

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GONZALO E. UBILLUS, individually and on behalf  
of all others similarly situated,

Plaintiff,

v.

Case No. 2019-741-Ck  
Judge Timothy P. Connors

PROGRESSIVE MARATHON INSURANCE CO.,

Defendant.

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**DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S  
ANSWER AND DEFENSES TO  
PLAINTIFFS' CLASS ACTION COMPLAINT**

Defendant Progressive Marathon Insurance Company ("Progressive Marathon"), through undersigned counsel, hereby states for its Answer with separate defenses to Plaintiff's Class Action Complaint and Demand for Jury Trial as follows:

**INTRODUCTORY STATEMENT**

1. Progressive Marathon admits that it has standard personal automobile insurance policies for Michigan. Further answering, Progressive Marathon avers that individual insureds can negotiate individualized coverage through endorsements. Accordingly, Progressive Marathon denies the categorical allegation that the same identical policy language is present in every

Progressive Marathon policy it issues in Michigan. Moreover, to the extent Plaintiff purports to characterize or restate information contained in Progressive Marathon's standard automobile policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same. Similarly, to the extent Plaintiff purports to characterize or restate information contained in Michigan law, such allegations assert a legal conclusion to which no response is required. To the extent a response is required, Progressive Marathon denies any inconsistent characterization of Michigan law. Progressive Marathon denies the remaining allegations contained in Paragraph 1 of the Complaint.

2. Progressive Marathon denies the allegations contained in the first sentence of Paragraph 2 of the Complaint. The remaining allegations in Paragraph 2 of the Complaint assert legal conclusions to which no response is required. To the extent a response is required, Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 2 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

3. The allegations in Paragraph 3 of the Complaint assert legal conclusions to which no response is required. To the extent a response is required, Progressive Marathon admits Paragraph 3 purports to characterize MCL §§ 205.52(1), 257.809(1), 257.217(1), 257.806(1), and 257.810a; these statutes are the best evidence of their content and Progressive denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 3 of the Complaint.

4. The allegations in Paragraph 4 of the Complaint assert legal conclusions to which no response is required. To the extent a response is required, Progressive Marathon admits that

Paragraph 4 purports to characterize MCL § 492.113(2)(a); this statute is the best evidence of its content and Progressive Marathon denies any inconsistent characterization of the same. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 4 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

5. Progressive Marathon denies the allegations contained in Paragraph 5 of the Complaint. Further answering, to the extent Plaintiff purports to characterize or restate information contained in Progressive's standard automobile insurance policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same.

6. Progressive Marathon denies the allegations contained in Paragraph 6 of the Complaint. Further answering, to the extent Plaintiff purports to characterize or restate information contained in Progressive's standard automobile insurance policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same.

7. Progressive Marathon denies the allegations contained in Paragraph 7 of the Complaint. Further answering, to the extent Plaintiff purports to characterize or restate information contained in Progressive's standard automobile insurance policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same.

8. Progressive Marathon denies the allegations contained in the first sentence of Paragraph 8 of the Complaint. Progressive Marathon admits that Plaintiff purports to bring a declaratory judgment action as alleged in the second and third sentences of Paragraph 8 but

denies that declaratory relief is appropriate. Progressive Marathon denies the remaining allegations contained in Paragraph 8 of the Complaint.

9. Progressive Marathon admits that Plaintiff purports to bring a class action on behalf of himself and all putative Class members. Progressive Marathon denies that class certification is appropriate under MCR 3.501. Progressive Marathon denies the remaining allegations contained in Paragraph 9 of the Complaint.

### **JURISDICTION, VENUE, AND PARTIES**

10. Progressive Marathon admits that Plaintiff purports to assert class claims for declaratory relief and damages. Progressive Marathon denies that class certification is appropriate under MCR 3.501 and that declaratory relief and damages are appropriate. Progressive Marathon denies any remaining allegations contained in Paragraph 10 of the Complaint.

11. The allegations in Paragraph 11 of the Complaint assert a legal conclusion to which no response is required. To the extent a response is required, Progressive Marathon neither admits nor denies the allegations in Paragraph 11 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

12. The allegations in Paragraph 12 of the Complaint do not require a response. To the extent a response is required, Progressive Marathon denies the allegations contained in Paragraph 12 of the Complaint.

13. Progressive Marathon neither admits nor denies the allegations in Paragraph 13 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

14. In response to the first sentence of Paragraph 14, Progressive Marathon admits that it regularly does business in Michigan. The allegations in the second and third sentences of Paragraph 14 of the Complaint assert legal conclusions to which no response is required. To the extent a response is required, Progressive Marathon neither admits nor denies the allegations in the second and third sentences of Paragraph 14 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations. Progressive Marathon denies that it injured Plaintiff or any putative class member.

15. The allegations in Paragraph 15 of the Complaint assert a legal conclusion to which no response is required. To the extent a response is required, Progressive Marathon neither admits nor denies the allegations in Paragraph 15 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

16. The allegations in Paragraph 16 of the Complaint assert a legal conclusion to which no response is required. To the extent a response is required, Progressive Marathon neither admits nor denies the allegations in Paragraph 16 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

**Facts Regarding Progressive's Treatment of Ubillus and the Class**

17. Progressive Marathon admits that it has standard personal automobile insurance policies for Michigan. Further answering, Progressive Marathon avers that individual insureds can negotiate individualized coverage through endorsements and that they issue other types of auto insurance in Michigan, besides personal auto insurance. Accordingly, Progressive Marathon denies the categorical allegation that the same identical policy language is present in every Progressive Marathon policy it issues in Michigan. Moreover, to the extent Plaintiff purports to characterize or restate information contained in Progressive Marathon's standard automobile

policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 17 of the Complaint.

18. To the extent Plaintiff purports to characterize or restate information contained in Progressive Marathon's standard automobile policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations in Paragraph 18 of the Complaint.

19. Progressive Marathon denies the allegations of the first sentence of Paragraph 19 of the Complaint. The remaining allegations in Paragraph 19 assert legal conclusions to which no response is required. To the extent a response is required, Progressive Marathon admits that Paragraph 19 purports to characterize *Salesin v. State Farm Fire & Cas. Co.*, 581 N.W.2d 781, 790 (Mich. App. 1998); this decision is the best evidence of its content and Progressive Marathon denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 19 of the Complaint.

20. The allegations in the first two sentences of Paragraph 20 assert legal conclusions to which no response is required. To the extent a response is required, Progressive Marathon admits that Paragraph 20 purports to characterize *Salesin v. State Farm Fire & Cas. Co.*, 581 N.W.2d 781, 790 (Mich. App. 1998); this decision is the best evidence of its content and Progressive Marathon denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 20 of the Complaint.

21. Progressive Marathon admits that it utilized third-party vendor, Mitchell International, to calculate the actual cash value of Plaintiff's total loss vehicle. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 21 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

22. Progressive Marathon admits that a total loss vehicle may still have salvage value. To the extent Plaintiff purports to characterize or restate information contained in Progressive Marathon's standard automobile policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same. To the extent the allegations of Paragraph 22 relate to actions taken with respect to salvage value and Plaintiff, Progressive Marathon admits that Plaintiff transferred the title of his insured vehicle to Progressive Marathon for the total loss payment and without consideration of the insured vehicle's salvage value. To the extent the allegations of Paragraph 22 relate to actions taken with respect to salvage value and putative class members, Progressive Marathon neither admits nor denies those allegations because it lacks knowledge or information sufficient to form a belief as to the truth of those allegations. Progressive Marathon denies the remaining allegations contained in Paragraph 22 of the Complaint.

23. To the extent Plaintiff purports to characterize or restate information contained in Progressive Marathon's standard automobile policies for Michigan, or the specific policies for each Michigan insured, the policies are the best evidence of their content and Progressive Marathon denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 23 of the Complaint.

**Facts Regarding Progressive's Treatment of Ubillus**

24. Progressive Marathon admits that Plaintiff purchased an Automobile Insurance Policy from Progressive Marathon, Policy No. [redacted]7359 (the "Policy") effective from February 12, 2019 to August 12, 2019. Progressive Marathon admits that Exhibit A to the Complaint appears to be a copy of the Declarations Page to the Policy, but denies any allegations inconsistent with that Declarations Page or the Policy. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 24 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

25. Progressive Marathon admits that Exhibit B to the Complaint appears to be a copy of a March 28, 2019 "Sales Tax Reimbursement" letter sent by Progressive Marathon to Plaintiff, but denies any allegations inconsistent with that March 28, 2019 letter. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 25 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations..

26. Progressive Marathon admits that Exhibit C to the Complaint appears to be a copy of an April 22, 2019 letter from Progressive Marathon to Plaintiff, but denies any allegations inconsistent with that April 22, 2019 letter. Progressive Marathon further admits that Exhibit D to the Complaint appears to be a copy of a copy of a Mitchell Work Center Total Loss Report (the "Report"), but denies any allegations inconsistent with the Report. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 26 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

27. Progressive Marathon neither admits nor denies the allegations in Paragraph 27 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.



28. Progressive Marathon neither admits nor denies the allegations in Paragraph 28 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

29. Progressive Marathon admits that Exhibit E to the Complaint appears to be a copy of a June 6, 2019 letter addressed to Progressive Marathon, but denies any allegations inconsistent with the June 6, 2019 letter. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 29 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

30. To the extent Plaintiff purports to characterize or restate information contained in Exhibit E, Exhibit E is the best evidence of its content and Progressive Marathon denies any inconsistent mischaracterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 30 of the Complaint.

31. To the extent Plaintiff purports to characterize or restate information contained in Exhibit E, Exhibit E is the best evidence of its content and Progressive Marathon denies any inconsistent mischaracterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 31 of the Complaint.

32. Progressive Marathon neither admits nor denies the allegations in Paragraph 32 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

#### **Class Action Allegations**

33. Progressive Marathon admits that Plaintiff purports to bring a class action on behalf of himself and a putative class. Progressive Marathon denies that class certification is

appropriate under MCR 3.501. Progressive Marathon denies the remaining allegations contained in Paragraph 33 of the Complaint.

34. Progressive Marathon admits that Plaintiff seeks to represent a class as defined in Paragraph 34 of the Complaint, but denies that class certification is appropriate under MCR 3.501. Progressive Marathon denies the remaining allegations contained in Paragraph 34 of the Complaint.

35. The allegations in Paragraph 35 of the Complaint do not require a response. To the extent a response is required, Progressive Marathon neither admits nor denies the allegations in Paragraph 35 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

36. Progressive Marathon admits that the precise number of individuals who would meet the definition of Plaintiff's proposed Class is presently unknown, but deny that class certification is appropriate under MCR 3.501. Progressive Marathon denies the remaining allegations contained in Paragraph 36 of the Complaint.

37. Progressive Marathon denies the allegations contained in Paragraph 37 of the Complaint.

38. Progressive Marathon denies the allegations contained in Paragraph 38 of the Complaint.

39. Progressive Marathon denies the allegations contained in Paragraph 39 of the Complaint.

40. Progressive Marathon neither admits nor denies the allegations in Paragraph 40 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

41. Progressive Marathon denies the allegations contained in Paragraph 41 of the Complaint.

42. Progressive Marathon denies the allegations contained in Paragraph 42 of the Complaint.

43. Progressive Marathon denies the allegations contained in Paragraph 43 of the Complaint.

44. Progressive Marathon denies the allegations contained in Paragraph 44 of the Complaint.

45. Progressive Marathon denies the allegations contained in Paragraph 45 of the Complaint.

46. Progressive Marathon denies the allegations contained in the last sentence in Paragraph 46 of the Complaint. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 46 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

**CLAIMS FOR RELIEF**

**Count I – Cause of Action for Declaratory Relief**

47. Progressive Marathon re-alleges and reincorporates by reference its responses to Paragraphs 1 through 46 of the Complaint as set forth above.

48. Progressive Marathon denies the allegations contained in Paragraph 48 of the Complaint.

49. Progressive Marathon denies the allegations contained in Paragraph 49 of the Complaint.

50. Progressive Marathon asserts a legal conclusion to which no response is required. To the extent a response is required, Progressive Marathon admits that Paragraph 50 purports to characterize MCR § 2.605(C); this statute is the best evidence of its content and Progressive denies any inconsistent characterization of the same. Progressive Marathon denies the remaining allegations contained in Paragraph 50 of the Complaint.

51. Progressive Marathon admits that Plaintiff seeks the relief alleged in Paragraph 51 of the Complaint but denies that Plaintiff or a putative class are entitled to any such relief.

52. Progressive Marathon admits that Plaintiff seeks the relief as alleged in Paragraph 52 of the Complaint but denies that Plaintiff, on behalf of himself or any alleged class, is entitled to any relief against Progressive Marathon.

**Count II – Cause of Action for Breach of Contract Based on Sales Tax**

53. Progressive Marathon re-alleges and reincorporates by reference its responses to Paragraphs 1 through 52 of the Complaint as set forth above.

54. Progressive Marathon admits that it issued a Policy to Plaintiff. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 54 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

55. Progressive Marathon denies the allegations contained in Paragraph 55 of the Complaint.

56. Progressive Marathon denies the allegations contained in Paragraph 56 of the Complaint.

**Count III – Cause of Action for Breach of Contract Based on Title and Vehicle  
Registration Transfer Fees**

57. Progressive Marathon re-alleges and reincorporates by reference its responses to Paragraphs 1 through 56 of the Complaint as set forth above.

58. Progressive Marathon admits that it issued a Policy to Plaintiff. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 58 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

59. Progressive Marathon denies the allegations contained in Paragraph 59 of the Complaint.

**Count IV – Cause of Action for Breach of Contract Based on Taking Salvage Value**

60. Progressive Marathon re-alleges and reincorporates by reference its responses to Paragraphs 1 through 59 of the Complaint as set forth above.

61. Progressive Marathon admits that it issued a Policy to Plaintiff. Progressive Marathon neither admits nor denies the remaining allegations in Paragraph 61 of the Complaint because it lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

62. Progressive Marathon denies the allegations contained in Paragraph 62 of the Complaint.

In response to Plaintiff's Request For Relief, Progressive Marathon admits that Plaintiff seeks the relief requested. Progressive Marathon denies that Plaintiff, on behalf of himself or any alleged class, is entitled to any relief against Progressive Marathon.

## SEPARATE OR AFFIRMATIVE DEFENSES

Progressive Marathon has undertaken in good faith to list all of the defenses that it may have with respect to insurance coverage under the applicable insurance policy. However, Progressive Marathon reserves the right to re-evaluate, re-state, and/or delete defenses and/or to assert additional defenses as further information and documentation is obtained. Further, by characterizing the following as defenses, Progressive Marathon does not admit that it bears the burden of proof on any of the issues raised by such defenses. Pursuant to MCR 2.113(C), Progressive Marathon states that the Policy is in the possession of Plaintiff.

Subject to and without waiving the foregoing limitations and reservations, Progressive Marathon identifies the following defenses upon which it may rely in this action:

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.
2. Plaintiff's claims and those of the proposed Class members are barred, in whole or in part, by the terms, definitions, conditions, exclusions, and limitations contained in his Progressive Marathon policy.
3. Plaintiff lacks standing to assert the claims for relief alleged in the Complaint on his behalf or on behalf of the proposed Class members.
4. Plaintiff's Complaint fails to meet the criteria for class action certification under MCR 3.501.
5. Plaintiff's causes of action and those of the proposed Class members are barred, in whole or in part, because he has not suffered any injury as a result of the acts alleged in the Complaint.

6. Plaintiff and the proposed Class members failed to comply with the terms and conditions of their respective policies.

7. Recovery, if any, by Plaintiff and the proposed Class members is barred or reduced by their failure to mitigate their alleged damages.

8. Plaintiff's and the proposed Class members' causes of action are barred, in whole or in part, by the applicable statutes of limitations.

9. Plaintiff's and the proposed Class members' causes of action are barred, in whole or in part, by statutes of repose and the doctrines of estoppel, waiver, release, set-off, payment, laches, and/or unclean hands.

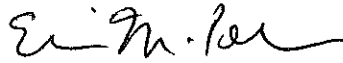
10. Plaintiff's and the proposed Class members' causes of action are barred, in whole or in part, by the doctrine of accord and satisfaction.

11. Progressive Marathon reserves all rights under the Policy and the policies issued to the proposed Class members. This includes the right to enforce all policy provisions, conditions, and exclusions, and to demand arbitration pursuant to the terms of the policies.

12. Progressive Marathon reserves its right to raise such further and additional defenses as may be available upon the facts to be developed in discovery and under other applicable substantive law.

WHEREFORE, Progressive Marathon respectfully requests that this Court deny the relief requested in Plaintiff's Complaint and dismiss Plaintiff's Complaint in its entirety with prejudice. Progressive Marathon further requests any and all other relief to which it is entitled, including costs and attorneys' fees.

Respectfully submitted,



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*Attorneys for Defendant Progressive Marathon  
Insurance Company*

Dated: September 20, 2019



**PROOF OF SERVICE**

I hereby certify that on September 20, 2019, a copy of the foregoing *Defendant Progressive Marathon Insurance Company's Answer And Defenses To Plaintiffs' Class Action Complaint And Demand For Jury Trial* was served on the following counsel of record by U.S. First Class Mail at the addresses set forth below.

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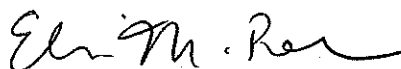
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*Attorneys for Plaintiff Gonzalo E. Ubillus  
and The Class*

I declare under penalty of perjury that the foregoing statement is true to the best of my  
knowledge, information and belief.



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One of the Attorneys for Defendant Progressive  
Marathon Insurance Company*

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GONZALO E. UBILLUS, individually and on  
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Judge Timothy P. Connors

PROGRESSIVE MARATHON INSURANCE  
COMPANY,

Defendant.

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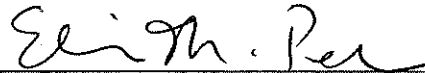
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**DEFENDANT'S RELIANCE UPON JURY DEMAND**

Defendant Progressive Marathon Insurance Company, through undersigned counsel,  
relies upon the Jury Demand filed by Plaintiff and demand a trial by jury on all issues so triable.

Respectfully submitted,



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*-and-*

*Karl A. Bekeny (pro hac vice application forthcoming)*

*Benjamin C. Sassé (pro hac vice motion forthcoming)*

*Courtney E. S. Mendelsohn (pro hac vice application forthcoming)*

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*Attorneys for Defendant Progressive Marathon Insurance Company*

Dated: September 20, 2019

**PROOF OF SERVICE**

I hereby certify that on September 20, 2019, a copy of the foregoing *Defendant Progressive Marathon Insurance Company's Reliance upon Jury Demand* was served on the following counsel of record by U.S. First Class Mail at the addresses set forth below.

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*Attorneys for Plaintiff Gonzalo E. Ubillus  
and The Class*

I declare under penalty of perjury that the foregoing statement is true to the best of my  
knowledge, information and belief.



Elaine M. Pohl (P60359)  
*One of the Attorneys for Defendant Progressive  
Marathon Insurance Company*