEROSITY

Plaintiff has satisfied all requirements of Florida Rule of Civil Procedure 1.220(a)(1) regarding numerosity because the class is so numerous that joinder of all members is impracticable.

## III. COMMONALITY

There are many questions of law and fact common to the class, as illustrated by the following nonexclusive question:

- Whether the Defendant knowingly violated § 627.840, Florida Statutes, by assessing and accepting for payment from Plaintiff and the Class members an additional charge in excess of twenty ($20) in a 12-month period.

Plaintiff has satisfied all requirements of Florida Rule of Civil Procedure 1.220(a)(2) regarding commonality because there are no questions of law and fact common to the class.

## IV. TYPICALITY

Plaintiff's claims are identical to the claims of all potential class members. Plaintiff's claims are brought pursuant to § 627.835, Florida Statutes, and are based on the allegation that Defendant knowingly assessed Plaintiff, as well as all potential class members, an additional charge in excess of twenty ($20) during a 12-month period, in violation of §627.840, Florida Statutes.

The interests of Lazaro Sosa are the same as the interests of the class members. Lazaro Sosa has no interests antagonistic to the interests of the class members.

The claims of Lazaro Sosa rise from the same course of conduct that gives rise to the class members' claims. The claims of Lazaro Sosa are based on the same legal theories as the class members' claims.

Plaintiff has satisfied all the requirements of Florida Rule of Civil Procedure 1.220(a)(3) regarding typicality because the claims of the plaintiff class representative are typical of the claims of the class.

## V. ADEQUACY

Lazaro Sosa has proved himself both willing and able to take an active role in this litigation and to protect the interests of the absent class members. Moreover, as found and concluded above, Lazaro Sosa has not interests antagonistic to the interests of the class members.

Roniel Rodriquez IV, Thomas K. Equels and Benjamin R. Alvarez have proved themselves to be a zealous and competent legal team to represent the class. This legal team includes lawyers with vast class action experience and nationally-recognized litigation experience.

Plaintiff has satisfied all requirements of Florida Rule of Civil Procedure 1.220(a)(4) regarding the adequacy of representation because Lazaro Sosa and his counsel in this cause will fairly and adequately protect the interests of the class.

## VI. PREDOMINANCE

As found and concluded above, there are questions of law and fact common to the class. The common questions of law and fact predominate over any individual questions.

Plaintiff has satisfied all requirements of Rule of Civil Procedure 1.220(b)(3) regarding predominance because questions of law or fact common to the members of the class predominate over any questions affecting only individual members.

## VII. SUPERIORITY

Plaintiff has satisfied all the requirements of Rule of Civil Procedure 1.220(b)(3) regarding superiority because a class action is superior to other available methods for the fair and efficient adjudication.

(App. C) (emphasis added).

Nor did the trial judge orally record the factual findings relating to the above requirements or explain how Mr. Sosa had standing. (App. M, 61:4 – 63:23). The Third District recognized these flaws and found that the judge had abused her discretion in certifying the class. *Safeway Premium Finance Company v. Sosa*, 15 So.3d 8 (Fla. 3d DCA 2009).

## SUMMARY OF THE ARGUMENT

The Third District Court of Appeal's decision in *Sosa* does not expressly and directly conflict with any other district court or Supreme Court opinion. Importantly, the Third District did not rule that there could never be a class action certified under Florida Statute section 627.835. Rather, the court determined that under the unique facts of this case, no class action could be maintained.

In order to plead and prove scienter, a necessary element of the statutory cause of action, Plaintiff had to show that Safeway had knowledge that it was overcharging Mr. Sosa and the members of the class he sought to represent. If Safeway had had no system in place to comply with the statutory requirements, there would be no question that the Plaintiff would have been able to plead and prove the requisite intent.

This, however, was simply not the case. Safeway's CFO testified that the manual system was put in place specifically as a safeguard to prevent charging a

customer the $20 service charge twice in a twelve month period. In fact, the system put in place by Safeway credited Mr. Sosa's account with a $20 waiver when he entered his third consecutive premium finance contract. Thousands of waivers were given to other Safeway customers from the time that the manual review process was put in place in February of 2001. Plaintiff neither pled nor proffered any evidence that Safeway had any notice that its manual system was insufficient.

For the first time in this discretionary appeal, Sosa attempts to argue that Safeway knew its manual system was inadequate. Sosa goes so far as to imply that Safeway purposely designed a flawed system in order to keep monies it was not entitled to. To support this scandalous argument, Sosa now claims that Safeway should have utilized social security numbers to better track individuals. While hindsight almost always affords a better or simpler solution to a problem, there is no factual predicate for the argument that Safeway intentionally skirted its statutory obligations by refusing to utilize social security numbers. There is simply no testimony on that subject because the issue was never raised below.

The fact of the matter is that while the manual system was not perfect (as no system can ever be) it did work to offer thousands of waivers to Safeway customers. Indeed, Mr. Sosa was afforded a waiver of the $20 service charge during his third consecutive premium finance contract over an eighteen month period. While the waiver should have been applied to his second contract and not

his third, the fact that he was afforded a waiver pursuant to Safeway's manual system makes him atypical, and without standing to represent any class that could theoretically have been certified.

The Third District correctly determined that a class action is not practicable in this case. In order to identify who is and who is not a member of the putative class, a court will have to conduct a series of mini-trials to determine if the individual charged the $20 service charge was done so in error, or as the result of an intentional act. If, for example, Customer A financed a six month auto policy and then financed a second policy within the requisite twelve month period and was charged the $20 fee twice, a court would need to determine, *inter alia*: 1) if the customer gave the same name and address to his/her agent; 2) if the agent correctly recorded the information on both application forms; 3) if the information was entered into Safeway's records correctly; 4) if the policy was purchased in the same name or if it was purchased in another family member's name; 5) if the individual performing the manual review process made any errors; 6) if the individual was mistakenly credited any other amounts (as was Sosa in his 3rd PFA) which would render the $20 charge irrelevant; and/or 7) if the individual did not fully pay all amounts owed under the PFA in question.

## STANDARD OF REVIEW

There is no direct and express conflict between district court opinions and it is respectfully suggested that this Court has improvidently granted jurisdiction in the case. Indeed, in order to even consider jurisdiction, this court must accept the dissenter's view of the evidence; which is, in and of itself, an inappropriate basis for jurisdiction. *Reaves v. State,* 485 So.2d 829 (Fla.1986). Nevertheless, if this Honorable Court accepts jurisdiction, then it is clear that the Third District applied the correct standard of review.

This is so because determinations as to whether a plaintiff has standing are reviewed *de novo*. *Ferreiro v. Philadelphia Indem. Ins.*, 928 So. 2d 374, 376 (Fla. 3d DCA 2006) (referencing *W.S. Badcock Corp. v. Webb*, 699 So. 2d 859, 861 (Fla. 5th DCA 1997)).[12] In addition, when determining the propriety of class certification in this case, the Third District had to construe the elements of a private

[12] "Standing is a preliminary question to be answered in determining commonality and typicality of a class." *The Club at Admiral's Cove v. Skigen*, 879 So.2d 57, 59 (Fla. 4th DCA 2004). Even though the Third District's opinion in *Sosa* did not expressly rule on the issue of standing, the matter was clearly taken into consideration as part of the court's analysis of typicality and commonality. *See, Safeway Premium Finance Company v. Sosa,* 15 So.3d 8, 11, (Fla. 3d DCA 2009) ("Sosa personally has not alleged any individual facts showing intentional actions by Safeway…"); and *Sosa* 15 So.3d at 14 ("Sosa's claim is not typical of that group of potential claimants). Indeed, Sosa's Initial Brief to the Third District argued that Sosa did not have standing because he did not have a private cause of action under the statute without alleging a "knowing violation." Defendant was under no obligation to file a cross-appeal on the question of standing in light of the Third District's opinion. Accordingly, Plaintiff's argument that the "standing" argument has been "waived" is wholly without merit.

statutory cause of action for violations of the premium finance laws. As this Honorable Court has previously determined, "interpretation of a statute is a purely legal matter and therefore subject to the *de novo* standard of review." *Curd v. Mosaic Fertilizer, L.L.C.*, 2010 WL 2400384 *2 (Fla. 2010).

In addition, while in general a trial court's certification of a class action is reviewed using an abuse of discretion standard, "where [as here] the trial court has decided issues of fact without an evidentiary hearing, we give its factual determinations less deference." *InPhyNet Contracting Services, Inc. v. Soria*, 33 So. 3d 766, 770 (Fla. 4th DCA 2010)(considering a two-day non-evidentiary hearing during which time the court considered multiple depositions, documents, and affidavits, but took no live testimony).

## ARGUMENT

### I. The Third District's Decision Does Not Expressly And Directly Conflict With The *Smith v. Foremost Insurance* Decision.

Article V, Section 3 of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2) provide the limited instances where this Court can exercise its discretionary jurisdiction. A jurisdictional basis exists only when the District Court's decision expressly and directly conflicts with a decision of either the Supreme Court or another District Court of Appeal on the same question of law. Art. V, §3 (b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(iv),(v).

The Third District's decision in the instant case reviewed §§ 627.840 and 627.835, Fla. Stat. (2002) and determined that class certification for violations of § 627.840 based on the damages specified in § 627.835 required for the overcharges to be "intentional." This holding is not in direct and express conflict with the Second District's decision in *Smith v. Foremost Insurance Company*, 884 So.2d 341 (Fla. 2d DCA 2004) which interpreted different premium finance provisions, did not involve the certification of a class, and did not discuss intent.[13]

In an attempt to "create" conflict, Plaintiff speaks of the "broad view regarding the *Foremost* opinion" and suggests that the *Foremost* case held that the question of whether a violation of the premium finance statutes was a "knowing" violation to be left to the trier of fact. (Initial Brief at p.29). Yet, the *Foremost* opinion never even touched upon this issue.

In *Foremost*, the Second District was faced with the question of whether an insurance company, which had charged service fees under a payment plan for premiums, fell under the auspices of the insurance statutes regulating premium financing by insurance companies: Fla. Stat. § 627.901, *et seq*. The court determined that the insurance company had indeed financed the policies and reversed a lower court's entry of summary judgment which had ruled otherwise.

[13] In his jurisdictional brief other cases with even less application to the instant case were cited as being in conflict. The *Foremost* case, however, was the only case involving premium finance laws.

The Second District then affirmed the trial court's denial of a cross-motion for summary judgment in favor of the insured finding as follows:

> We affirm the denial of Smith's cross-motion for summary judgment. A question of material fact remains as to whether the service charges Foremost assessed to Smith and others similarly situated were "substantially more than that provided in s[ection] 627.901," which would subject Foremost to part XV of the code, see § 627.902, and penalties for any noncompliance.

*Smith*, 884 So.2d at 345. In essence, the Second District remanded for trial the question of whether there had even been a violation of Fla. Stat. § 627.901 (setting caps on service charges) and noted, *in dicta*, that a violation would trigger the penalty provisions under Part XV of the Code, i.e., Fla. Stat. § 627.835. Accordingly, whether or not the potential statutory violation at issue in *Smith* warranted application of the penalty provisions in § 627.835 had not yet been considered by the lower court and was never an issue raised before the Second District.

By contrast, in *Sosa*, Defendant admitted that statutory violations had mistakenly occurred. Thus, the central issue determined in *Sosa* was whether Plaintiff could maintain, either as an individual, or as the representative of a class, a private cause of action under Florida Statute 627.835 where he could not allege the requisite "knowing" violation. *Sosa* does not preclude all claims for violations of the premium finance statutes from being maintained as class actions.

It merely states that a "knowing" violation could not have occurred on a class wide basis under the facts of this particular case. *Safeway Premium Finance Co. v. Sosa*, 15 So.3d 8 (Fla. 3d DCA 2009) As such, *Sosa* in no way effects the holding in *Foremost* and this Court should not entertain jurisdiction of this matter.

## II. The Third District Correctly Determined that Sosa Could Not Maintain a Class Action Because He Did Not Allege or Proffer Any Evidence That Safeway Knowingly Violated the Premium Finance Laws During the Relevant Time Frame.

The Third District Court correctly determined, as a matter of law, that Sosa's Motion for Class Certification was "insufficient on its face and subject to dismissal for failure to allege facts demonstrating that Safeway 'knowingly' billed or received the additional premium finance charge from its customers." *Sosa*, 15 So.3d at 11. Indeed, as noted by the concurrence, "[d]uring the three years this case has been pending below, neither Sosa nor his counsel has unearthed any evidence that the failure of Safeway to adjust his (or any other) proposed premium finance agreements resulted from some uniform action by Safeway." *Id.* at 13.

If Safeway had taken no measures to comply with the statutory requirements of Florida Statute 627.840, then Sosa would have been successful in having a class certified. However, by the time that this case had progressed to the class certification hearing, it was clear to all involved that these were not the facts of the case. Safeway had, in fact, developed a system specifically aimed at complying with the statutory requirements. (App. Tab F, 64:19-21).

Although section 627.835, Florida Statutes, grants a private cause of action to an individual for a violation of section 627.840, Florida Statutes, an individual may only bring such action when the premium finance company *knowingly* charged the excessive fee. § 627.835, Fla. Stat. (2005). The Third District correctly relied on the Black's Law Dictionary definition of "knowingly" to mean one who acts "with knowledge, consciously, willfully and intentionally." *Sosa*, 15 So.3d at 10. *See also, Mogavero v. State*, 744 So. 2d 1048, 1050 (Fla. 4th DCA 1999) (defining "knowingly" as performing an act with actual knowledge and awareness). While the Premium Finance Statutes do not define "knowingly" other Florida statutes do. The Medicaid Provider Fraud Statute, for example, defines "knowingly" as follows: "[k]nowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident. As used in this section, the term "knowingly" also includes the word "willfully" or "willful" which, as used in this section, means that an act was committed voluntarily and purposely, with the specific intent to do something that the law forbids, and that the act was committed with bad purpose, either to disobey or disregard the law." Florida Statute, Section 409.920(1)(d)(2009).

Florida law unequivocally states that a "knowing" requirement in a penal statute, such as section 627.835, Florida Statutes, "must be governed by the principle of statutory construction that penal statutes shall be strictly construed in

favor of the person against whom the penalty could be imposed." *See Roche Sur. & Cas. Co. Inc. v. Dep't of Fin. Servs.*, 895 So. 2d 1139, 1141 (Fla. 2d DCA 2005) (citation omitted). Indeed, the existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence and thus, the *mens rea* requirement "is dispensed with only upon a 'clear statement' from the legislature that scienter is not an essential element of the offense." *Shearer v. State*, 754 So. 2d 192, 194–95 (Fla. 1st DCA 2000) (quoting in part *Dennis v. United States*, 341 U.S. 494, 500 (1951)); *Padilla v. State*, 753 So. 2d 659, 668 (Fla. 2d DCA 2000) (examining criminal *mens rea*) (citations omitted). *See also, Cohen v. State*, 125 So. 2d 560, 563 (Fla. 1961) (holding that when the statute includes an element of scienter or knowledge, it is fundamental error to not charge the jury with instructions that proof of scienter or knowledge is required).

Nowhere in his motion for class certification, or even in his proposed class definition, did Sosa allege that Safeway *knowingly* acted as to Sosa and/or the individual class members when failing to comply with the premium finance statute, section 627.840, Florida Statutes. Although Sosa now attempts to paint Safeway's actions in a Machiavellian light, there is nothing in the record below, or in the

Court's findings which would allow a finding of willfulness with regard to Safeway's actions.[14]

Quite the contrary, the record below demonstrates that Safeway's manual system granted thousands of waivers during the three year period in which it was in place. While Sosa now complains that Safeway's system was flawed and that it should have had a better system based on social security numbers, such argument misses the point regarding the requirement of *mens rea* and *scienter*. Indeed, Sosa offers nothing but conjecture to suggest that Safeway designed a "knowingly flawed – and profitable" system. *See* (Initial Brief at p. 17).

In truth and fact, there is nothing in the record below regarding the feasibility of utilizing social security numbers for this purpose. Despite three years of discovery and the ability to fully question witnesses regarding policies and procedures, no testimony was taken of Safeway employees regarding this matter

[14] Plaintiff's argument, based on the dissenting opinion authored by Judge Gersten, assumes that the Safeway's actions are intentional and disregards the fact that Safeway does not "collect" or "charge" any monies at the Agency level. As the Third District's concurrence correctly detailed: independent agents are the first point of contact; they enter the customer's information on a computer application created by a third party vendor; Safeway performed its manual check at its initial receipt of the proposed application in its mailroom, and the Safeway premium finance contract did not legally go into effect (and thus was not binding on Sosa or any other putative class member) until it was accepted by Safeway. Thus the acceptance of a PFA by Safeway occurred <u>well after</u> the manual system check and the application of any necessary waiver. *Sosa,* 15 So.3d at 12-13. ("The image penned by the dissent of the 'big guy…lift[ing] $20 from unsuspecting customer's pockets' as each agreement floats through the premium finance company's door [citation omitted] is a false one.") *Sosa,* 15 So.3d at 12.

and it is unknown if social security numbers were required by Safeway or even obtained by the independent agents. Moreover, social security numbers can also be subject to mistaken input and while arguably better, would not eliminate all errors or other privacy concerns.[15] Accordingly, Sosa's argument that Safeway's system was knowingly "flawed" and should have been more accurate, is inappropriately raised for the first time in this discretionary appellate proceeding in which the sole focus of the argument should be about whether the Third District's opinion creates conflict. *See, Florida Farm Bureau Cas. Ins. Co. v. Mathis,* 33 So.3d 94, 98 (Fla. 1st DCA 2010) (Resolution of factual determinations not appropriate for appellate review.)

The record below illustrates that Safeway lacked the requisite knowledge, which effectively leaves Sosa with no cause of action under the law. § 627.835, Fla. Stat. Safeway's fundamental lack of knowledge is demonstrated by its implementation of safeguards to prevent overcharging customers an additional $20 fee; in other words, Safeway could not have knowingly charged customers the $20, as it had a system in place to prevent that very occurrence. (App. Tab B, 6 ¶29);

[15] Indeed, for public policy purposes, the Florida Legislature has steered away from use of the social security number. *See,* Florida Statue, Section 119.071(5)(a), acknowledging that "the social security number was never intended to be used for business purposes but was intended to be used solely for the administration of the federal Social Security System… it can be used as a tool to perpetuate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual."

(App. E, Tab 4 ¶¶29–30); (App. Tab F, 17:5–6). Moreover, Safeway implemented new technology and computer systems as soon as such equipment and software became available to lessen the chance of error from its previous manual process. (App. Tab F, 17–18:10–2).[16] Safeway's lack of requisite intent is also evidenced by the company's prompt, self-initiated response as soon as Sosa's billing error was discovered; Safeway refunded Sosa the $20 overcharge *before* the suit was filed. § 627.840(3)(b), Fla. Stat.; § 627.835, Fla. Stat. Furthermore, the company actively initiated an internal audit, wherein after they discovered that its manual system had erroneously overcharged customers, the company rapidly refunded all overcharged customers the $20 fee, which included sending Mr. Sosa an additional $20.[17] (App. B, 8 ¶38); (App. E, 4 ¶25).

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[16] Although, undersigned counsel is reminded of the saying, "To err is human, but to really foul things us requires a computer." *Farmer's Almanac*, 1978.

[17] It should also be noted that any knowledge that an independent insurance agent may have had as to whether or not the applicant had been charged the $20 fee in the preceding six-months, cannot be imputed to Safeway because the individual insurance agent is neither an actual or apparent agent of Safeway, but instead, is the agent of the insured. *Almerico v. RLI Ins. Co.*, 716 So. 2d 774, 776, 781 (Fla. 1998); *Fernandez v. Florida Nat'l Coll.*, Inc., 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006). Moreover, for the purposes of this Appeal, Safeway refers to the individuals at the local insurance office as "independent agents." These independent agents, however, are technically "insurance producers." An insurance producer is someone who "acts as a middleman between the insured and the insurer, soliciting insurance from the public under no employment from any special company and, upon securing an order, placing it with a company selected by the insured or with a company selected by himself or herself; whereas an 'insurance agent' is one who represents an insurer under an employment by it." 3 Lee R. Russ, *Couch on Insurance 3d*, §45:1 (1997). Safeway is using the term

Thus, the Third District correctly ruled that requisite element required by section 627.835, Florida Statutes - that a defendant act with knowledge towards each individual plaintiff - effectively eliminates a "class action" as a proper vehicle for Sosa's claim due to Safeway's manual process.

## III. The Third District Correctly Determined That The Trial Court Abused Its Discretion In Certifying The Class Action Because It "Failed To Engage In The Rigorous Analysis Required By Florida Rule Of Civil Procedure 1.220."

Florida Rule of Civil Procedure 1.220 governing class actions, which mirrors Federal Rule 23, requires that the four conjunctive elements in 1.220(a) (numerosity, commonality, typicality, and adequacy of representation) and at least one of the alternative requirements of Rule 1.220(b) be satisfied before a class may be certified. *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1025 (11th Cir. 2001) (referencing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997)); *See also Chase Manhattan Mortgage Corp. v. Porcher*, 898 So. 2d 153, 156–57 (Fla. 4th DCA 2005) (noting "[b]ecause Florida's class action rule is based on Federal Rule of Civil Procedure 23, Florida courts may generally look to federal cases as persuasive authority in their interpretation of rule 1.220") (citations omitted); *See Concerned Class Members v. Sailfish Point, Inc.*, 704 So. 2d 200, 201 (Fla. 4th DCA 1998) (citation omitted).

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"independent agent" because the Florida Insurance Code states that the term "agent" includes an insurance producer. § 626.015(2), Fla. Stat.

The party who seeks class certification bears the burden of establishing these four elements. Fla. R. Civ. P. 1.220(a); *See Freedom Life Ins. Co. of Am. v. Wallant*, 891 So. 2d 1109, 1114 (Fla. 4th DCA 2004). Moreover, [i]n determining whether these prerequisites have been established, a 'rigorous analysis' must be conducted. *Id.* Such an analysis entails the court 'look[ing] beyond the pleadings and, without resolving disputed issues, determin[ing] how disputed issues might be addressed on a class-wide basis.' *Id.* (citing *Rutstein v. Avis Rent A Car Sys. Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000)). It is to be determined whether '"the purported class representatives can prove their own individual cases and, by doing so, necessarily prove the cases for each one of the…other members of the class."' *Bouchard Transp. Co. v. Updegraff*, 807 So. 2d 768, 771 (Fla. 2d DCA 2002) (citation omitted). …*Freedom Life Ins. Co. of Am.*, 891 So. 2d at 1114.

Quite importantly, "[t]o grant class action certification, the trial court must conduct a rigorous analysis to determine that the elements of Florida Rule of Civil Procedure 1.220, the class action rule, have been met." *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 638 (Fla. 3d DCA 2006) (citations omitted); *See Ford Motor Co. v. Morris*, 904 So. 2d 612, 612–13 (Fla. 1st DCA 2005). In *Ford Motor Co.*, the court concluded as follows:

> the order certifying the class contains no findings of fact as required by Florida Rule of Civil Procedure 1.220(d)(1) ('…*the order shall separately state the findings of fact and conclusions of law upon which the*

> *determination is based.'). Absent specific findings, we cannot discern whether the trial court applied the correct analysis when making its decision*.

*Id*. at 613 (citations omitted); *See Rollins, Inc. v. Butland*, 852 So. 2d 895, 896 (Fla. 2d DCA 2003); *KPMG Peat Marwick, L.L.P. v. Barner*, 771 So. 2d 56, 56 (Fla. 2d DCA 2000). Hence, the trial court's specific findings as to each conjunctive requirement in Rule 1.220 *must* be demonstrated in the order and mere conclusory statements will not suffice. Fla. R. Civ. P. 1.220(d)(1). *See id*.

For example, in *Rollins, Inc.*, although the trial court "issued a twelve-page order…which clearly summarized the argument of the parties relating to the requirements[,]" it wholly failed to "state the factual and legal findings required by…Rule 1.220(d)(1) to support certification…." 852 So. 2d at 896. Instead, the court's order "merely made conclusory statements that the parties had established the prerequisites to qualify for class certification." *Id*. Consequently, where the trial court fails to make such required findings, this court cannot "determine whether the trial court abused its discretion by certifying the class" and thus, the order must be reversed. *Id*. (referencing *KMPG*, 771 So. 2d at 56–57) (concluding, "by taking the class certification issue under advisement, the trial judge did not state the reasons for his ruling on the record" and the order must therefore be reversed).

In the instant case, the trial court's order granting class certification was issued after a one-half day non-evidentiary hearing. The order was plainly facially deficient of findings of fact as to standing, numerosity, commonality, typicality, predominance, and superiority. (App. Tab C). Because the court abused its discretion in wholly failing to conduct the rigorous analysis required by Rule 1.220(d)(1), the order was correctly reversed.

**a. The Third District correctly determined that Sosa's case did not meet the class action requirement of commonality.**

As explained by the majority opinion of the Third District Court of Appeal:

> In the class action against Safeway, there would be different circumstances for each individual member of the class which serve as the bases for and as defenses to the additional premiums charged such that the class action requirement of commonality cannot be met.

*Sosa*, 15 So.3d at 11.

Pursuant to Rule 1.220(a)(2), "[t]he primary concern in determining commonality is whether the representative members' claims arise from the same course of conduct that gave rise to the other claims, and whether the claims are based on the same legal theory." *Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 267 (Fla. 5th DCA 2002) (referencing *McFadden v. Staley*, 687 So. 2d 357, 359 (Fla. 4th DCA 1997)). Quite significantly, where the circumstances are such that a series of mini-trials will be required, there is no commonality and class certification is not appropriate. *Execu-Tech Bus. Sys. Inc. v. Appleton Papers, Inc.*,

743 So. 2d 19, 22 (Fla. 4th DCA 1999) (noting that commonality or predominance requirement is not satisfied where claims involve factual determinations unique to each plaintiff). Thus, even where there is a "common nucleus of facts concerning a prospective class-action-defendant's conduct, a lawsuit may present individualized plaintiff-related issues which inherently make it unsuitable for class certification." *Philip Morris USA, Inc. v. Hines*, 883 So. 2d 292, 294 (Fla. 4th DCA 2003) (citations omitted); *See Shoma Dev. Corp. v. Vazquez*, 749 So. 2d 1287, 1288 (Fla. 3d DCA 2000).

Plaintiff cites to numerous cases in which there was a "common course of conduct" which established the Defendant's liability. However, none of the cases cited involved cases in which the Defendant's intent needed to be proven in order to establish liability. The case of *Equity Residential Properties Trust v. Yates,* 910 So.2d 401 (Fla. 4th DCA 2005) for example, involved the collection of "double rent" by the landlord. No question was presented as to whether the collection of the double rent had to be intentional to be actionable.

While Plaintiff relies heavily on the case of *Morgan v. Coats*, 33 So.3d 59 (Fla. 2d DCA 2010), its holding does not alter the analysis. *Morgan*, was a wage and hour class action brought by a detention deputy for the Broward Sheriff's Office (BSO's) failure to pay for meal breaks during which time the deputies were "on call" and required to be on the premises. Pursuant to federal law such time

must be paid as hours worked even if no work is performed. *See*, 29 C.F.R. § 785.17.

The failure to pay for meal breaks when deputies were on call but not actually working was a "common course of conduct" requiring no proof of intent and thus, there was never any question as to liability, as all officers who were required to be "on call" were legally required to be compensated. In its opinion, the court recognized that BSO's policy was to pay for the lunch break when a deputy's lunch period was interrupted and that whether payment occurred on any given day would vary on a case to case basis. However, these variances did not preclude certification as the differences did not determine whether an individual had a claim, only how much the individuals claim was worth:

> In this case, although there will be some factual variations among the claims of each class member, those variations go to the determination of each class member's damages rather than to the elements of the claims. The actual claims are based on the same legal theories and are based on the same course of conduct by the sheriff.

*Morgan v. Coats*, 33 So.3d at 66.

Unlike in *Morgan,* in the case at bar, the "variances" in each putative class member's claim determine not the amount of damages owed, but whether an individual has a statutory claim at all. Because Safeway had a manual system in place, to recover from Safeway, each individual would have to prove whether or not Safeway acted with intent and knowingly overcharged them. In *Morgan*, <u>all</u>

deputies were regularly denied payment of wages for "on call" duty. Whether or not an individual was paid for a meal break because on that particular day their break was interrupted could be quickly determined by a simple analysis of pay records. The "variances" in the instant case, by contrast, would require a jury determination to establish the viability of each individual claim since the question of "knowledge" and intent would be for the jury to decide.[18]

**b. The Third District correctly determined that Sosa's case did not meet the class action requirement of typicality.**

In addition to commonality, Rule 1.220(a)(3) requires that the class representative's claims be typical of the claim of each member of the class. In other words, *there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class.* A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. … A factual variation will not render a class representative's claim atypical *unless the factual position of the representative markedly differs*

[18] Plaintiff's failure in being able to prove intent on a class-wide basis goes hand-in-hand with his failure to demonstrate numerosity. When a court cannot reasonably ascertain if a person is a member of the class, the requirement of numerosity is not met. *Canal Insurance Company v. Gibraltar Budget Plan, Inc.*, 2010 WL 2925378 (Fla. 4th DCA 2010). While the evidence below indicated that numerous individuals had been mistakenly overcharged in the six years prior to the filing of the class action, nothing in the record below established that any individual was "knowingly" overcharged and to conclude otherwise would constitute a giant "leap of logic." *See, Id.*, at *3.

*from that of other members of the class. Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (citations omitted) (emphasis added). Moreover, "[t]he representatives' claims and the class members' claims…[should] not [be] antagonistic in any way." *Smith*, 847 So. 2d at 1111 (citation omitted).

As to typicality, Sosa's individual "factual position…markedly differs from that of other members of the class." *Kornberg*, 741 F.2d at 1337 (citation omitted). Specifically, Sosa had *no injury* since he was credited the $20 fee *before* he filed the claim, quite distinct from the other putative class members whose billing errors were not corrected until after suit was filed. (App. B, 7 ¶¶33–34); (App. E, 4 ¶24). Moreover —and noticeably unlike the other putative class members— he was refunded an *additional* $20 after the claim was filed and thus, is an atypical plaintiff because he recovered twice the amount of the overcharge. *See Terry L. Braun, P.A.*, 827 So. 2d at 268 (noting that plaintiff's "experience" with defendant appeared to be very different than other class, and thus failed to satisfy the typicality requirement). As a result of Sosa's unique circumstances, his claims are antagonistic to the other class members and therefore neither the typicality nor the commonality requirement is met.

Sosa's claim is also atypical for the reasons recognized by Judge Shepherd's concurring opinion. From December 10, 1999 until February 16, 2001, a class

action lawsuit may have been certified for "knowing" violations.[19] Sosa's overcharge, however, occurred in June of 2003, well after a manual review system had been put in place to ensure that Safeway was in compliance with the subject statute. Thus, Sosa's claim was not typical of the claims of individuals who had been charged the $20 fee prior to the February 16, 2001 establishment of the review system; and he therefore lacked standing to raise any such claim on behalf of such a class:

> Although, in a proper case, we might remand with the direction there be a separate adjudication for this group of potential claimants, we cannot consider that alternative here because Sosa's claim is not typical of that group of potential claimants.

*Sosa*, 15 So.3d at 14 (Shepherd, J., concurring)(emphasis added).

In sum, Sosa's claim is atypical because he cannot prove *in his own case* that Safeway's actions were "knowing." The recent case of *Kirts v. Green Bullion Financial Services, LLC*, 2010 WL 3184382 (S.D. Fla. August 3, 2010) is instructive. In *Kirts*, certification was denied where, *inter alia*, the named plaintiffs had made no showing that they could prove their own claim. As in the instant case, the Plaintiff's purported class definition "assumed the Defendant's

[19] While there is no testimony or evidence below regarding Safeway's intent or knowledge prior to February 16, 2001, it is clear by virtue of the Department of Insurance audit that Safeway was not in compliance with the statutory requirements prior to this time. Accordingly, it is presumed that a class could have been certified for this time period.

misconduct." In denying certification the court noted, "The question of whether Defendant's misconduct is legally actionable is a common question only 'at a very high level of abstraction.'" *Id.* at *8.

**c. The Third District correctly determined that the trial court abused its discretion in finding that common issues of law and fact predominated over individual ones.**

The *Sosa* court determined that "in order to prove damages, individual questions pertinent to all potential class members are subject to different explanations and defenses relating to *knowing* violations of these statutes. Therefore, individual questions of law and fact predominate over common allegations of simple overcharge." *Sosa*, 15 So.3d at 11 (emphasis added).

Where, as here, liability and damages depend on individual factual determinations, class certification is inappropriate. *InPhyNet Contracting Services v. Soria, M.D.*, 33 So.3d 766, 772 (Fla. 4th DCA 2010). *See, Black Diamond Props., Inc. v. Haines*, 940 So.2d 1176, 1178 (Fla. 5th DCA 2006)(individual issues predominated where the complaint was based on oral misrepresentations in 500 separate contracts); *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 737 (S.D. Fla. 2007)(denying certification as an "exercise in inefficiency" where there was need for individual determinations that a deceptive act had occurred); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009) (where significant questions

concerning ultimate liability would remain for many class members common questions would not predominate).

Furthermore, whether Safeway *knowingly* charged a customer an excessive fee is undoubtedly a case-by-case determination, requiring the court to conduct a series of mini-trials to evaluate whether each particular plaintiff was knowingly charged the fee; hence, individualized issues would predominate and overwhelm the issues common to the class in this case. *See Volkswagen of Am., Inc. v. Sugarman*, 909 So. 2d 923, 924 (Fla. 3d DCA 2005) (noting "[t]he need to litigate substantially different factual issues also indicates that a class action is not superior to individual suits") (citation omitted).

## IV. Sosa Lacks Standing to Prosecute A Class Action.

The Trial Court's Order granting Class Certification did not determine that Sosa had standing. Rather, the court ruled that the issue of standing was for the "trier of fact." This was a fatal error as "[t]he issue of standing is a threshold inquiry which must be made at the outset of the case before addressing whether the case is properly maintainable as a class action." *United Auto. Ins. Co. v. Diagnostics of South Florida, Inc.*, 921 So. 2d 23, 25 (Fla. 3d DCA 2006) (citations omitted); *Ferreiro*, 928 So. 2d at 376 (referencing *Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d DCA 1997); *Baptist Hosp. of Miami, Inc. v. Demario*, 661 So. 2d 319, 321 (Fla. 3d DCA 1995)). Necessarily,

"[t]o satisfy the requirement of standing, the plaintiff must show that a case or controversy exists between the plaintiff and the defendant, and that such case or controversy continues from the commencement through the existence of the litigation." *Ferreiro*, 928 So. 2d at 377 (relying on *Godwin v. State*, 593 So. 2d 211 (Fla. 1992); *Montgomery v. Dep't of Health & Rehabilitative Servs.*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985)) (emphasis added).

A case or controversy exists "under elementary principles of standing[,]" if a plaintiff properly alleges and proves "that he personally suffered injury." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987) (citation omitted) (emphasis added). Therefore, a party has standing when he has a sufficient stake in a justicable controversy and has an injury in fact for which relief is likely to redress. *See Chinchilla v. Star Cas. Ins. Co.*, 833 So. 2d 804, 805 (Fla. 3d DCA 2002). In the instant case, Mr. Sosa failed to meet his burden of proof on the question of standing.

"We have held that if it is demonstrated, at the outset, that plaintiffs who have filed a class action complaint have suffered no injury and have no cause of action against the defendants, that the class should not be certified." *Neighborhood Health P'ship, Inc. v. Fischer*, 913 So. 2d 703, 706 (Fla. 3d DCA 2005) (citations omitted); *See Ferreiro*, 928 So. 2d at 377 (citation omitted). More specifically, if 'none of the named plaintiffs purporting to represent a class

establishes a requisite of a case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class.' *Taran,* 685 So. 2d at 1006 (citation omitted).

For example, in *Ramon v. Aries Ins. Co.*, plaintiff was a passenger in an automobile accident. 769 So. 2d 1053, 1054 (Fla. 3d DCA 2000). Thereafter, the defendant insurance company erroneously applied the insured's deductible to plaintiff and plaintiff filed a class action alleging that defendant improperly applied deductibles to claims where the claimant was neither the insured, nor a relative. *Id*. Significantly, *after* plaintiff filed the lawsuit, the company learned of the billing error and within *one month*, paid all sums in full owed to plaintiff's medical providers. *Id*. In examining the insurance company's conduct, the court emphasized the following:

> [p]resented with an error in the payment of Ramon's medical bills, the insurer immediately corrected its error by prompt payment and a stipulation to pay Ramon's fees and costs. *We have previously held such actions to be totally appropriate. …Where a defendant, prior to class certification, recognizes billing errors and desires to correct them, it may do so*.

*Ramon*, 769 So. 2d at 1055 (referencing *Taran, Inc.*, 685 So. 2d at 1006–07) (holding, following filed complaint, insurer's conduct was proper in issuing refunds to customers before class was certified) (emphasis added); *See also Chinchilla*, 833 So. 2d at 805–06 (noting that where "insurer, prior to class

certification, recognizes billing errors and desires to correct them, it may do so. [c.o.]"). Therefore, because he was fully refunded, the *Ramon* court ultimately found that plaintiff had "no injury" *and was merely asserting that "others may have suffered the harm he no longer can claim*[.]" *Ramon*, 769 So. 2d at 1055. Thus, the court concluded that in light of the "evidence that the insurer was doing no more than it was legally obligated to do[,]" plaintiff clearly lacked standing. *Id*.

Similarly, in *Graham v. State Farm Fire & Cas. Co.*, 813 So. 2d 273 (Fla. 5th DCA 2002), the named plaintiffs filed a complaint against State Farm insurance company regarding a disputed property loss claim. Shortly after plaintiffs filed their initial complaint, the insurer paid the disputed amount with interest; nevertheless, two years later, plaintiffs transferred the case to circuit court and amended the complaint to assert class action claims. *Id.* Ultimately, the *Graham* court held that because the insurance company paid all monies owed to plaintiffs, plaintiffs therefore lacked standing as there was no existing controversy between the parties. *Id.* at 274.

Sosa, like the plaintiffs in *Ramon* and *Graham*, has not suffered an injury and as a result, wholly lacks standing to bring this complaint.[20] *See Neighborhood*

[20] Mr. Sosa's own case belies the Plaintiff's argument that Safeway's actions were knowing and intentional. Mr. Sosa had three consecutive premium finance contracts over an eighteen month period. During these eighteen months Sosa could legally be charged the $20 service fee on two occasions – for the first and the third contract. Instead, he was charged the $20 service fee for the first and the second

*Health P'ship, Inc.*, 913 So. 2d at 706. Although Safeway mistakenly charged Sosa an additional $20 finance fee, upon discovery of this error, Sosa was refunded the $20 fee *prior* to the filing of the class action claim. *See Ramon*, 769 So. 2d at 1055 (noting "where a defendant prior to class certification, recognizes billing errors and desires to correct them, it may do so"); *See also Graham*, 813 So. 2d at 274 (explaining defendant's actions proper where defendant corrected billing mistake before plaintiff filed class action complaint leaving plaintiff with no injury and no standing). Indeed, Safeway's actions in rectifying its error occurred prior to the filing of the class action and was not prompted by the threat of litigation. Sosa was then refunded an additional $20 by Safeway prior to the hearing on class certification.

In accordance with legal precedent, because Sosa has no injury and lacks the requisite standing, the class action complaint was appropriately dismissed by the Third District as it is axiomatic "that no class action may proceed until there is a named plaintiff with standing to represent the class[,]" [and] the proper procedure

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contract and was not charged the final $20 for the third contract. (App. Tab E, ¶¶ 17-24). The reason that Mr. Sosa's service charge was "waived" on the third contract was because the manual system recognized that he had a prior six month contract in which he had been charged the $20. Mr. Sosa should have been charged the $20 on his third contract. Because he received a waiver of this charge, he was returned the $20 overcharge for his second premium finance contract. This waiver occurred twenty-nine days before his class action lawsuit was filed. (App. Tab J, Ex. A). As such, at the time that the instant lawsuit was filed, Mr. Sosa had suffered no injury and had no standing to bring a claim.

for courts to follow when the plaintiff lacks standing is to dismiss the action. *Policastro v. Stelk*, 780 So. 2d 989, 991 (Fla. 5th DCA 2001) (citation omitted); *Graham*, 813 So. 2d at 274. Based on the foregoing, the trial court's certification was in error and a clear abuse of discretion and the Third District was correct in its reversal.

## CONCLUSION

Because the Third District's decision does not expressly and directly conflict with any other district court or Supreme Court opinion, this Court should dismiss this case, holding that jurisdiction was improvidently granted. Alternatively, this Court should approve the Third District's decision and hold that (1) the Third District properly determined that Plaintiff failed to allege a knowing violation of the premium finance laws; (2) the Third District properly determined that the Plaintiff was atypical and lacked commonality; (3) the Third District properly determined that the Plaintiff's claim raised more individual issues than common issues of law and fact due to the inability to prove intent on a class-wide basis; and (4) the Plaintiff lacks standing to bring this claim.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished via United States Mail this _____ day of September 2010 to PAUL B. FELTMAN, ESQ., Alvarez, Carbonell, Feltman, Jimenez & Gomez, PL, 2100 Ponce de Leon Boulevard, Suite 750, Coral Gables, Florida 33143.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Jurisdictional Brief of Respondent complies with the font standards in Rule 9.210, Florida Rules of Appellate Procedure. This Brief utilizes Times New Roman 14 point font.

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