IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

ANNIE ARNOLD, individually and on behalf of all others similarly situated,	)	CIVIL ACTION NO. 2:17-CV-00148-TFM-C
Plaintiff,	)	
v.	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
Defendant.	)	

PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES TO CLASS COUNSEL AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

Pursuant to Rule 23(e) and (h) and Rule 54(d)(2) of the Federal Rules of Civil Procedure and the Parties' Settlement Agreement, Plaintiff and Class Representative Annie Arnold and the Additional Class Representatives Bobby Abney, Tina Daniel, and Kenneth Scruggs (collectively the "Class Representatives"), on behalf of themselves and the proposed Settlement Class, respectfully move the Court in the above-captioned action for an Order granting Plaintiffs' Motion for an Award of Attorneys' Fees, Costs, and Expenses to Class Counsel. Specifically, the Class Representatives respectfully move the Court for:

1. An Order awarding attorneys' fees, costs, and litigation expenses to Class Counsel in the amount of $8,595,000 (which is a maximum of 22% of the estimated total benefit made available as a result of the settlement without any reduction in the payments to be made to Class Members); and

2. A service award to Named Plaintiff and Class Representative Annie Arnold in the amount of $20,000, and service awards to the Additional Class Representatives Bobby Abney, Tina Daniel, and Kenneth Scruggs in the amount of $15,000 each, for their service to the Class. However, the Class Representatives request that the Court defer a final determination on the issue of service awards to the Class Representatives and retain jurisdiction to allow the Class Representatives to renew their request for service awards after the final outcome of *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), *pet. for reh'g en banc denied* (11th Cir. Aug. 3, 2022).[1]

Pursuant to the Parties' Settlement Agreement, Defendant State Farm Fire and Casualty Company has agreed to pay the attorneys' fees, costs, litigation expenses, and service awards awarded by the Court (up to the amounts set forth above) *in addition to* the relief made available to the Class, and none of the payments will reduce or otherwise impact the amount to be paid to the Class. Doc. 196-1, ¶¶ 4.1.2-4.1.3, 13.2.

This Motion is based upon the Parties' Settlement Agreement and supporting documents, and the entire files and proceedings herein. This Motion is unopposed.

For the reasons set forth in the accompanying Memorandum of Law and accompanying Declarations of Class Counsel, the Class Representatives respectfully request that the Court grant this Motion.

[1] The Parties' Class Action Stipulation and Settlement Agreement (Dkt. 196-1) (hereinafter "Settlement Agreement"), provides that "the final outcome of *Johnson* refers to the date upon which all appellate courts with jurisdiction (including the United States Supreme Court by petition for certiorari) have ruled upon such appeal, or denied any such appeal or petition for certiorari, such that no future appeal is possible." Dkt. 196-1, ¶ 13.6.

Dated: August 10, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2022, I electronically filed the foregoing Notice via CM/ECF system, which will send a notice of electronic filing to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

ANNIE ARNOLD, individually and on behalf of all others similarly situated, Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	CIVIL ACTION NO. 2:17-CV-00148-TFM-C **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES AND FOR SERVICE AWARDS TO THE CLASS REPRESENTATIVES**

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INTRODUCTION

Plaintiff and Class Representative Annie Arnold ("Plaintiff") and Additional Class Representatives Bobby Abney, Tina Daniel, and Kenneth Scruggs ("Additional Class Representatives"), on behalf of themselves and the proposed Settlement Class, allege that Defendant State Farm Fire & Casualty Co. ("State Farm") improperly withheld certain labor costs in the payment of State Farm's policyholders' actual cash value ("ACV") insurance claims, thereby breaching their insurance policies.[1] On April 25, 2022, this Court preliminarily approved the Parties' proposed Settlement and appointed Plaintiff as Class Representative, along with the Additional Class Representatives (collectively the "Class Representatives"), and appointed the undersigned as Class Counsel. Doc. 199. The Class Representatives now move for an award of attorneys' fees, costs, and expenses to Class Counsel and service awards to the Class Representatives. However, the Class Representatives respectfully request that the Court reserve the issue of service awards to the Class Representatives until such time that the final outcome of *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), *pet. for reh'g en banc denied* (11th Cir. Aug. 3, 2022),[2] is known.[3]

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[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Settlement Agreement (the "Settlement" or "SA"). Doc. 196-1.

[2] In *Johnson*, the Eleventh Circuit held that incentive awards for class action representatives that compensate them for their time and reward them for bringing lawsuits are prohibited. 975 F.3d at 1260. On June 3, 2022, the Eleventh Circuit denied plaintiff-appellee Charles T. Johnson's Petition for Rehearing *En Banc*. The parties' Settlement Agreement provides that "the final outcome of *Johnson* refers to the date upon which all appellate courts with jurisdiction (including the United States Supreme Court by petition for certiorari) have ruled upon such appeal, or denied any such appeal or petition for certiorari, such that no future appeal is possible." SA, ¶ 13.6.

[3] The Class Representatives will separately file an unopposed motion for final settlement approval on or before September 16, 2022, in accordance with the Court's preliminary approval order. Doc. 199, ¶ 31.

Class Counsel undertook significant litigation efforts and expense to prosecute this case against State Farm. The Settlement provides outstanding results for Class Members, and was achieved because of the skill, determination, and effective advocacy of Class Counsel. Accordingly, the Class Representatives respectfully submit this Motion seeking an award of attorneys' fees, litigation costs, and expenses in the amount of $8,595,000 (which represents a maximum of 22% of the total benefit made available to the Class). State Farm's payments to Class Members will *not* be reduced by the separate amounts paid for attorneys' fees and litigation costs. Instead, attorneys' fees, costs, and expenses will be paid "over and above" the amounts paid to Class Members. To date, *no* Class Members have objected to any aspect of the Settlement, including Class Counsels' request for attorneys' fees, expenses, and costs.

The requested award is fair, reasonable, commensurate with the results obtained by Class Counsel and consistent with Alabama and Eleventh Circuit precedent. For these reasons, the Class Representatives' Motion should be approved.

BACKGROUND AND PROCEDURAL HISTORY

I. PROCEDURAL HISTORY

On March 8, 2017, Plaintiff commenced this Action in the Circuit Court of Dallas County, Alabama, and State Farm timely removed the Action to this Court on April 7, 2017. Doc. 1, 1-2. Plaintiff alleged that State Farm improperly depreciated the estimated cost of labor necessary to complete repairs to insured property when it calculated and issued ACV claim payments to her and other class members for structural damage losses suffered under their property insurance policies. *See generally* Doc. 1-2. Plaintiff asserted a claim for breach of contract on behalf of herself and a class of other Alabama State Farm policyholders who received ACV payments from

State Farm for loss or damage to a structure where the estimated cost of labor was depreciated. *Id.* ¶¶ 27, 48-56.

On April 14, 2017, State Farm moved to dismiss Plaintiff's complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Doc. 10. On May 2, 2017, Plaintiff filed a conditional motion to remand the Action to Alabama state court. Doc. 19. After full briefing, Judge Steele denied both motions in a published decision issued on August 3, 2017. *Arnold v. State Farm Fire & Cas. Co.*, 268 F. Supp. 3d 1297 (S.D. Ala. 2017).

On August 16, 2017, State Farm filed a motion in which it asked the Court to: (i) make Section 1292(b) findings regarding the Court's denial of State Farm's motion to dismiss; (ii) certify the "labor depreciation" question to the Alabama Supreme Court; and (iii) reconsider in part the Court's denial of State Farm's motion to dismiss. Doc. 32. After full briefing, on November 14, 2017, Judge Steele denied State Farm's motion. *Arnold v. State Farm Fire & Cas. Co.*, 2017 WL 5451749 (S.D. Ala. Nov. 14, 2017) (Doc. 31).

In response to the Court's Order denying State Farm's motion to dismiss, State Farm changed its claims handling practices and discontinued its practice of withholding labor from any ACV payments in the state of Alabama. In addition, State Farm also issued refund payments for withheld labor to certain putative class members. *See Arnold v. State Farm Fire & Cas. Co.,* 2020 WL 6879271, at *3, 5, 11 (S.D. Ala. Nov. 23, 2020) (Doc. 178) (recognizing August 3, 2017 as "the date on which State Farm amended its statewide practices and ceased deducting labor depreciation from its payments" and discussing "State Farm's supplemental payment program"); Doc. 88, at 8-10 (discussing State Farm's cessation of its labor depreciation practice in Alabama and its program refunding depreciated labor costs for ACV calculations made from August 2, 2017 through August 25, 2017).

State Farm sharply disputed the appropriateness of class certification, and also claimed that, even if it improperly withheld sums as labor depreciation, Plaintiff and certain putative class members had not suffered any damages. The parties engaged in extensive discovery, including but not limited to: (1) State Farm's production of Xactimate® estimating and State Farm claims and payment data for all persons and entities potentially falling within the asserted class within the alleged class period; (2) State Farm's production of documents related to its Alabama labor depreciation refund program; and (3) several depositions of fact and expert witnesses. *See* Declaration of Erik Peterson, Doc.200-1, PageID.11793-11794, ¶12. As the Court is aware, the parties also engaged in extensive dispositive, certification and expert-related motion practice.

More specifically, on April 22, 2019, Plaintiff moved for class certification. Doc. 87. State Farm filed its opposition thereto on September 19, 2019, (Doc. 108), and Plaintiff later filed a reply brief in support of her motion. Doc. 113. On October 16, 2019, State Farm filed a motion asking the Court to hold an evidentiary hearing on class certification-related issues, (Doc. 114), including issues raised in State Farm's subsequently filed motion for summary judgment on Plaintiff's individual claim, (Doc. 119), and State Farm's subsequently filed motion to exclude the opinions of Plaintiff's proffered expert witness, Toby Johnson. Doc. 122. Plaintiff opposed State Farm's three motions. Docs. 116, 128, 131.

On February 13, 2020, this Court granted State Farm's motion for an evidentiary hearing. Doc. 138. The parties then participated in a two-day, live-witness evidentiary hearing before this Court on July 22-23, 2020, concerning Plaintiff's motion for class certification. The Court also heard arguments by the parties' counsel concerning State Farm's motion for summary judgment on Plaintiff's individual claims and State Farm's motion to exclude Plaintiff's expert, Toby Johnson.

On September 30, 2020, this Court denied State Farm's motion to exclude the expert opinions of Toby Johnson. Doc. 177. Thereafter, on November 23, 2020, the Court denied State Farm's motion for summary judgment, (Doc. 179), and granted Plaintiff's motion for class certification. *Arnold v. State Farm Fire & Cas. Co.,* 2020 WL 6879271 (S.D. Ala. Nov. 23, 2020) (Doc. 178). In doing so, the Court appointed Arnold, Abney, Daniel, and Scruggs as the Class Representatives, and the undersigned attorneys as Class Counsel. *See id.* at *3, 11.

On December 7, 2020, State Farm filed a petition with the U.S. Court of Appeals for the Eleventh Circuit for permission to appeal the Court's class certification order, pursuant to Federal Rule of Civil Procedure 23(f). Class Representatives filed their opposition on December 17, 2020. State Farm's petition was denied on January 26, 2021.

On February 22, 2021, the Court granted the Parties' joint motion to stay all proceedings in the Action to allow them time to engage in mediation to explore potential settlement of the Action. Doc. 185.

II. SETTLEMENT NEGOTIATIONS

The parties agreed to use George M. Van Tassel, Jr., of Upchurch Watson White & Max, as a private mediator to facilitate settlement discussions. Doc. 200-1, PageID.11796, ¶18.[4] The parties participated in three full-day mediation sessions with Mr. Van Tassel on April 28, May 27, and June 21, 2021. At the conclusion of the third day of mediation on June 21, 2021, the parties reached an agreement in principle to settle the Action on a class-wide basis. *Id.* With Mr. Van

[4] The Peterson Declaration, filed concurrently with this Memorandum, addresses the history of settlement negotiations for this lawsuit and the timing and structure of the settlement negotiations. Doc. 200-1, PageID.11796-11797, ¶¶18-21. The Declaration also addresses the considerations that led to the compromise in exchange for the proposed release. *Id.*, PageID.11797-11802, ¶¶ 22-30, 34-40; *see also generally* Doc. 200-2, PageID.11814-11818; Doc. 200-3, PageID.11820-11822; Doc. 200-4, PageID.11824-11825.

Tassel's further assistance, the parties subsequently executed a summary term sheet evidencing that agreement on August 13, 2021, and began the process of negotiating a more comprehensive settlement agreement. *Id.* The parties participated in one further, five-hour mediation session with Mr. Van Tassel on November 18, 2021, to resolve the remaining issues that had arisen during negotiations of the more comprehensive settlement agreement. *Id.*

Consistent with the highest ethical standards, and through mediator Van Tassel, the Parties negotiated potential attorneys' fees, costs, and service awards only after relief to the Settlement Class was agreed to. Any award of attorneys' fees, costs, expenses, or service awards will not reduce the proposed amounts to be awarded to the Settlement Class. *Id.*, PageID.11796, 11798, ¶19, 26. The Parties fully executed the Settlement Agreement on January 20, 2022, (Doc. 196-1), and the Court entered a Preliminary Approval Order on April 25, 2022. Doc. 199.

III. SUMMARY OF CLASS RELIEF

The Settlement provides the following categories of damages to Class Members who submit settlement claims. First, the settlement provides 100% of the still withheld Non-Material Depreciation. Second, for the first time in any State Farm labor depreciation class action settlement across the country,[5] State Farm will also pay 44% of the withheld General Contractor Overhead and Profit ("GCOP") Depreciation (in addition to 100% of the Non-Material Depreciation) to any class member who was also subjected to GCOP Depreciation.[6] Doc. 200-1, PageID.11797-11798,

[5] The prior State Farm labor depreciation class action settlements are *Hicks v. State Farm Fire & Cas. Co.*, No. 14-00053 (E.D. Ky. Apr. 28, 2022) (final order and judgment (*Hicks* Doc. 238)); *Mitchell v. State Farm Fire & Cas. Co.*, No. 3:17cv00170-M (N.D. Miss. Feb. 25, 2021) (final order and judgment (*Mitchell* Doc. 249)); *Stuart v. State Farm Fire & Cas. Co.*, No. 4:14-4001 (W.D. Ark. June 2, 2020) (final order and judgment (*Stuart* Doc. 259)).

[6] This Court referenced the ongoing dispute over whether GCOP Depreciation was properly included within the scope of class damages in its November 23, 2020 class certification and summary judgment orders. *See* Doc. 178, at 3, n.1; Doc. 179, at 3, n.1.

11804, ¶¶22-25, 47; SA ¶¶ 6.4. Finally, for each of the foregoing categories, and also for "interest only" Class Members from whom State Farm withheld Non-Material Depreciation or GCOP Depreciation and subsequently paid back the same, State Farm will pay an additional 5.55% prejudgment interest for each year of withholding from March 8, 2017 to the Effective Date. Doc. 200-1, PageID.11797-11798, ¶¶22-25; SA ¶ 6.4. For most class members, and assuming an Effective Date of September 15, 2022, this equates to an additional 28.36% increase for any "still withheld" amounts of Non-Material Depreciation or GCOP Depreciation. Doc. 200-1, PageID.11797, ¶23. Significantly, *none of these payments* are subject to any reduction for attorneys' fees, costs, and expenses or the service awards to the Class Representatives, as approved by the Court. *Id.*, PageID.11796, 11798, ¶19, 26; SA ¶¶ 4.1.3, 13.2.

IV. AGGREGATE VALUE OF MONENTARY RELIEF TO THE CLASS AND AVERAGE POTENTIAL CLAIM RECOVERY

Based upon analysis of proprietary depreciation data from Xactanalysis® reports for State Farm property claims in Alabama, Class Counsel estimate that the aggregate amount to be made available to class members for payment on a claims made basis is at least $30MM, exclusive of attorneys' fees, litigation expenses, administration costs, and any class representative service awards. Doc. 200-1, PageID.11799, ¶27. This amount is also exclusive of the amounts already paid by State Farm to its Alabama policyholders after this lawsuit resulted in a "change in practices" on a prospective basis.[7]

The amounts of payments to be made available to Class Members will vary. Based on modelling using state-wide claim data spreadsheets produced by State Farm, the average potential

[7] After the Court's August 3, 2017 Order denying State Farm's motion to dismiss, State Farm discontinued its practice of withholding labor from ACV payments in the State of Alabama and issued payments for withheld labor to certain putative class members. *See Arnold,* 2020 WL 6879271, at *3, 5, 11 (Doc. 178); Doc. 88, at 8-10.

claim recovery for claims with "still withheld" amounts of Non-Material Depreciation or GCOP Depreciation is $1,021.76. This average amount is the principal, and this average amount would still be subject to 5.55% simple interest for each year of withholding. *Id.*, PageID.11799, ¶28.

V. ATTORNEYS' FEES, COSTS AND SERVICE AWARDS

After the proposed settlement terms for the putative class was agreed to, the Parties began to negotiate proposed attorneys' fees and costs (subject to Court approval) through mediator Van Tassel. The negotiation of the service awards to the Class Representatives also followed an agreement in principle on the settlement terms for the proposed Class that they represent. Doc. 200-1, PageID.11796, 11800, ¶¶19-20, 31. All negotiations were conducted at arms' length under the supervision of mediator Van Tassel and structured in accordance with the highest ethical standards to avoid conflicts of interest between Class Counsel and the putative class members. *Id.*

Class Counsel seeks as attorneys' fees, costs and litigation expenses, and State Farm has agreed to pay if Court approved, an amount no greater than $8,595,000. Class Members' recoveries will *not* be reduced or enhanced by the amounts of attorneys' fees, costs or litigation expenses paid. SA ¶¶ 13.2.

At the time of the execution of this Settlement, the permissibility of service awards within the Eleventh Circuit was somewhat unsettled, as described in the decision *Phillips v. Hobby Lobby Stores, Inc*., 2021 WL 3710134 at *5-6 (N.D. Ala. August 20, 2021), and the cases cited therein.[8] SA ¶ 13.5. If this remains the case at the time of the Final Approval Hearing, the Parties agreed that the Court should proceed to enter Final Judgment pursuant to Rule 54(b), award Class Counsel their requested attorneys' fees and costs, and defer service awards to the Class Representatives while retaining jurisdiction to allow the Class Representatives to renew their request for service

[8] Unless otherwise noted, all emphasis is added, and all internal citations and footnotes are omitted.

awards after the final outcome of *Johnson v. NPAS Sols., LLC*, *supra* (defined to mean the date upon which all appellate courts with jurisdiction (including the U.S. Supreme Court by petition for certiorari) have ruled upon such appeal, or denied any such appeal or petition for certiorari, such that no future appeal is possible). SA ¶ 13.6. If the Court enters such a Rule 54(b) judgment, Class Counsel and the Class Representatives all expressly agree to waive any right to appeal the deferred decision by the Court as to the request for service awards after the final outcome of *Johnson*. SA ¶ 13.6.

In the event the Court determines (either at the time Final Judgment is entered as to the overall Settlement or at some later date) that it may award service awards to the Class Representatives, State Farm agrees, but only subject to approval of and determination of amount by the Court, to pay to Plaintiff Annie Arnold a service award in an amount not to exceed $20,000, and to pay to each of the Additional Class Representatives Bobby Abney, Tina Daniel and Kenneth Scruggs a service award in an amount not to exceed $15,000 each. *Id.* ¶ 13.7. If approved, these service awards will *not* reduce the Class Members' recoveries. *Id.* ¶ 4.1.3.

ARGUMENT

I. STANDARD OF REVIEW

A. "Over And Above" Attorneys' Fee Agreements, Negotiated *After* Relief To The Class, Are Subject To Deference.

Rule 23(h) of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized by law." *Id.* District courts may award reasonable attorneys' fees and expenses from the settlement of a class action upon motion under Fed. R. Civ. P. 54(d)(2) and 23(h). "A fee agreement between parties in the settlement of a class action is encouraged where, like here, the parties negotiated attorneys' fees separately from the underlying settlement and only after the terms of the settlement

were reached." *In re Progressive Ins. Corp. Underwriting and Rating Practices Litig.*, 2008 WL 11348505, at *2 (N.D. Fla. Oct. 1, 2008); *accord Deas v. Russell Stover Candies, Inc.*, 2005 WL 8158201, at *13 (N.D. Ala. Dec. 22, 2005) ("Such agreements … in class actions are encouraged, particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the parties."). "Indeed, the Supreme Court has addressed the value of negotiating fees, stating that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *In re Progressive*, 2008 WL 11348505, at *2 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

District courts in this Circuit have recognized that class action attorneys' fees should only be negotiated *after* relief to the class is agreed to by the parties. *Deas*, 2005 WL 8158201, at *13 ("the Court gives great weight to the negotiated fee in considering the fee and expense request" where "the fee and expense negotiations were conducted at arm's length, only after the parties had reached agreement on all terms of the Settlement."); *see also* William Rubenstein, NEWBERG ON CLASS ACTIONS § 13:2 (5th ed. June 2022 Update) ("Fees should not be negotiated between class counsel and defendant's counsel until after a settlement of the class's claims has been agreed upon."). Here, the fees were not negotiated until *after* relief to the Class was agreed to by the parties. *See* Doc. 200-1, PageID.11796, 11800, ¶¶19-20, 31. Further, the Settlement provides that attorneys' fees shall be directly paid by State Farm and shall *not* reduce any class member's recovery. *Id.*, PageID.11798-11799, ¶26.

"Over and above" attorneys' fee agreements such as this one—negotiated *after* relief to the Class—are subject to deference. Where attorneys' fees will not reduce any class member's recovery and the attorneys' fees are to be paid "*over and above* the settlement costs and benefits with no reduction of class benefits," agreements between the parties as to the amount of fees "are

encouraged, particularly where the attorneys' fees are negotiated separately and only after all the terms have been agreed to between the parties." *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, *28-30 (M.D. Tenn. Aug. 11, 1999); *see, e.g., Carroll v. Macy's, Inc.*, 2020 WL 3037067, at * (N.D. Ala. June 5, 2020) (approving "fees paid on top of (that is, above and beyond) the fund set up for the Settlement Class"); *Williams v. New Penn Fin., LLC*, 2019 WL 2526717, at *6-8 (M.D. Fla. May 8, 2019) (approving "attorneys' fees under Settlement [] to be paid separately from the Settlement amount paid to Class Members"); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 690, 694 (S.D. Fla. 2014) (holding $20 million attorneys' fee award was reasonable in homeowners' nationwide class action against mortgage lender and force-placed hazard insurer, in part, because requested fee would be paid by defendants in addition to $300 million available to class); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) ("the Court should give substantial weight to a negotiated fee amount, assuming that it represents the parties' 'best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees'").

Courts hold that these "over and above" fee requests are entitled to a "presumption of reasonableness." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322-33 (W.D. Tex. 2007); *see also Cole v. Collier*, 2018 WL 2766028, at *13 (S.D. Tex. June 8, 2018) ("When the amount of fees agreed upon, is separate and apart from the class settlement, and has been negotiated after the other terms have been agreed, the attorneys' fee is presumed to be reasonable."); *Bailey v. AK Steel Corp.*, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008) ("fees negotiated and paid separate and apart from the class recovery are entitled to a 'presumption of reasonableness'"). The reasoning of these courts is twofold. First, any hypothetical judicial reduction of "over and above" fee requests upon final approval would only benefit the insurance companies that breached their contracts—

not any class members. *E.g.*, *DeHoyos*, 240 F.R.D. at 322 ("Were the Court to reduce the award of class counsel's fees, this would not confer a greater benefit upon the class, but rather would only benefit Allstate."); *accord Lane v. Page*, 862 F. Supp. 2d 1182, 1258 (D.N.M. 2012) ("Even if the Court were to reject the attorney's fees arrangement, the funds would not go to the class and would not increase the class fund in any way."). Second, "where the money paid to attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no potential conflict of interest between attorneys and class members." *Mirakay v. Dakota Growers Pasta Co.*, 2014 WL 5358987, at *11 (D.N.J. Oct. 20, 2014).

B. Attorneys' Fees Are Awarded Pursuant To The Percentage Method As Informed By The *Johnson* Factors.

In the Eleventh Circuit, attorneys' fees to be awarded in class actions involving either a common fund or a "claims-made" settlement are based on a percentage of the class benefit. *See Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."); *Poertner v. Gillette Co.*, 618 Fed. App'x 624, 628 n.2 (11th Cir. 2015) (applying percentage approach to "claims-made settlements," noting that a "claims-made settlement is … the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant.").

> This accomplishes two objectives. First, it is consistent with the private marketplace where contingent fee attorneys are regularly compensated on a percentage of recovery method. Second, it provides a strong incentive to Plaintiffs' counsel to obtain the maximum recovery in the shortest time possible under the circumstances. Finally, the percentage approach reduces the burden of the Court to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members.

Deas, 2005 WL 8158201, at *13.

Where the requested fee exceeds 25% of the total amount of benefits available to class members, "the Eleventh Circuit encourages courts to apply the factors set out in *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), … to determine the reasonableness of the requested fees in light of the outcome of the case." *Drazen v. GoDaddy.com, LLC*, 2020 WL 4606979, at *3 (S.D. Ala. Aug. 11, 2020); *Swaney v. Regions Bank*, 2020 WL 3064945, at *7 (N.D. Ala. June 9, 2020).[9] The factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. Other pertinent factors include any non-monetary benefits conferred upon the class by the settlement. *Drazen*, 2020 WL 4606979, at *3; *Swaney*, 2020 WL 3064945, at *7; *Carroll*, 2020 WL 3037067, at *9.

Even though the *Johnson* factors must be addressed to ensure that the resulting fee is reasonable where the request exceeds 25% of the benefits made available to the class, not every factor must be considered. *See, e.g., Deas*, 2005 WL 8158201, at *14 (approving class counsel fee request after applying six *Johnson* factors "of particular relevance"); *see also Uselton v.*

[9] Where the actual percentage of fees compared to the entire benefits to be made available to the class are less than 25%, "the court need not examine the *Johnson* factors." *Carroll*, 2020 WL 3037067, at *9 ("Here, …the actual percentage of fees compared to the entire 'constructive' common fund is 24%. Therefore, the court need not examine the *Johnson* factors here. Nevertheless, it has evaluated them and finds they support the fee awarded.").

Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993) ("rarely are all the *Johnson* factors applicable; this is particularly so in a common fund case").

Finally, in this Circuit, the fee petition process need *not* include the time-consuming process associated with the lodestar approach. *See In re Home Depot Inc.*, 931 F.3d 1065, 1091 n.25 (11th Cir. 2019) ("We do not mean to suggest that a cross-check is required. A lodestar cross-check is a time-consuming exercise."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) (declining to undertake a lodestar cross-check over objectors' request, stating that "[t]he lodestar approach should not be imposed through the back door via a 'cross-check'"). Alabama courts "regularly award fees based on a percentage of the recovery without discussing the lodestar at all." *Drazen*, 2020 WL 4606979, at *2, n. 2; *see, e.g., Carroll*, 2020 WL 3037067, at *9 (awarding fees pursuant to percentage method without conducting lodestar cross-check); *Deas*, 2005 WL 8158201, at *13-14 (same); *see also Drazen v. GoDaddy.com, LLC*, 2020 WL 8254868, at *12, n.11 (S.D. Ala. Dec. 23, 2020) (overruling objection that lodestar method should be used to calculate class counsels' fees), *vacated and remanded on other grounds by Drazen v. Pinto*, --- 4th ---, 2020 WL 2963470 (11th Cir. July 27, 2020).

II. THE COURT SHOULD AWARD ATTORNEYS' FEES, COSTS, AND EXPENSES TO CLASS COUNSEL.

A. Fees Are Properly Awarded As A Percentage Of The Gross Benefits Made Available To The Class.

The Supreme Court recognizes that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980). When calculating attorneys' fees under the common fund doctrine, "a

reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

The Supreme Court has also held that a class member's "right to share the harvest of the suit upon proof of their identify, *whether or not they exercise it*, is a benefit in the fund created by the efforts of class representatives and their counsel." *Boeing*, 444 U.S. at 478-80 (holding class counsel are entitled to reasonable fee based on funds potentially available to be claimed by class members, regardless of the amount actually claimed). Accordingly, "in this Circuit, common-fund fee awards are properly calculated as a percentage of benefits made available to the class, regardless of whether each class member redeems the benefits made available to class members, or even whether unclaimed benefits revert to the defendant." *Drazen*, 2020 WL 4606979, at *2; *Swaney*, 2020 WL 3064945, at *6; *see, e.g., Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294-95 (11th Cir. 1999) (upholding attorney fee award based on entire settlement fund even though portion reverted to the defendant).[10]

Under the percentage method, it is appropriate to base the percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the settling defendants' separate payment of attorneys' fees and expenses, and the expenses of administration. *See, e.g., In re Home Depot*, 931 F.3d at 1092 (recognizing that in cases in which the parties designate attorneys' fees to be paid separately from class relief, and agree on the amount of attorney's fees or set a cap, courts include the expected attorneys' fees to value the aggregate

[10] Several Circuit Courts have held it is an abuse of discretion for a court to base a percentage-of-the-fund award on the amount claimed by class members rather than the total amount of a common fund. *See Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 436-37 (2d Cir. 2007); 2 MCLAUGHLIN ON CLASS ACTIONS § 6:24 (18th ed. Oct. 2021 Update) ("Most Circuits to address the question hold that in a common fund case … attorneys' fees should be calculated as a percentage of the total funds made available through counsel's efforts, whether claimed or not.").

"class benefit" afforded by proposed settlement); *Phillips v. Hobby Lobby Stores, Inc*., 2021 WL 3710134 at *7 (N.D. Ala. August 20, 2021) ("[T]he calculation of the value of the common fund should include all cash used to pay attorneys' fees and the expenses of claims administration."); *Carroll*, 2020 WL 3037067, at *9 and n.12 (approving fee award representing "31.1% of the award to the Settlement Class or 24% of the total fund (which includes attorneys' fees and expenses"); *Carnegie v. Mut. Sav. Life Ins. Co.*, 2004 WL 3715446, at *37 (N.D. Ala. Nov. 23, 2004) (awarding fees pursuant to percentage-of-the-fund method based on "aggregate Settlement benefits," including settlement benefits to class, class counsel's out-of-pocket expenses, and class counsel's requested fees).

Decisions in the labor depreciation context, are in accord. *See, e.g.,* Final Order and Judgment at 4, 9-10, 14, ¶¶ 8, 28, 40, *Mitchell v. State Farm Fire & Cas. Co.*, No. 3:17-cv-00170 (N.D. Miss. February 25, 2021) (awarding fees and costs as percentage of total monetary benefit to be made available to Mississippi labor depreciation class—inclusive of the value of the amount of unrecovered nonmaterial depreciation and interest, attorneys' fees and expenses, service awards, and settlement administrative costs); Doc. 200-1, PageID.11809-11812 (identifying eighteen "claims made" labor depreciation class settlements resulting in final approval between June 1, 2017 and May 27, 2022 in which fees and costs were awarded based on a percentage of the total monetary benefit made available to the class).

Finally, in analyzing the anticipated fee request, the Court may consider State Farm's cessation of its labor depreciation practice in Alabama, and its corresponding labor withholding refund program, which were significant achievements that resulted directly from this litigation. *See In re Home Depot*, 931 F.3d at 1093-94 (holding class counsel deserved credit for premiums

paid by defendant to banks for releases prior to class settlement since banks were putative class members at the time, and payment of premium was direct result of filing of class action).

B. The Percentage Requested By Class Counsel Is Appropriate.

Class Counsel seek as attorneys' fees, litigation costs and expenses, and State Farm has agreed to pay subject to Court approval, an amount no greater than $8,595,000, which is a maximum of 22% of the estimated total benefit to be made available to the Settlement Class. Doc. 200-1, PageID.11801-11803, ¶¶32-33, 41-43. This percentage is calculated by dividing Class Counsel's requested fee by the total benefit to be made available to the Class, inclusive of the available cash benefits, assuming each class member were to make a claim; settlement administrative costs; and agreed to attorneys' fees, costs, and expenses. *See In re Home Depot*, 931 F.3d at 1092; *Phillips*, 2021 WL 3710134 at *7; *see also Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 285 (6th Cir. 2016) ("When conducting a percentage of the fund analysis, courts must calculate the ratio between attorney's fees and benefit to the class. Attorney's fees are the numerator and the denominator is the dollar amount of the Total Benefit to the class (which includes the 'benefit to class members,' the attorney's fees and may include costs of administration).").

Here, the numerator is the amount of requested attorneys' fees and costs ($8,595,000). Doc. 200-1, PageID.11802-11803, ¶¶ 42-43. The denominator is $38,810,000, which is the sum of the: i) estimated aggregate principal and interest values to be made available to the class (at least $30,000,000); ii) Administrator's estimated website and administration costs to be borne by State Farm (estimated to be $215,000); iii) attorneys' fees and litigation costs and expenses ($8,595,000). *Id.*; *see In re Home Depot*, 931 F.3d at 1092; *Phillips*, 2021 WL 3710134 at *7; *Mitchell* Final Approval Order at 4, 9-10, 14, ¶¶ 8, 28, 40.

This Court has substantial discretion in determining the appropriate fee percentage. *Waters v. Cooks Pest Control, Inc.*, 2012 WL 2923542, at *15 (N.D. Ala. July 17, 2012). However, awards in this Circuit commonly fall between 20-30% and an upper end of 50%. *Comeens v. HM Operating Inc.*, 2016 WL 4398412, at *4 (N.D. Ala. Aug. 18, 2016) ("[T]he Eleventh Circuit noted courts have generally approved counsel fees of 20% to 30% but that higher than 50% was known to occur."); *see also In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir. 2021) ("average percentage award in Eleventh Circuit is roughly one-third"); *In re Home Depot*, 931 F.3d at 1076 ("In this Circuit, courts typically award between 20-30%, known as the benchmark range.").

Here, Class Counsels' fees request is at the low end of the typical percentage range awarded by district courts within the Eleventh Circuit, including in Alabama. *See Waters*, 190 F.3d at 1300 (awarding 33.33% of the common fund of $40 million); *Waters*, 2012 WL 2923542, at *15-19 (awarding 35% of common fund plus litigation expenses); *Deas*, 2005 WL 8158201, at *15 (awarding 33% of total monetary fund made available to class as attorneys' fees); NEWBERG §15:73 ("fee awards in class actions average around one-third of the recovery."). "Indeed, in this Circuit, many awards have been approved at the 30% *or more range*." *Amason v. Pantry, Inc.*, 2014 WL 12600263, at *3 (N.D. Ala. July 3, 2014) (approving class counsel fee award of 30% of the total potential common fund).

C. Consideration Of The *Johnson* Factors Supports The Requested Fee Award.

Because the requested fees compared to the gross monetary benefit to be made available to the Class is a maximum of 22%, "the court need not examine the *Johnson* factors here." *Carroll*, 2020 WL 3037067, at *9. Nevertheless, should the Court elect to do so, it will find that the pertinent factors support the fees requested by Class Counsel. *See id.*

Courts respect the integrity of counsel and presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary. *Camp v. City of Pelham*, 2014 WL 1764919, at *4 (N.D. Ala. May 1, 2014) ("There is a presumption of good faith in the negotiation process."). Here, there is no such evidence. *See Drazen*, 2020 WL 8254868, at *7, 13 (overruling objection contending attorneys' fees provision of settlement indicated collusion where settlement was result of extensive arms-length negotiations overseen by experienced mediator); *Camp*, 2014 WL 1764919, at *4 (finding no evidence of collusion where parties participated in multiple mediations and the settlement was the result of arm's-length negotiations); *Deas*, 2005 WL 8158201, at *12 (recognizing "no collusion exists where the parties are represented by counsel who are all experienced in complex litigation, who have properly weighed and balanced the factual and legal issues, and who evaluated the settlement proposals in good faith…."). Rather, this Settlement was only achieved *after* the parties engaged in extended and difficult arm's-length negotiations during four separate mediation sessions overseen by experienced mediator, George M. Van Tassle, Jr. The attorneys' fees, costs and expenses sought here by Class Counsel were only negotiated *after* the substantive terms of the class relief had been agreed upon. Doc. 200-1, PageID.11796, 11800, ¶¶19, 31. This is the standard and ethical manner of negotiating class action settlement and fee issues and allows defendants to actively contest and negotiate the amounts of fees without any adverse impact on the putative class members. *See* NEWBERG § 13:2.

1. The Time And Labor Required To Prosecute And Settle This Case Support The Requested Fee.

Prosecuting and settling this case demanded considerable time and labor over the course of more than five years. As summarized more thoroughly in the Peterson Declaration, the work performed by Class Counsel in prosecuting this matter spanned multiple case-crucial areas, including but not limited to case investigation; fact discovery; third-party discovery; meet-and-

confer discussions to resolve discovery disputes; dispositive motion practice; class certification motion practice; retention of an expert witness by Plaintiffs; *Daubert* motion practice; a two-day, live-witness evidentiary hearing; settlement negotiations on a class-wide basis; and the preparation and presentation of settlement documents. *See* Doc. 200-1, PageID.11792-11796 ¶¶ 7-18.

Class Counsel "expended substantial and, more importantly, productive attorney time in litigating and resolving this action. This expenditure of time and effort, on a wholly contingent basis, confirms the reasonableness of [Class] Counsel's fee request." *Deas*, 2005 WL 8158201, at *14; *see also Waters*, 2012 WL 2923542, at *16 (recognizing that "[c]ases of first impression generally require more time and effort on the attorney's part."). For example, Class Counsel thoroughly researched and analyzed the claims estimating software utilized by State Farm, called Xactimate®, to calculate losses for State Farm's ACV payments. This information was essential to Class Counsels' ability to understand the nature of State Farm's conduct and potential remedies.

Class Counsel successfully defeated State Farm's motions: (1) to dismiss Plaintiff's breach of contract claim; (2) for summary judgment on Plaintiff's individual claim; and (3) to exclude the expert opinions of the Class Representatives' expert, Toby Johnson. *See* Docs. 31, 177 and 179. Class Counsel also secured Rule 23(b)(3) certification of the litigation class, which ruling State Farm unsuccessfully sought to challenge under Rule 23(f). *See* Docs. 178 and 181.

Settlement negotiations and working to refine damage numbers consumed additional time and resources over the course of nine months, including four separate mediation sessions with mediator Van Tassel. The multiple negotiations with State Farm's counsel, which ultimately led to the proposed Settlement, required substantial preparation and follow-up work. After the Settlement was reached, several weeks of detailed discussions followed concerning the specific terms of the Settlement, claim form and notice.

Each of the above-described efforts was essential to achieving the Settlement before the Court. The time and resources Class Counsel devoted to prosecuting and settling this Action justify the requested fee. *Waters*, 2012 WL 2923542, at *16; *Deas*, 2005 WL 8158201, at *14.

2. The Complexity Of The Litigation Supports The Requested Fee.

"It is common knowledge that class action suits have a well deserved reputation as being most complex." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Dunn v. Dunn*, 318 F.R.D. 652, 659 (M.D. Ala. 2016) (recognizing complexity of class litigation "with their notable uncertainty, difficulties of proof, and length."). As this Court's sister district has noted, a class action "to be successful, involves extensive discovery and expert involvement; contentious argument and voluminous briefing over certification, summary judgment and *Daubert* challenges; a lengthy trial; and appeals." *Swaney*, 2020 WL 3064945, at *4.

This case is no exception. The proposed settlement here was not reached until Class Counsel had conducted extensive pre- and post-suit analysis and investigation; thoroughly researched the law and facts; engaged in discovery and extensive data analysis; briefed dispositive, certification and *Daubert* motions; and assessed the risks of prevailing at both the trial court and appellate levels for more than five years. Doc. 200-1, PageID.11792-11796, 11802, ¶¶ 7-18, 39.

Labor depreciation class actions are notoriously complex and slow moving due to the increased likelihood of interlocutory appeals via state supreme court "question certification" laws, 28 U.S.C. 1292(b) and/or Federal Rule of Civil Procedure 23(f)—this is particularly true in class actions involving State Farm's labor withholdings. For example, the labor depreciation class action, *Mitchell v. State Farm Fire & Cas. Co.*, was filed on June 27, 2017, and remained pending for nearly three-and-a-half years (and after a Fifth Circuit appellate decision). *Mitchell*, No. 17-00170 (N.D. Miss.); *Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700 (5th Cir. 2020), *reh'g*

and reh'g en banc denied (5th Cir. May 13, 2020), *aff'g Mitchell v. State Farm Fire & Cas. Co.*, 327 F.R.D. 552 (N.D. Miss. 2018), and *aff'g in part and rev'g in part and remanding Mitchell v. State farm Fire and Cas. Co*., 335 F. Supp. 3d 847 (N.D. Miss. 2018). In fact, from start to finish, the appellate process associated with State Farm's appeal of the district court's adverse rulings on State Farm's motion to dismiss and Rule 23 certification motion in *Mitchell* took over 18 months.

As another example, the labor depreciation lawsuit *Stuart v. State Farm Fire & Cas. Co.* was filed on January 2, 2014, and remained pending in the Western District of Arkansas for over six years (and after an Eighth Circuit decision).[11] *Stuart*, Case No. 4:14-4001 (W.D. Ark.). Similarly, *Hicks v. State Farm Fire & Cas. Co.*, was filed on February 28, 2014, and remained pending in the Eastern District of Kentucky until April 28, 2022, when the case settled and judgment was entered just past its eighth-year anniversary. During the summer of 2020, the Sixth Circuit resolved State Farm's *second* interlocutory appeal in *Hicks*. *See generally Hicks,* 965 F.3d 452 (6th Cir. 2020), *reh'g en banc denied* (6th Cir. Aug. 26, 2020).

As these cases demonstrate, the risk at the time of suit and settlement was and remains substantial. *Hicks v. State Farm Fire & Cas. Co.*, 751 F. App'x. 703, 710 (6th Cir. 2018) (the "substantial weight of authority" is in favor of insurers in labor depreciation class actions); Doc. 200-1, PageID.11801-11802, ¶¶ 34-39. This lawsuit could have continued for several additional years in trial and appellate courts absent settlement. More importantly, while labor depreciation class lawsuits have settled or been dismissed with no recovery, no certified labor depreciation class action has ever gone to final judgment in favor of the policyholder.

[11] *Stuart v. State Farm Fire & Cas. Co.,* 910 F.3d 371 (8th Cir. 2018*), reh'g and reh'g en banc denied* (8th Cir. Jan. 29, 2019).

State Farm retained experienced litigators Joseph Cancila and Jacob Kahn from Riley Safter Holmes & Cancila LLP, a national law firm with specialized expertise in defending class actions in general and labor depreciation cases, in particular. Absent settlement, this talented team of defense lawyers would have continued to put forward several grounds for avoiding both liability and class certification. Given the foregoing, the complexity, and risks inherent in the litigation support the requested fee.

3. The Skill And Experience Of Counsel Supports The Requested Fee.

The skill and experience of counsel on both sides of the litigation is a factor courts consider in determining a reasonable fee award. *Waters*, 2012 WL 2923542, at *16-17. The Court previously found Class Counsel here have the requisite skill and experience in class action and labor depreciation litigation to serve effectively as class counsel for the Class. *Arnold,* 2020 WL 6879271, at *11. In fact, Class Counsel have taken on several large insurance companies in contingent fee litigation, including but not limited to labor depreciation cases against State Farm (e.g., *Hicks* and *Mitchell*, *supra*). *See* Doc. 200-1, PageID.11791-11792, ¶¶2-5; Doc. 200-2, PageID.11814-11818,¶¶2-11; Doc. 200-3, PageID.11821-11822, ¶¶2-9; Doc. 200-4, PageID.11825, ¶¶1-2. Given the excellent results achieved, the complexity of the claims and defenses, the real risk of non-recovery, the formidable defense team, the delay in receipt of payment, and the substantial experience and skill of counsel, the requested fees and costs award is reasonable compensation for the work done by Class Counsel in this case. *Waters*, 2012 WL 2923542, at *16 ("The skill necessary to litigate this case, despite the consistently tough opposition of reputable law firms with significant resources, is high. Accordingly, this factor weighs in favor of approving the requested fees in the amount of 35% of the Settlement Fund.").

4. The Amount Involved And Results Obtained Support The Requested Fee.

"Courts frequently consider this factor to be the most critical. In this instance, Counsel has negotiated a beneficial and creative settlement. This is extraordinary and warrants approval of Class Counsel's request." *Deas*, 2005 WL 8158201, at *14.

Under the Settlement, eligible Class Members who submit timely, complete claim forms stand to receive 100% of their still-withheld labor depreciation.[12] They will also receive 44% of the estimated GCOP Depreciation (if any) that was initially deducted from their ACV payments by State Farm. To date, no State Farm labor depreciation class action has resulted in the payment of GCOP Depreciation. Finally, 5.55% prejudgment interest per year will be provided to Class Members for the periods of withholdings, resulting in 28+% increase in payments for still withheld labor depreciation. These are very favorable terms, which are coupled with an agreed-to "over and above" fees and costs request, as well as administrative costs to be paid separately by State Farm. *See Bennett v. Behring Corp.*, 737 F.2d. 982, 986-87 & n.9 (11th Cir. 1984) (affirming settlement approval in which class fund represented 5.6% of potential recovery); *Waters*, 2012 WL 2923542, at *17 ("The monetary award for each Class Member is expected to be several thousand dollars. Considering the complexities of this case and the vigorous defense of opposing counsel, this is an excellent recovery when there was a very real chance the Class would no recover anything….").

Additionally, so-called "interest only" Class Members are also eligible to receive relief. Class Members who timely submit a claim, and from whom Non-Material Depreciation was initially deducted but who subsequently recovered all previously-withheld depreciation through

[12] Settlements in which class members are entitled to receive 100% of their claimed damages are both rare and exceptional. *E.g., Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) (holding settlement in which "Settlement Class Members who file timely and otherwise valid claims will receive 100% of their claimed damages—*a percentage almost unheard of in class-action litigation*" supported class counsel's fee request).

replacement cost benefit ("RCB") payments, will receive simple interest at 5.55% on the amount of estimated Non-Material Depreciation initially applied but subsequently recovered, plus simple interest at 5.55% on 44% of the estimated GCOP Depreciation (if any) that was initially applied but subsequently recovered, calculated from the date of the initial ACV Payment through the date of the final RCB payment.

Finally, "this Settlement cannot be evaluated in the vacuum of monetary recovery." *In re Blue Cross*, 2020 WL 8256366, at *17 (recognizing business practice changes established by proposed settlement were "exceptional" and weighed in favor of settlement approval); *see also Poertner*, 618 Fed. App'x at 628 (approving inclusion of nonmonetary relief in "settlement pie" when evaluating whether proposed settlement was fair, and rejecting objection that nonmonetary relief was illusory since Gillette was no longer selling or marketing batteries at issue when it agreed to stop putting allegedly misleading statements on batteries' packaging as record showed Gillette's cessation "was motivated by the present litigation"). State Farm's cessation of its labor depreciation practice in the state of Alabama as of August 3, 2017 (*i.e.*, the date of this Court's Order denying State Farm's motion to dismiss), and its corresponding labor withholding refund program,[13] are significant achievements that were the direct results of this litigation. Accordingly, these business practice changes, coupled with the monetary relief provided in the proposed Settlement, support Class Counsels' fee request. *See Deas*, 2005 WL 8158201, at *14 ("The financial relief available to Class Members is substantial; however, this amount does not reflect the total value of relief provided … under the Settlement…. [T]he proposed Settlement also includes non-monetary injunctive relief.").

[13] *See Arnold*, 2020 WL 6879271, at *3, 5, 11.

5. The Customary Fee And Awards In Similar Cases Support The Requested Fee.

"The reasonableness of a fee may also be considered in light of awards made in similar litigation within and without the court's circuit." *Waters*, 2012 WL 2923542, at *18. The "percentage of the fund" fee award sought here by Class Counsel (approximately 22%) is supported by Eleventh Circuit precedent and is *lower* than the typical range of fee awards made by courts in this Circuit. *See, supra,* Arg. § II.B. Additionally, Class Counsels' requested fee is commensurate with the fees awarded in similar labor depreciation class actions in other jurisdictions. *See* Doc. 200-1, PageID.11809-11812 (identifying all "claims made" Nonmaterial Depreciation/labor depreciation class settlements resulting in final approval between June 1, 2017 and July 22, 2022 of which Class Counsel are aware with range of percentages for fees and costs awards between 17.08% to 27.7%). Coupled with the outstanding results in this case—100% recovery of withheld Nonmaterial Depreciation recovered for Class Members—the "over and above" requested fees and costs of $8,595,000 should be deemed fair and reasonable.

6. Class Counsel Assumed Considerable Risk To Pursue This Case On A Pure Contingency Basis And Were Precluded From Other Employment As A Result.

Class Counsel have pursued this litigation on a contingent basis with the amount of any fee being subject to Court approval, assuming a substantial risk that the cases would result in no recovery and leave counsel not only uncompensated, but also losing their substantial investments in the cases. *See* Doc.200-1, PageID.11801-11806, ¶¶34-39, 49-55 (discussing substantial litigation risks). These risks support the reasonable fee award requested here. *Waters*, 2012 WL 2923542, at *17 (finding fact that "Class Counsel accepted this matter on a contingent basis" and "incurred significant expenses in prosecuting this action over the course of five years and received no compensation" supported fee request of 35% of settlement fund). Moreover, without the willingness of Class Counsel to assume the risks inherent in this case (or in other cases of similar

magnitude and complexity) Class Members would not have recovered anything, let alone the substantial recovery secured here. The public interest is thus served by awarding compensation in an amount appropriate to encourage skilled attorneys to assume the risks of this type of litigation.

7. The "Undesirability" Of The Case Supports The Requested Fee.

Some of the risks facing Class Counsel have been described above, as well as in the Peterson Declaration (Doc.200-1, PageID.11801-11806, ¶¶34-39, 49-55). "The expense and time in prosecuting such litigation on a contingent basis, with no guarantee or high likelihood of recovery, would make this case highly undesirable for many attorneys. Therefore, this factor, too, supports the requested amount of attorneys' fees. *Waters*, 2012 WL 2923542, at *18.

Indeed, when Class Counsel filed this case "the substantial weight of authority" was *against* policyholders throughout the United States. *Hicks*, 751 F. App'x. at 710; *see, e.g., In re State Farm Fire & Cas. Co. (LaBrier)*, 872 F.3d 567 (8th Cir. 2017) (reversing certification of State Farm labor depreciation class and concluding labor may be depreciated under Missouri law). Moreover, at the time this case was filed, no appellate courts had addressed the labor depreciation merits question under Alabama law, or the propriety of class certification of a labor depreciation class within the Eleventh Circuit. Accordingly, heading into this case, Class Counsel confronted these issues without any assurances as to how the Court would rule. Class Counsel accepted the case and the risks that accompanied it. Given the positive societal benefits to be gained from attorneys' willingness to undertake this kind of difficult and risky, yet important, work, such decisions should be incentivized. *See Waters*, 2012 WL 2923542, *16-18.

8. The Reaction Of The Class

"The absence of objections to Class Counsel's fee request also supports approval of the request." *Deas*, 2005 WL 8158201, at *14. "This lack of objections is 'strong evidence of the

propriety and acceptability of that request.'" *Id.* To date, *no* Class Members have objected to any aspect of the Settlement, including Class Counsels' request for attorneys' fees, expenses, and costs. Doc. 200-1, PageID.11805, ¶54.

9. Nature/Length Of Professional Relationship With The Client

Although this factor could be deemed inapplicable or neutral to the Court's analysis here, it bears repeating that the length of the relationship *in this matter* is extensive as the case has been pending for over five years. This factor therefore supports Class Counsels' fee request.

III. THE COURT SHOULD RESERVE THE ISSUE OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES UNTIL THE FINAL DISPOSITION OF *JOHNSON V. NPAS SOLS.*

As previously discussed, the permissibility of service awards within the Eleventh Circuit was somewhat unsettled at the time the parties executed this Settlement. *See Phillips*, 2021 WL 3710134 at *5-6; *see also Venerus v. Avis Budget Car Rental, LLC*, 2022 WL 2441903, at *7 (M.D. Fla. June 24, 2022) (recognizing *Johnson* "ruling is something of an outlier among the circuits and is a significant change from longstanding practice."). While a divided panel of the Eleventh Circuit has held "incentive" or "service" awards that compensate a class representative solely for her time and efforts in commencing and prosecuting a class action lawsuit are not permitted, district courts within the Circuit have continued to provide class representatives additional compensation above that provided to the class. *Compare NPAS Sols.,* 975 F.3d at 1260 (holding incentive award "that compensates a class representative for his time and rewards him for bringing a lawsuit" while commonplace is unlawful), *pet. for reh'g en banc denied* (11th Cir. Aug. 3, 2022), *with, e.g., Dozier v. DBI Servs., LLC*, 2021 WL 6061742, at *9 (M.D. Fla. Dec. 21, 2021) (recommending $7,500 service payment to named plaintiff as "separate consideration for a general release"), *rep. and recommendation adopted by* 2022 WL 2305814, (M.D. Fla. Jan. 19, 2022);

Tweedie v. Waste Pro of Fla., Inc., 2021 WL 5843111, at *11 (M.D. Fla. Dec. 9, 2021) (approving $7,500 payment to named plaintiff as consideration for execution of a general release despite concern such payment "constitutes a thinly veiled attempt at an incentive award"); *Broughton v. Payroll Made Easy, Inc.*, 2021 WL 3169135, at *4, n.5 (M.D. Fla. July 27, 2021) (finding settlement provision requiring defendant to pay class representative $5,000 "as consideration for his agreement to execute a general release that was beyond the scope of the class release "fair, adequate, and reasonable[,]" and distinguishing *NPAS Sols.* prohibition on service awards). "Thus, while the proscription set forth in *Johnson* is clear, it is not well-settled law." *Venerus*, 2022 WL 2441903, at *7.

Accordingly, several courts within the Circuit, including this Court's sister district, have carved out and reserved the issue of service awards until such time that the final outcome[14] of *NPAS Sols.* is known. *Phillips*, 2021 WL 3710134, at *5 (collecting cases); *Macrum v. Hobby Lobby Stores, Inc.*, 2021 WL 3710133, at *5 (N.D. Ala. Aug. 20, 2021).[15] This approach has been deemed "the current best practice." *Macrum*, 2021 WL 3710133, at *5.

Because the permissibility of service awards in the Eleventh Circuit remains subject to potentially further appellate review by way of a petition for certiorari as of the date of this filing,

[14] In this case, the "final outcome of *Johnson* refers to the date upon which all appellate courts with jurisdiction (including the United States Supreme Court by petition for certiorari) have ruled upon such appeal …." Doc. 196-1, ¶ 13.6.

[15] *See also Venerus*, 2022 WL 2441903, at *7-8 (ordering service award to named plaintiff "should be held in escrow until resolution of the *Johnson* decision"); *Belin v. Health Ins. Innovations, Inc.*, 2022 WL 1125788, at *1 (S.D. Fla. Apr. 15, 2022) (approving fees and costs request while reserving jurisdiction as to class representative service awards and ordering settlement administrator to hold in service award funds in escrow pending the final adjudication of *Johnson*); *Pinon v. Daimler AG*, 2021 WL 6285941, at *20 (N.D. Ga. Nov. 30, 2021) (approving settlement except for incentive award but retaining jurisdiction to allow plaintiff to renew request if *NPAS, Sols.* is reversed); *Cotter v. Checkers Drive-In Rest., Inc.*, 2021 WL 3773414, at *13 (M.D. Fla. Aug. 25, 2021) (same).

Plaintiffs respectfully request that this Court should: (1) approve Plaintiffs' unopposed motion for award of attorneys' fees, costs, and litigation expenses; and (2) defer a determination of service awards to Plaintiff and the Additional Class Representatives, while retaining jurisdiction to allow Plaintiff and the Additional Class Representatives to renew their request for service awards after the final outcome of *Johnson, supra. See* SA ¶¶ 13.5-13.7; *Phillips*, 2021 WL 3710134 at *6 (retaining jurisdiction over matter until ultimate disposition of *Johnson* is known and holding "[i]f *NPAS Sols.* is reversed after that final decision, Plaintiff may refile a motion renewing her request for approval of class representative awards").

CONCLUSION

For the foregoing reasons, the Class Representatives respectfully request that the Court: (1) award attorneys' fees, costs, and litigation expenses to Class Counsel in the amount of $8,595,000 (a maximum of 22% of the estimated total benefit made available as a result of the settlement without any reduction in the payments to be made to Class Members); and (2) defer a determination on service awards to the Class Representatives, but retain jurisdiction to allow the Class Representatives to renew their request for service awards after the final outcome of *NPAS Sols., supra*.

Dated: August 10, 2022

Respectively submitted,

/s/ Erik D. Peterson

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following registered participants:

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