

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.  
OF THE TRIAL COURT

\_\_\_\_\_ )  
 REBECCA L. KONSEVICK and )  
 COLLEEN A. BARTINI, )  
 individually, and on behalf )  
 of others similarly situated, )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 PLYMOUTH ROCK ASSURANCE )  
 CORPORATION, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Civil Action No. 2084-CV-02130C

**FIRST AMENDED CLASS ACTION COMPLAINT FOR DAMAGES, DECLARATORY, AND INJUNCTIVE RELIEF**

The Plaintiffs, Rebecca L. Konsevick (“Plaintiff” or “Konsevick”) and Colleen A. Bartini (“Plaintiff” or “Bartini”), on behalf of themselves and all others similarly situated, file this Class Action Complaint against Plymouth Rock Assurance Corporation (“Plymouth Rock Assurance”), and in support thereof state the following:

**INTRODUCTION**

1. This is a class action lawsuit by Plaintiffs, who were the named insureds under Plymouth Rock Assurance automobile policies issued for private passenger auto physical damage including comprehensive and collision coverage (the “Policy”), pursuant to which Defendant was required to pay the cost to repair an insured vehicle up to the “Actual Cash Value” (“ACV”) of the insured vehicle.

2. Insureds, such as Plaintiffs and the putative Class Members, pay a premium in exchange for Plymouth Rock Assurance’s promise to repair any damage to an insured vehicle

caused by a covered peril. However, Plymouth Rock Assurance's obligation to repair any damage is not limitless; rather, it is limited (or capped) to the ACV of the insured vehicle – for example, Plymouth Rock Assurance is not obligated to spend \$20,000 to repair extensive damage to a vehicle that is only worth \$5,000. Under such circumstances, where the cost to repair damage exceeds the value of the vehicle (less retained value), the vehicle is considered a “total loss.” If a “total loss” occurs, Plymouth Rock Assurance's contractual obligation is limited to paying the ACV of the total-loss vehicle.

3. The policy provides that Plymouth Rock Assurance has the option to pay to repair the vehicle or to declare it a total loss. If the vehicle is declared a total loss then Plymouth Rock Assurance must pay the ACV of the insured vehicle.

4. The goal of ACV in insurance contracts is that of indemnity. By promising to pay the cost to repair the vehicle limited at ACV in the event of a total loss, Defendant promises to put its insureds back to their pre-loss position.

5. Plaintiffs and the putative Class Members lived up to their end of the bargain by paying the premiums owed and abiding by all contractual requirements. Plymouth Rock Assurance did not. Rather, insureds who experienced a total loss of their insured vehicles incurred sales tax, title, inspection and registration costs that are part of the actual cost of purchase (“Actual Cost of Purchase”) of an available automobile of like kind and quality.

6. A like kind vehicle is a vehicle that, like the total-loss vehicle was, is properly titled, registered, and inspected. Plymouth Rock Assurance failed to pay its insureds for these mandatory costs of purchase of an available automobile of like kind and quality. In doing so, Plymouth Rock Assurance failed to put its insureds back to their pre-loss positions, notwithstanding its promise and obligation to do so.

7. Plymouth Rock Assurance's standard practice is to cut corners by declining to pay mandatory costs that are necessarily included in the ACV of a vehicle. This widespread practice shortchanges its insureds who have paid valuable premiums for insurance that they would be put back to their pre-loss positions in the event of a total loss of their insured vehicle.

8. Plymouth Rock Assurance is a large private insurance company that, based upon Plaintiff's information and belief, collects hundreds of millions of dollars in private-passenger physical damage coverage premiums every year from its insureds. By shortchanging its insureds who experience a total loss, Plymouth Rock Assurance unjustly profits from its breach of contract by forcing its customers to pay out-of-pocket for fees associated with replacing their vehicles.

9. This lawsuit is brought by Plaintiffs and all other similarly situated insureds who have suffered damages due to Plymouth Rock Assurance's practice of refusing to fully pay the ACV of insured vehicles in making total-loss payments to first-party insureds. Specifically, as a matter of uniform procedure, Plymouth Rock Assurance fails to include full ACV owed by failing to pay all fees associated with replacing a vehicle after experiencing a total loss of their insured vehicles.

10. Plymouth Rock Assurance's failure to pay the cost to replace the total-loss vehicle when it purportedly paid the ACV of insured vehicles on first-party claims constitutes a breach of the Policy, a breach of contract, and violations of Mass. Gen. L. c. 176D and 93A, as to Plaintiffs and every member of the putative Class defined herein.

### **PARTIES**

11. At all times material hereto, Plaintiff, Rebecca L. Konsevick is and was a person domiciled and residing at 15 Hillview Avenue, Roslindale, Suffolk County, Massachusetts.

12. At all times material hereto, Plaintiff, Colleen Bartini is and was a person domiciled and residing at 510 Dean Hill Road, Richmond, Berkshire County, Massachusetts.

13. At all times material hereto, Plymouth Rock Assurance is and was a Massachusetts corporation authorized to transact insurance in the Commonwealth of Massachusetts, with a principal place of business at 695 Atlantic Avenue, Boston, Suffolk County, Massachusetts.

### **FACTUAL ALLEGATIONS**

14. Defendant utilizes standardized Policy language as to comprehensive and collision coverage that is uniformly present in Plymouth Rock Assurance's auto policies issued by Defendant in Massachusetts. When Plymouth Rock Assurance declares a vehicle a total loss (i.e., when the cost to repair the vehicle is more than the value of the vehicle), Defendant promises to pay the insured the ACV of the vehicle.

15. Vehicles insured under the subject Plymouth Rock Assurance Insurance Policy have titles and are properly registered and inspected in accordance with Massachusetts law.

16. Actual Costs of Purchase of a replacement vehicle include Registration Fees, Title fees, and Inspection fees.

17. ACV includes an obligation to pay Actual Costs of Purchase.

### **Plaintiff Konsevick's Total Loss**

18. At all times material hereto, Plaintiff Konsevick owned a 2015 INFINITI Q50, VIN No. JN1BV7AR3FM404835 ("Konsevick Insured Vehicle").

19. At all times material hereto, Konsevick insured the Insured Vehicle under an insurance policy issued by Plymouth Rock Assurance.

20. The Insured Vehicle was titled, registered, and inspected in accordance with Massachusetts law. Actual Costs of Purchase were paid to procure the insured vehicle and are part

of the cost basis of the vehicle just as much as the procurement cost of the physical automobile itself. The cost basis of the total-loss insured vehicle includes all mandatory costs associated with the procurement of the total-loss vehicle.

21. The value of the vehicle was substantially higher than a comparable vehicle that had no title, no registration, and no emissions sticker to verify it did not need extensive emissions repairs.

22. On or about May 18, 2018, Konsevick was involved in an accident while operating her Insured Vehicle. As a result of the accident, Konsevick filed a claim for property damage with Defendant (claim number 651501320115).

23. Following the filing of the claim, Plymouth Rock Assurance determined that the cost to repair the vehicle exceeded the cost to replace the vehicle.

24. Because the cost to repair exceeded the cost to replace the Insured Vehicle, Defendant determined it was a “total loss” and elected pursuant to the Policy to pay the ACV of the vehicle instead of the higher cost to repair the vehicle.

25. Defendant represented that it adjusted and paid the claim as the ACV of the Insured Vehicle.

26. A vendor, Mitchell, was hired by Defendant to compute the components that make up the determination of the Insured Vehicle’s ACV.

27. One component of ACV, the “Market Value” was calculated by using a “Base Value” based on the cost to purchase similar vehicles with similar conditions and mileage, with adjustments based on the Insured Vehicle’s condition relative to that of comparable vehicles’ condition. Defendant computed the Market Value to be \$20,695.89. **Exhibit A** (Konsevick Vehicle Valuation Report).

28. The condition and price adjustments in determining the Market Value account for the depreciation/betterment component of the ACV calculation as permitted in the Policy. Mitchell then added the Vehicular Tax of \$1,293.49 (6.25% x Market Value \$20,695.89) to reflect the applicable state, county, and municipal taxes that would be added to the cost of the Insured Vehicle if it was replaced. **Exhibit A**.

29. Mitchell then applied the policy deductible of \$1000.00 to arrive at the “Settlement Value” of Konsevick’s insured vehicle of \$20,989.38. **Exhibit A** (Konsevick Vehicle Valuation Report).

30. Based on the Mitchell determination of Settlement Value, Defendant paid what it calculated due for ACV to be \$20,989.38. **Exhibit B** (“Konsevick Total Loss Settlement Letter”).

31. Despite that Plymouth Rock Assurance included both comparable depreciated car prices and the sales tax required to arrive at the cash cost to replace the Insured Vehicle, Plymouth Rock Assurance ignored and did not pay anything for other mandatory Actual Costs of Purchase necessarily required to be paid to replace the properly titled and registered Insured Vehicle. **Exhibit B** (Konsevick Total Loss Settlement Letter).

32. Defendant’s payment of merely the “market value” plus sales tax but not pay for reasonably necessary Actual Costs of Purchase failed to put Plaintiff Konsevick back to her pre-loss position and constituted a breach of its insurance policy.

33. Title transfer fees, registration fees, and other state and local regulatory fees are mandatory Actual Costs of Purchase that are part of the cost to purchase any vehicle in the Commonwealth of Massachusetts.

### **Plaintiff Bartini's Total Loss**

34. At all times material hereto, Plaintiff Bartini owned a 2015 NISSAN MURANO, VIN No. 5N1AZ2MH4FN221811 (“Bartini Insured Vehicle”).

35. At all times material hereto, Bartini insured the Insured Vehicle under an insurance policy issued by Plymouth Rock Assurance.

36. The Insured Vehicle was titled, registered, and inspected in accordance with Massachusetts law. Actual Costs of Purchase were paid to procure the insured vehicle and are part of the cost basis of the vehicle just as much as the procurement cost of the physical automobile itself. The cost basis of the total-loss insured vehicle includes all mandatory costs associated with the procurement of the total-loss vehicle.

37. The value of the vehicle was substantially higher than a comparable vehicle that had no title, no registration, and no emissions sticker to verify it did not need extensive emissions repairs.

38. On or about November 19, 2019, Bartini was involved in an accident while operating her Insured Vehicle. As a result of the accident, Plaintiff filed a claim for property damage with Defendant (claim number 655601738356-644121).

39. Following the filing of the claim, Plymouth Rock Assurance determined that the cost to repair the vehicle exceeded the cost to replace the vehicle.

40. Because the cost to repair exceeded the cost to replace the Insured Vehicle, Defendant determined it was a “total loss” and elected pursuant to the Policy to pay the ACV of the vehicle instead of the higher cost to repair the vehicle.

41. Defendant represented that it adjusted and paid the claim as the ACV of the Insured Vehicle.

42. A vendor, Mitchell, was hired by Defendant to compute the components that make up the determination of the Insured Vehicle's ACV.

43. One component of ACV, the "Market Value" was calculated by using a "Base Value" based on the cost to purchase similar vehicles with similar conditions and mileage, with adjustments based on the Insured Vehicle's condition relative to that of comparable vehicles' condition. Defendant computed the Market Value to be \$18,188.68. **Exhibit C** (Bartini Vehicle Valuation Report).

44. The condition and price adjustments in determining the Market Value account for the depreciation/betterment component of the ACV calculation as permitted in the Policy. Mitchell then added the Vehicular Tax of \$1,136.79 (6.25% x Market Value \$18,188.68) to reflect the applicable state, county, and municipal taxes that would be added to the cost of the Insured Vehicle if it was replaced. **Exhibit C**.

45. Mitchell then applied the policy deductible of \$500.00 to arrive at the "Settlement Value" of Plaintiff's insured vehicle of \$18,825.47. **Exhibit C** (Bartini Vehicle Valuation Report).

46. Based on the Mitchell determination of Settlement Value, Defendant paid what it calculated due for ACV to be \$18,825.47. **Exhibit D** ("Bartini Total Loss Settlement Letter").

47. Despite the fact that Plymouth Rock Assurance included both comparable depreciated car prices and the sales tax required to arrive at the cash cost to replace the Insured Vehicle, Plymouth Rock Assurance ignored and did not pay anything for other mandatory Actual Costs of Purchase necessarily required to be paid to replace the properly titled and registered Insured Vehicle. **Exhibit D** (Bartini Total Loss Settlement Letter).



48. Defendant's agreement to pay merely the "market value" plus sales tax and failure to pay for reasonably necessary Actual Costs of Purchase failed to put Plaintiff Bartini back to her pre-loss position and constituted a breach of its insurance policy.

49. Title transfer fees, registration fees, and other state and local regulatory fees are mandatory Actual Costs of Purchase that are part of the cost to purchase any vehicle in the Commonwealth of Massachusetts.

**Title Fees are Mandatory Actual Costs of Purchase**

50. Title fees are an Actual Cost of Purchase because a vehicle cannot even be purchased without a title transfer and concomitant title fee. Massachusetts law requires that whoever acquires a motor vehicle shall apply for a certificate of title. MGL c. 90D, § 4(a). No motor vehicle may be registered until the owner thereof makes application for a certificate of title of the vehicle. MGL c. 90D, § 4 (b). The registrar shall refuse issuance of a certificate of title if the required fee is not paid. MGL c. 90D, § 13. An application for a certificate of title shall be accompanied by the required fee when mailed or delivered to the registrar. MGL c. 90D, §18. A transfer by an owner is not effective until the titling requirements are complied with. MGL c. 90D, § 15(e).

51. Mandatory title fees in replacing the Insured Vehicle (which was legally titled) are required under Massachusetts law and amount to, at minimum, \$75.00 plus a \$10.00 administrative fee for a total of \$85.00 (hereinafter, "Title Fees"). In addition, where the Insured Vehicle's title included a recorded lien (lease or financed vehicle) there is an additional \$25.00 mandatory title fee. Mass. Registry of Motor Vehicles, *Schedule of Fees*, <https://www.mass.gov/doc/rmv-schedule-of-fees/download> (last visited Sept. 11, 2020).

52. Title fee charges are assessed: (1) For filing an application for a first certificate of title, a certificate of title after a transfer, or a salvage title; (2) For each assignment of a security interest, or an addition of a lienholder; (3) For a duplicate, amended or corrected certificate of title; (4) For a certificate of search of its record for each name or identifying number searched against; and (5) For affixing a new identifying number to a vehicle. MGL c. 90D, § 28.

53. Titling laws including payment of concomitant fees are mandatory and violators are subject to a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment in a jail or house of correction for not more than six months, or both. MGL c. 90D, § 32(b).

#### **Registration Fees are Mandatory Actual Costs of Purchase**

54. Registration fees are Actual Costs of Purchase because a vehicle simply cannot be operated without a valid registration, and when the vehicle is purchased the prior registration automatically expires. Massachusetts law requires that all vehicles be properly titled and registered in order to be legally operated on Massachusetts roadways. MGL c. 90, § 2 (registration requirements). Upon the transfer of ownership of any motor vehicle its registration shall expire. *Id.* No motor vehicle shall be operated unless it is registered with payment of concomitant registration and other regulatory fees. MGL c. 90, § 2 (registration requirements).

55. Reasonably necessary registration fees are required to register a replacement vehicle for a total-loss Insured Vehicle (which Insured Vehicle was properly registered), and amount to, at minimum, a \$25.00 plate transfer fee for a total of \$25.00. Registry of Motor Vehicles, *Schedule of Fees*, <https://www.mass.gov/doc/rmv-schedule-of-fees/download> (last visited Sept. 11, 2020). If the registration is not transferred the cost of registration on the purchase of a vehicle is \$60.00 registration fee (“Registration Fees”).

56. A registration is a mandatory cost to purchase a motor vehicle because nobody can operate, or even push, or draw any motor vehicle, unless such vehicle is registered and carries its registered number displayed. MGL c. 90, § 9. To do so is a crime punishable by a fine of not more than one hundred dollars for the first offense and not more than one thousand dollars for any subsequent offense. *Id.*

**Inspection Fees are Mandatory Actual Costs of Purchase**

57. No motor vehicle may be operated in Massachusetts unless such vehicle has been presented for inspection and concomitant fees are paid. The registrar may deny the issuance of registration to the owner of a motor vehicle, or the renewal of registration to any such owner, or suspend or revoke any registration that has been issued, if such motor vehicle is not in compliance with the inspection requirements. Operation of a vehicle not in compliance with the inspection requirements is an infraction subject to a fine for each violation. MGL c. 90, § 7A; MGL c. 111, § 142M.

58. Reasonably necessary emissions inspection fees required to register a vehicle replacing a total-loss Insured Vehicle (which Insured Vehicle was properly registered) incurred to replace the total-loss vehicle are, at minimum, \$35.00. Registry of Motor Vehicles, *Schedule of Fees*, <https://www.mass.gov/doc/rmv-schedule-of-fees/download> (last visited Sept. 11, 2020).

59. Plaintiffs Konsevick and Bartini replaced their total-loss Insured Vehicles with replacement vehicles. The cost of purchase of the vehicles included the mandatory Actual Costs of Purchase set forth above, which fees are necessarily included in the Actual Costs of Purchase.

60. Plaintiffs Konsevick and Bartini paid all premiums owed and otherwise satisfied all conditions precedent such that the insurance policies were in effect and operational at the time of the total losses of their insured vehicles.

## **THE PLYMOUTH ROCK ASSURANCE INSURANCE POLICY**

61. Plymouth Rock Assurance's form Policy includes coverage provisions applicable to all claims asserted herein. These coverages include the following:

62. The Policy provides both Comprehensive and Collision.

63. Under Comprehensive coverage, Defendant promises to "pay for direct and accidental damage to or loss of your auto other than damage caused by collision." (**Exhibit E**, the "Policy," Part 9).

64. Under Collision coverage, Defendant promises to "pay for any direct and accidental damage to your auto caused by a collision." (**Exhibit E**, Part 7).

65. For both Comprehensive and Collision coverage, Defendant promises to: "pay the cost to physically repair the auto or any of its parts up to the actual cash value of the auto or any of its parts" (*Id.*).

66. Defendant limits liability under both Comprehensive and Collision coverage to "either the actual cash value of the auto or the cost to physically repair the auto, whichever is less." (*Id.*).

67. The Policy does not further define "actual cash value." (*Id.*).

68. The Policy states that Defendant will repair or replace the auto, or declare the auto a total loss. The Policy does not define "total-loss." (*Id.*).

69. The Policy does not expressly reference nor define the mandatory vehicle Actual Cost of Purchase, but such costs must be considered in the calculation of ACV, which includes the actual cost of purchase of an available motor vehicle of like kind and quality but for the damage sustained. (*Id.*).

70. Regulatory fees are included in the actual cost to purchase an available motor vehicle of like kind and quality.

71. The Policy requires Defendant to provide the same coverage for total losses under both comprehensive and collision coverage provisions.

72. The Policy contains no provision excluding regulatory fees from ACV.

73. The Policy defines “auto” as any vehicle listed in the “Coverage Selections Page.” The Policy coverage provisions are the same for all covered autos, regardless of whether the covered auto is owned without lien, financed, or leased.

### **CLASS REPRESENTATION ALLEGATIONS**

74. Plaintiffs bring this action seeking representation of a class pursuant to Massachusetts Rule of Civil Procedure 23, and as to their claims asserted under Mass. Gen. L. c. 93A, §§ 2 and 9.

75. Plaintiffs are members of and seek to represent the following class (“Class”):

All insureds, under any Massachusetts policy issued by Plymouth Rock Assurance Corporation with the same material operative policy language covering a vehicle with auto physical damage coverage, who 1) made a first-party auto property damage claim during the time period of two years prior to the filing of this Complaint to the date on which an Order certifying the class is entered, 2) where such vehicle was declared a total loss, 3) whose claim was adjusted as a total loss.

76. Plaintiffs are members of the Class, because a) Plaintiffs made claims under Massachusetts Policies issued by Plymouth Rock Assurance, which contained the same operative policy language and which included auto physical damage coverage, b) Plaintiffs made a first-party claim during the relevant time period, c) Plaintiffs’ vehicles were declared to be and adjusted as a total loss, and d) Plaintiffs received a total-loss payment for less than full ACV.

77. **Numerosity:** Although the precise number of class members is unknown to Plaintiffs at this time and can only be determined through appropriate discovery, upon information and belief, the class members, in this case, are over 1,000. Thus, joinder of all such claims is impracticable and numerosity as to the Class is otherwise established within the meaning of Mass. R. Civ. P. 23 (a)(1).

78. **Commonality:** Mass. R. Civ. P. Rule 23's commonality requirement for the Class is satisfied because the central (and dispositive) issues in this litigation turn on the content of materially identical policy provisions; thus, this case is well-suited for class wide adjudication. Defendant and all class members are bound by the same materially identical policy terms. Common questions include, but are not limited to, the following: (a) whether under Defendant's standardized policy language, Plaintiffs and Class Members are owed Registration, Title, and Inspection Fees upon the total loss of an insured vehicle; (b) whether Defendant breached its insurance contracts with Plaintiffs and the Class Members by failing to include Title and Registration Fees in making payment for the total loss of an insured vehicle; and (c) whether Defendant's policy and practice of failing to include Registration, Title, and Inspection Fees in making payment for the total loss of an insured vehicle was done in bad faith within the meaning of the common law or was an unfair insurance practice.

79. **Typicality:** Mass. R. Civ. P. Rule 23's typicality requirement is satisfied because Plaintiffs and Class Members were injured by Defendant's uniform misconduct. Plaintiffs and Class Members' legal claims arise from the same core practices, namely, the failure to pay Registration, Title, and Inspection Fees for first-party total loss claims. Plaintiffs' claims are based upon the same legal theories as those of the Class Members, Plaintiffs suffered the same harm as all the other Class Members, and Plaintiffs are not subject to unique affirmative defenses sufficient

to preclude a finding of typicality. Moreover, the material and relevant policy terms for each class member are substantially identical to the terms of Plaintiffs' policies .

80. **Adequacy:** Mass. R. Civ. P. Rule 23's adequacy requirement is satisfied because Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in prosecuting class actions, and Plaintiffs have no interests in conflict with or antagonistic towards those of putative Class Members. Plaintiffs' local counsel has prosecuted numerous class actions and Plaintiffs' proposed pro hac vice counsel has successfully litigated other class action cases similar to this one, where insurers breached contracts with insureds by failing to include mandatory replacement fees after total losses.

81. **Predominance:** Mass. R. Civ. P. Rule 23's predominance requirement is satisfied because the previously articulated common issues of fact and law predominate over any question solely affecting individual Class Members. Resolution of the common issues in this litigation will resolve virtually the entirety of every Class Members' claims in a single stroke. There are no significant individual questions of liability or damages, and certainly not ones that predominate over issues common to the Class.

82. **Superiority:** Further, Mass. R. Civ. P. Rule 23's superiority requirement is satisfied. Class treatment is superior to any other alternative method of adjudication because the damages suffered by individual Class Members is small, their interests in maintaining separate actions is questionable, and the expense and burden of individual litigation makes it impracticable for Class Members to seek individual redress for the wrongs done to them. Plaintiffs know of no difficulty that would be encountered in the management of this case that would preclude its maintenance as a class action. Moreover, it is desirable to concentrate the litigation of the Class

Members' claims in one forum, as it will conserve party and judicial resources and facilitate the consistency of adjudications.

83. Plaintiffs retained the undersigned counsel and agreed to pay reasonable attorney's fees and costs in connection with this action. Plaintiffs, for themselves and the putative Class, are entitled to recover attorney's fees and taxable costs.

84. Mass. Gen. L. c. 93A, § 9 provides, in pertinent part:

“Any persons entitled to bring such action [under this section] may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons . . .”

Mass. Gen. Laws Ann. c. 93A, § 9 (West).

85. For the same reasons set forth above with respect to Mass. R. Civ. P. 23, Plaintiffs' claims and those of the Class Members they purport to represent satisfy this standard and may thus be brought on behalf of such “numerous other persons similarly situated,” i.e., the Class Members.

### **COUNT I -- BREACH OF CONTRACT**

86. Plaintiffs were parties to insurance contracts with Defendant as described herein. All Class Members were parties to an insurance contract with Defendant containing materially identical terms.

87. The interpretation of Plaintiffs' and all Class Members' Policies is governed by Massachusetts law.

88. Plaintiffs and all Class Members made a claim determined by Defendant to be a first-party total loss under the insurance policy and determined by Defendant to be a covered claim.



89. Defendant, by paying the total-loss claim, determined that Plaintiffs and each Class Member complied with the terms of their insurance contracts, and fulfilled all of their duties and conditions under the Policies for each Plaintiff to be paid on her total loss.

90. Pursuant to the uniform contractual provisions, upon the total loss of an insured vehicle, Plaintiffs and every Class Member were entitled to be put back into their pre-loss positions, and were thereby owed the actual cash value of the vehicle, including Actual Costs of Purchase.

91. Defendant refused to pay the full ACV owed by failing to pay the Actual Cost of Purchase to Plaintiffs and every Class Member and thereby refused to put Plaintiffs and Class Members back to their pre-loss positions.

92. Defendant's failure to provide coverage for the full ACV, including the Actual Cost of Purchase, constitutes a material breach of contract with the Plaintiffs and every Class Member.

93. As a result of these breaches, Plaintiffs and the Class Members have suffered damages.

94. Plaintiffs and the Class Members are entitled under Defendant's insurance policy to sums representing the benefits owed for ACV under the policy as well as costs, prejudgment, and postjudgment interest, injunctive relief, and other relief as is appropriate.

## **COUNT TWO –CLAIM FOR DECLARATORY RELIEF**

95. Paragraphs 1-66 are hereby incorporated by reference in this Count Two.

96. This is a claim for declaratory relief pursuant to Massachusetts Rule of Civil Procedure 27. A declaratory judgment action is authorized by GL c. 231A, which provides that “[t]he supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty,

status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity . . . .

97. It is the Plaintiffs' and the class members' position that upon the total loss of the insured vehicles, the Plaintiffs and the class members were properly owed ACV including Actual Costs of Purchase under the Defendant's policy.

98. It is the Defendant's position, that upon the total loss of the insured vehicles, the Defendant did not owe full ACV, including Actual Costs of Purchase, to Plaintiffs and the Class Members.

99. The issue regarding whether ACV in the context of a total loss of a vehicle includes Actual Costs of Purchase fees is a substantial question in dispute and an uncertainty of legal relations between Plaintiffs, the putative class and Defendant, which requires settlement between the parties.

100. A dispute having arisen between the Parties as to the proper interpretation of the subject contractual provisions, the Plaintiffs and the class members request that this Court declare that under the Defendant' policy provisions, following the total loss of an insured vehicle, the Plaintiffs and the class members were owed ACV that includes Actual Costs of Purchase.

101. In addition, the Plaintiffs and the class members request further relief consisting of an order and injunctive relief requiring readjustment of total-loss claims to require payment of the aforementioned ACV Actual Costs of Purchase; mandating payment of said ACV Actual Costs of Purchase to all insureds with total-loss claims for comprehensive and collision coverage issued the

same Policy as well as costs, prejudgment and post judgment interest and such other relief as deemed appropriate.

**COUNT THREE – VIOLATION OF MASS. GEN. L. c. 176D/93A**

102. Plaintiffs restate and incorporate by reference the allegations contained in the preceding paragraphs.

103. In a letter sent on September 18, 2020, and received by Defendant on September 21, 2020, Plaintiff Bartini provided due notice and demand of her claims to Defendant Plymouth Rock pursuant to Mass. Gen. L. c. 176D and Sections 2 and 9 of Chapter 93A. *See* Demand Letter, **Exhibit F**.

104. On October 21, 2020, Defendant responded to the demand letter, denying liability and failing to tender the relief requested, or make any offer of settlement. *See* 93A Response, **Exhibit G**.

105. Defendant's actions and inactions detailed herein took place in trade or commerce conducted primarily and substantially in the Commonwealth of Massachusetts.

106. Defendant's actions and inactions detailed herein, and in the Demand Letter attached hereto as Exhibit F, constitute unfair and deceptive business and insurance practices in violation of Mass. Gen. L. c. 176D, and Mass. Gen. L. c. 93A, § 2, et seq., including (without limitation) its multiple acts and omissions detailed above.

107. In addition, Defendant's actions constitute multiple violations of Mass. Gen. L. c. 176D, § 3(9), and other provisions of such chapter.

108. Defendant's actions and inactions detailed herein (and in the Demand Letter attached as Exhibit F) were knowing and willful. Defendant's failure to consider the factors set forth above with respect to Plaintiffs' "total loss," ACV, and Actual Costs of Purchase, and to

account for the amounts referenced are willful and knowing violations of Mass. Gen. L. Chapter 176D and Chapter 93A, including (without limitation) because Defendant is actually aware that it is violating the applicable regulations, terms of the policy, and Chapter 176D/93A, yet continues to do so in order to boost its profits, or for other reasons that benefit Defendant to Plaintiffs' and the Class Members' clear detriment. Such willful and knowing violations warrant the imposition of double to treble damages and other relief.

109. Under Mass. Gen. L. c. 93A, § 9, Plaintiff Bartini properly asserts this claim on behalf of herself, Plaintiff Konsevick, and the Class Members, as they are persons "similarly injured and situated" by the unfair and deceptive acts and practices of Defendant detailed herein, because Defendant has withheld the same or similar fees and other components of Actual Costs of Purchase and thus caused them the same or similar injury, and has violated the same or similar Policy provisions, statutes, regulations, and common law tenets.

110. As a direct and proximate result of Defendant's actions and inactions detailed herein, Plaintiff Bartini, Plaintiff Konsevick, and all other similarly situated Class Members have suffered actual monetary and other damages.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff, individually and on behalf of the Class, seeks and prays for relief and judgment as follows:

1. For an Order certifying this action as a Class Action on behalf of the Class described above and appointing Plaintiffs as Class Representatives;
2. For an award of compensatory damages for Plaintiffs and Class Members in amounts owed under the Policies, to be multiplied pursuant to Mass. Gen. L. c. 93A or other applicable statutes, as set forth above;

3. For all other damages according to proof;
4. For an award of attorney's fees and expenses as appropriate pursuant to Mass. Gen. L. c. 93A and/or other applicable law;
5. For costs of suit incurred herein;
6. For Declaratory and Injunctive Relief;
7. For pre- and post-judgment interest on any amounts awarded; and
8. For other and further forms of relief as this Court deems just and proper.

**JURY DEMAND**

**PLAINTIFFS, ON BEHALF OF THEMSELVES AND THE CLASS, DEMAND A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.**

PLAINTIFFS REBECCA L. KONSEVICK  
and COLLEEN A. BARTINI,  
INDIVIDUALLY AND ON BEHALF OF  
OTHERS SIMILARLY SITUATED,  
By their attorneys,

Dated: November 13, 2020

/s/ Matthew J. Ginsburg  
Matthew J. Ginsburg, Esq. (BBO#641089)  
ASCENDANT LAW GROUP LLC  
204 Andover Street, Suite 401  
Andover, MA 01810  
Tel.: (978) 409-6238  
[mg@ascendantlawgroup.com](mailto:mg@ascendantlawgroup.com)