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,	*	
vs.	*	Case No.: 2:17-CV-148-TFM-C
STATE FARM FIRE AND CASUALTY COMPANY,	*	
Defendant.	*	

STATE FARM FIRE AND CASUALTY COMPANY'S SEPARATE SUBMISSION IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Defendant State Farm Fire and Casualty Co. ("State Farm"), by its undersigned counsel, respectfully provides this separate submission in support of final approval of the Proposed Settlement of this case, as described in the Stipulation and Settlement Agreement entered into by State Farm and Plaintiff Annie Arnold ("Plaintiff") and additional class representatives Bobby Abney, Tina Daniel, and Kenneth Scruggs (collectively, the "Additional Class Representatives") (Doc. 196-1) (hereinafter, the "Settlement Agreement").[1]

INTRODUCTION

This case is one of several class actions filed against insurers challenging the practice of applying "labor depreciation" when calculating actual cash value ("ACV") payments under property insurance policies in Alabama. The Complaint asserts a single claim for breach of contract on behalf of policyholders who made structural damage claims for property located in

[1] Capitalized terms used herein shall have the meaning given to them in the Settlement Agreement.

Alabama under policies written by State Farm. State Farm has denied any wrongdoing throughout this litigation and continues to so maintain.

State Farm believes that it ultimately would have prevailed in this matter either at a trial on the merits or in any post-trial appeal. Though the Court denied State Farm's motion to dismiss and granted class certification over State Farm's objection, neither ruling has been tested on appellate review. In State Farm's view, Plaintiff and the Additional Class Representatives would be unable to demonstrate to a jury that State Farm's policy does not permit labor depreciation. State Farm likewise believes that Plaintiff and the Additional Class Representatives would be unable carry their burden of proof in establishing that the ACV payments State Farm made to them and other class members were insufficient, or that State Farm otherwise failed to fully meet its contractual obligations.

Despite State Farm's confidence that it would have received a favorable outcome at trial and in a subsequent appeal, it believes that the claims-made Settlement described in the Agreement is in the best interests of its policyholders. First, this matter has been actively litigated for over five years and would likely span several more years inclusive of trial and appeals. Second, a class-wide trial of this matter would be unmanageable and impose unnecessary burdens both on State Farm and on State Farm's current and former Alabama policyholders. It further would present significant costs and risks for each side.

State Farm therefore has determined that the Proposed Settlement is in the best interests of its current and former Alabama policyholders. State Farm seeks to resolve this case so that it can avoid further litigation expenses and uncertainty, while continuing to provide excellent service to its policyholders. As set forth below, State Farm believes that the Proposed Settlement is fair, reasonable, and adequate, especially in view of the strength of State Farm's defenses to the asserted

claims and the difficulties Plaintiff and the Additional Class Representatives would face in establishing liability and proving damages. Moreover, as discussed further below, the full and successful implementation of the Notice Plan, the notification of appropriate state and federal officials in accordance with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, the lack of any objections by any of those officials, the absence of objections by any Class Member or other interested persons, and the other fairness factors discussed below demonstrate that the Settlement should be finally approved by the Court.

BACKGROUND

A. Procedural History

Plaintiff filed this action in March 2017 in the Circuit Court of Dallas County, Alabama, asserting a breach of contract claim on behalf of a class of State Farm insured with structural loss claims in Alabama. State Farm timely removed the action to this Court. Doc. 1. On April 14, 2017, State Farm moved to dismiss Plaintiff's complaint 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 case to state court. Doc. 19.

On August 3, 2017, the Court denied both motions. Doc. 31. State Farm asked the Court to make Section 1292(b) findings regarding its denial of the motion to dismiss, to certify the "labor depreciation" question to the Alabama Supreme Court, and to reconsider in part the denial of the motion to dismiss. Doc. 32. On November 14, 2017, the Court denied State Farm's motion. Doc. 35.

Following extensive fact and expert discovery, on April 22, 2019, Plaintiff moved for class certification. Doc. 87. In addition to briefing the class certification question, State Farm moved for summary judgment on Plaintiff's individual claim (Doc. 119) and to exclude the opinions of Plaintiff's class certification expert witness, Toby Johnson (Doc. 122). State Farm also asked the

Court to hold an evidentiary hearing on class certification and the issues raised in its related motions. Doc. 114. The Court granted State Farm's request for an evidentiary hearing, which was held on July 22-23, 2020.

On September 30, 2020, the Court denied State Farm's motion to exclude the opinions of Toby Johnson. Doc. 177. On November 23, 2022, the Court denied State Farm's motion for summary judgment on Plaintiff's individual claim (Doc. 179) and granted Plaintiff's motion for class certification (Doc. 178).

On December 7, 2020, State Farm filed a Rule 23(f) petition to appeal the class certification order. *See* Doc. 180 at ¶ 2. That petition subsequently was denied by the Eleventh Circuit. Doc. 181. Following the denial, the parties jointly requested a stay to allow them to pursue mediation. Doc. 184.

B. Summary of Proposed Class and Settlement

The parties participated in three full-day mediation sessions before private mediator George M. Van Tassel, Jr., resulting in this arm's length, claims-made settlement. The parties then continued to engage in extensive negotiations over several months to draft a term sheet, followed by negotiation of the Settlement Agreement.

The Settlement Agreement was fully executed on January 20, 2022. Doc. 196-1. While the terms of the Proposed Settlement are set forth more fully in the Settlement Agreement, the following summary of its key features demonstrates that it provides real and substantial benefits to the Class, while also (in State Farm's view) giving credence to the defenses State Farm has asserted throughout this litigation.

The Class as defined in the Settlement Agreement includes "all persons and entities insured under a State Farm structural damage policy who made: (1) a structural damage claim for property located in the State of Alabama with a date of loss on or after March 8, 2011, but before August

3, 2017; and (2) which resulted in an actual cash value payment during the class period from which 'non-material depreciation' was withheld from the policyholder; or which would have resulted in an actual cash value payment but for the withholding of 'non-material depreciation' causing the loss to drop below the applicable deductible." Doc. 196-1 at ¶ 2.9. Subject to State Farm's right to challenge or reduce Claim Settlement Payments as outlined in the Settlement Agreement, potential Class Members who submit an accurate and complete Claim Form within the Claim Period, and are deemed eligible, will receive a Claim Settlement Payment in accordance with the following provisions:

> **Group A**: **Settlement Claimants Who Previously Received Only An ACV Payment.** The Claim Settlement Payments to Claimants from whom estimated Non-Material Depreciation was initially deducted and who did not receive any subsequent [replacement cost benefits ("RCB")] payments will be equal to 100% of the estimated Non-Material Depreciation that was initially deducted from the ACV payment, plus 44% of the estimated General Contractor Overhead and Profit Depreciation (if any) that was initially deducted from the ACV payment, plus simple interest at 5.55% on those additional amounts to be paid from March 8, 2017, to the Effective Date.
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> **Group B**: **Settlement Claimants Who Previously Received Partial RCBs.** The Claim Settlement Payments to Claimants from whom estimated Non-Material Depreciation was initially deducted and who partially recovered the initially deducted Non-Material Depreciation through payment of RCBs will be equal to 100% of the estimated Non- Material Depreciation that was not fully recovered, plus 44% of the estimated General Contractor Overhead and Profit Depreciation (if any) that was initially deducted from the ACV payment and that was not fully recovered through payment of RCBs, plus simple interest at 5.55% on those additional amounts to be paid from March 8, 2017, to the Effective Date.
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> **Group C**: **Settlement Claimants Who Previously Received Full RCBs.** The Claim Settlement Payments to Claimants from whom Non-Material Depreciation was initially deducted and who subsequently recovered all depreciation will be equal to 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 General Contractor Overhead and Profit 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 replacement cost payment.

> **Group D**: **Settlement Claimants Who Would Have Received an ACV Payment But For Application of Non-Material Depreciation.** The Claim Settlement Payments to these Claimants shall be equal to 100% of the portion of the estimated Non-Material Depreciation that the Settlement Class Member did not receive as an ACV payment solely because application of Non-Material Depreciation caused the calculated ACV figure to drop below the applicable deductible, plus simple interest at 5.55% on those amounts from March 8, 2017, to the Effective Date.

Id. at ¶ 6.4.[2]

State Farm's right under the Settlement Agreement to challenge or reduce the settlement payments otherwise provided for in these groupings is consistent with State Farm's position through the Action that many policyholders were fully compensated for their losses notwithstanding State Farm's alleged labor depreciation practices. The Settlement Agreement provides State Farm the right to review its own claim file materials for each Claim and to reduce the amount to be paid to any Claimant on the basis that (i) the Claimant is not a Settlement Class Member, (ii) the Non-Material Depreciation portion of the Claim Settlement Payment amount as calculated above would exceed the applicable limit of liability under the Class Member's Policy, or (iii) the Claimant already recovered the Non-Material Depreciation in full through payment of RCBs. More specifically:

> (a) If Defendant determines through its review of claim file materials that Non-Material Depreciation was not actually applied to any payment made in connection with the Covered Loss, then the Claimant is not a Settlement Class Member and is not entitled to claim the benefits afforded by this Agreement.
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> (b) If Defendant determines through its review of claim file materials that the Claimant is not a Settlement Class Member because the Claimant already received ACV payments from Defendant for the Covered Loss in the full

[2] Under the claims-made settlement structure, these Claim Settlement Payments will not be reduced by any attorneys' fees that the Court directs State Farm to pay separately to Class Counsel as part of the final approval order.

> amount of any applicable limits under the Claimant's Policy, then the Claimant is not entitled to claim the benefits afforded by this Agreement.
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> (c) If Defendant determines through its review of claim file materials that the Non-Material Depreciation portion of the Claim Settlement Payment amount as calculated above would exceed any applicable limits of liability under the Class Member's Policy, then Defendant may reduce the Non-Material Depreciation portion of the Claim Settlement Payment accordingly and update the interest calculation to correspond to the reduced figure.
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> (d) If Defendant determines through its review of claim file materials that the Non-Material Depreciation amount as determined above (in Section 7.1) was already recovered in full through RCB payments, then Defendant may calculate the Claim Settlement Payment as under Group C from Section 6.4 above.

Id. at ¶ 7.2.

Under the Settlement Agreement, State Farm has sixty (60) days after it receives all timely, properly completed Claim Forms (subject to reasonable extensions) to provide Class Counsel with a complete list of: (a) Settlement Class Members who submitted Claim Forms; (b) the amount of Claim Settlement Payments, if any, owing to each; and (c) if no Claim Settlement Payment is owing, a brief explanation why. *Id.* at ¶ 7.5. Within thirty (30) days after the final determinations of Claim Settlement Payments, State Farm will send funds to the Administrator for use in issuing Claim Settlement Payments. *Id.* at ¶ 7.7.

In addition, the Administrator will send a notice to all Class Members who submitted a Claim Form explaining that the Settlement Class Members may dispute the amount of their Claim Settlement Payment or denial of their Claim by requesting in writing, within thirty (30) days of the notice, a final and binding resolution by the Neutral Evaluator, explaining in writing the reason for their dispute, and submitting any supporting documentation. *Id.* at ¶ 7.9. The Neutral Evaluator will then decide what Claim Settlement Payment, if any, shall be paid to the Claimant, which decision shall be final and not subject to further review. *Id.* at ¶ 7.11.

State Farm submits that the foregoing manageable processes and procedures could not have occurred had the Action proceeded to trial as a class action, for it does not believe that there is class-wide evidence to adjudicate these liability, damages, and class membership issues for all members of the Class, as required for a litigation class under Rule 23. Instead, individual evidence would need to be presented, and disputes regarding that evidence adjudicated, for each putative class member.

C. The Court's Preliminary Approval of the Settlement

On February 9, 2022, Plaintiff and the Additional Class Representatives filed a motion for preliminary approval of the Proposed Settlement. Doc. 196. On April 25, 2022, the Court granted the motion and issued a Preliminary Approval Order in which it preliminarily approved the Settlement as "fair, adequate, and reasonable." Doc. 199 at ¶ 4. The Court also found that the plan for Class Notice specified in the Agreement "constitutes the best notice practicable under the circumstances," and "meets the requirements of the Federal Rules of Civil Procedure, the requirements of due process under the United States Constitution, and the requirements of any other applicable rules or law." *Id.* at ¶ 16. The Court further found that "all notices concerning the Settlement required by the Class Action Fairness Act of 2005 . . . have been [or will be sent]." *Id.* at ¶ 17. The Court appointed JND Legal Administration ("JND") to act as third-party administrator for the Proposed Settlement and directed JND to disseminate the Class Notice pursuant to that plan. *Id.* at ¶¶ 9, 11. Finally, the Court conditionally certified the previously certified litigation class for settlement purposes and scheduled a Final Approval Hearing for September 23, 2022. *Id.* at ¶¶ 5, 19.

ARGUMENT

I. The Proposed Settlement is Fair, Reasonable, and Adequate.

The Eleventh Circuit recognizes that "[p]ublic policy strongly favors the pretrial settlement of class action lawsuits." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). Under Rule 23(e)(2), a Court may approve a class settlement based on a finding that the proposed settlement is "fair, reasonable, and adequate," which requires consideration of whether:

> (A) The class representatives and class counsel have adequately represented the class;
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> (B) The proposal was negotiated at arm's length;
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> (C) The relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and
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> (D) The proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). In reviewing a proposed settlement, the Court also must find that there has been no fraud or collusion between the parties. *Marcrum v. Hobby Lobby Stores, Inc.*, 2021 WL 3710133, at *2 (N.D. Ala. Aug. 20, 2021); *see also Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.").

In addition to the Rule 23(e)(2) requirements, the Eleventh Circuit has also identified the following factors as relevant to whether a settlement is fair and adequate: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *In re Equifax Inc. Customer Data*

Sec. Breach Litig., 999 F.3d 1247, 1273 (11th Cir. 2021) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984)), *cert denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021).

The following discussion demonstrates that each of the factors above supports the Court's final approval of the Proposed Settlement as fair, reasonable, and adequate.

A. Absence of Fraud and Collusion

As a threshold matter, supervision of settlement negotiations by an independent mediator helps to ensure that the negotiations are conducted at arm's length and without collusion between the parties. *See, e.g.*, *Marcrum*, 2021 WL 3710133, at *3; *Saccoccio v. JPMorgan Chase Bank, N.A.*, 297 F.R.D. 683, 692 (S.D. Fla. 2014) (noting there is a "presumption of good faith in the negotiation process"). Here, Plaintiff and State Farm were both represented by experienced counsel who vigorously defended their respective clients' interests. Prior to entering into the Settlement Agreement and agreeing to its terms, the Parties undertook complex discovery and motion practice. Further, the Agreement was reached only through multiple, arm's length mediation sessions overseen by Mr. Van Tassel. As such, the "absence of fraud or collusion requirement has been satisfied." *See Marcrum*, 2021 WL 3710133, at *3 (finding that a proposed settlement is not the product of fraud or collusion where "the settlement process and the litigation history demonstrates that the settlement was negotiated at arm's length and the without collusion or any other improper activity, and that nothing in the record contradicts this finding").

B. The Likelihood of Success

Of the *Bennett* factors, "[t]he likelihood of success at trial is by far the most important factor when evaluating a settlement." *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1032–33 (N.D. Ala. 2006), *aff'd sub nom. United States v. Alabama*, 271 F. App'x 896 (11th Cir. 2008). The likelihood of success "is weighed against the amount and form of relief contained in the settlement." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1319 (S.D. Fla. 2005). This

includes assessing the litigation risks faced by class members, including the strength of the defendant's defenses and the potential for an unfavorable verdict. *See Broughton v. Payroll Made Easy, Inc.*, 2021 WL 3169135, at *2 (M.D. Fla. July 27, 2021) (approving settlement where the plaintiff faced "legal challenges not only to the merits of the action but also to certification of the class as well as the possibility of an appeal"); *In re Checking Acct. Overdraft Litig.*, 2020 WL 4586398, at *11 (S.D. Fla. Aug. 10, 2020) (finding a settlement to be "a fair compromise" where there were "myriad risks attending [the plaintiff's] claims, as well as the certainty of substantial delay and expense from ongoing litigation"). In weighing the likelihood of success on the merits against the proposed settlement, the court "should not reach any ultimate conclusions with respect to the issues of fact or law involved in the case." *Knight*, 469 F. Supp. 2d at 1033. Instead, this factor favors approval if there is "no guarantee that the plaintiffs would prevail at trial on their . . . claims." *Camp v. City of Pelham*, 2014 WL 1764919, at *3 (N.D. Ala. May 1, 2014).

Because there is no guarantee that Plaintiff would prevail at trial in this matter, this factor weighs in favor of final approval. Given the Court's ruling on State Farm's motion to dismiss finding that State Farm's prior policy language was ambiguous as to whether it permitted labor depreciation, the ultimate resolution of Plaintiff's liability theory remains an open question in this case. Specifically, whether labor depreciation was permissible under State Farm's policy will need to be decided by the jury: "when the terms of a contract are ambiguous in any respect, the determination of the true meaning of the contract is a question of fact for the jury." *Dill v. Blakeney*, 568 So.2d 774, 777-78 (Ala. 1990); *accord Certain Underwriters at Lloyd's, London v. S. Nat'l Gas Co.*, 142 So.3d 436, 454 (Ala. 2013). State Farm submits that a jury could find in its favor on that issue. Indeed, another federal court in Alabama has concluded that a policy effectively defining "ACV" as replacement cost less depreciation—the same formula that Plaintiff

acknowledges State Farm appropriately used to calculate ACV under their policies—"logically" permits "depreciation of the full estimated cost of repair, which obviously includes materials and labor." *Ware v. Metropolitan Property and Casualty Insurance Co.*, 220 F. Supp. 3d 1288, 1291 (M.D. Ala. 2016) (Land, J.). Further, a substantial number of state supreme courts (and two federal appellate courts) have reached a similar conclusion.[3]

In addition, to prevail on the breach of contract claim, Plaintiff, the Additional Class Representatives, and each class member must prove that State Farm's ACV payments did not sufficiently compensate them for the actual cash value of their damaged property. State Farm contends that resolution of this question turns on whether the amount paid was or was not less than the amount the policy promised—namely, the ACV of the damaged property. But because State Farm calculates ACV payments using *estimates* of replacement costs, State Farm's estimate of ACV may not reflect the actual ACV of any damaged property. Indeed, depending upon the inputs to the estimated ACV and for a myriad of reasons, the amount paid by State Farm to a policyholder may be much higher than the actual ACV, regardless of the application of depreciation for labor and other non-material costs. *See generally* Doc. 119, at 10-13. Only by examining the actual costs to repair the damaged property can the true ACV be derived and compared to the ACV payment each policyholder received. Further, because State Farm's policies expressly cap the amount owed for ACV at the policyholder's cost to complete repairs, State Farm submits that members of the class who received initial claim payments that exceeded their actual cost of repairs

[3] *See, e.g.*, *Accardi v. Hartford Underwriters Ins. Co.*, 838 S.E.2d 454, 457 (N.C. 2020) (holding that it "makes little sense" to "differentiat[e] between labor and materials when calculating" ACV under the replacement cost less depreciation method because the "value of a house is determined by considering it as a fully assembled whole, not as the simple sum of its material components").

will be unable to establish breach of contract as a matter of law. Simply put, those class members were not underpaid for ACV and, thus, the policy was not breached.

Plaintiff's claim is illustrative of these defenses. State Farm believes that the evidence at trial would establish that its initial ACV payment to Plaintiff for several repairs substantially exceeded her actual cost for these repairs, meaning that State Farm overpaid her for ACV by several thousand dollars. *See, e.g.*, Doc. 119, at 12-13. For example, while Plaintiff represented to State Farm that she would incur replacement costs identified by a particular contractor of $49,704 (*see* Arnold Dep., Doc. 118-2, at 139:22-141:22, 164:17-165:16), she conceded in her deposition that she did not recall hiring the contractor or paying them to do the repairs (*see id.* at 63:14-64:4, 65:2-7, 140:15-141:14, 162:22-163:13). As a result, Plaintiff's documented repair costs were substantially less than the amount of the ACV payment she received from State Farm. *See* Pierce Decl., Doc. 118-4 at ¶ 10; *id.* at 95 (Bent Tree Electric Co. Estimate); *id.* at 97 (Premium Roofing & Construction Proposal); *id.* at 63 (Payment Summary); *id.* at 103 (Claim File History); *see also* Plaintiff's RFA Resp., Doc. 118-5, at 5-6. In sum, Plaintiff may well be unable to prove at trial that she was underpaid, regardless of State Farm's application of depreciation for labor and other non-material costs in calculating her ACV payment.

How overstatements such as this impact the overall sufficiency of State Farm's ACV payments—regardless of labor depreciation—is an issue that cannot be decided in a vacuum based solely on an initial estimate, but rather will require individualized determinations by the trier of fact. Indeed, this Court denied State Farm's motion for summary judgment as to Plaintiff's individual claim after finding that there were multiple triable issues of fact for her claim that would need to be resolved by a jury. *See* Doc. 179, at 9-12.

A similar analysis could well be required for a substantial number of potential class members' claims. In fact, as State Farm demonstrated in opposing class certification, individualized review and analysis of claim files as well as records in the sole possession of policyholders may be required to determine which policyholders (a) received an ACV payment with labor depreciation applied, (b) received a payment of the applicable policy limit, (c) recovered any RCBs, or (d) completed repairs to all or part of the damaged property using their initial ACV payment. *See* Albright Rpt., Doc. 106-3 at 43-53 (Examples 1-5).[4]

Although this Court granted Plaintiff's motion for class certification, that ruling—like the Court's ruling denying State Farm's motion to dismiss—was interlocutory in nature and did not resolve on the merits any elements of Plaintiff's claims or State Farm's defenses, and neither ruling has been tested via the appellate review process. While State Farm expects that a jury might well rule in its favor in this matter, the Court may also determine at, before, or after trial that the case should not be maintained as a class action under Rule 23 because of litigation manageability issues. Indeed, another district court in Alabama recently denied class certification in a similar case because of the individualized proof that would be required at trial. *See Brasher v. Allstate Indem. Co*., 2020 WL 4673259, at *13 (N.D. Ala. Aug. 12, 2020) (Axon, J.) (holding that even "assuming

[4] For example, State Farm's forensic accounting expert found that some policyholders whose claims she reviewed were paid full replacement costs up-front, without depreciation, even though the available spreadsheet data suggested that they had received ACV payments. *See id.* at 44-45 (Example 1). Moreover, State Farm's expert found that more than one-third of the policyholders whose claims she reviewed had recovered replacement cost benefits for at least some repairs. *See id*. at 26. Still others were able to complete repairs to some or even all of the damaged property using only their ACV payment. *Id*. at 45-47 (Example 2). And when actual repair costs were available, State Farm's expert found that they frequently differed from estimated costs. *Id.* at 48-49 (Example 3). State Farm's expert further found that State Farm often does not have records of policyholders' actual repair costs unless they seek replacement costs benefits. *Id*. at 47.

that depreciating labor breaches the policies, if a class member with one of these policies made repairs for less than their ACV payment, then the class member would [be] unable to establish" any claim for breach of contract). Alternatively, that issue could well be addressed upon any post-trial appeal.

Given the strength of State Farm's defenses, Plaintiff's success on the merits at trial or on appeal is far from guaranteed. This factor thus supports final approval of the Proposed Settlement.

C. The Range of Possible Recovery is Fair, Adequate, and Reasonable

The second and third *Bennett* factors are "easily combined and normally considered in concert." *Camp*, 2014 WL 1764919, at *3. "In considering the question of possible recovery, the focus is on the possible recovery at trial." *Lipuma*, 406 F. Supp. 2d at 1323. Each Settlement Class Member who submits a valid claim will receive 100% of all estimated non-material depreciation deducted from their ACV payments (and not subsequently recovered through payment of full replacement cost benefits), plus interest. Settlement Class Members will also receive 44% of estimated GCOP depreciation (if any) deducted from the ACV payment, plus interest—even though the Complaint does not expressly include a claim for GCOP depreciation. *See* Dkt. 178 at 3, n.1; Dkt. 179 at 3, n.1.

Thus, the settlement amount is within the range of possible recovery for Class Members: $0.00 if the jury determines that labor depreciation was permissible under State Farm's policy language, or they are otherwise unsuccessful at trial or on appeal, and 100% of the withheld non-material and GCOP depreciation for a successful litigant. Further, this recovery is well above the point in that range that courts have generally found to be fair and adequate. *See Parsons v. Brighthouse Networks, LLC*, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (approving 13% and 20% recoveries, and collecting cases approving recoveries as low as 5.5%).

D. The Complexity, Expense, and Likely Duration of the Litigation

A class settlement merits approval where it "will alleviate the need for judicial exploration of . . . complex subjects, reduce litigation costs, and eliminate the significant risk that individual claimants might recover nothing." *Lipuma*, 406 F. Supp. 2d at 1324. As discussed above, determining whether or not Plaintiff or any other potential class member received less than the contracted-for amount (ACV) will require an individualized analysis of each claim, analysis that creates further litigation manageability issues. Indeed, there may be many policyholders for whom an individualized review would show there is no entitlement to damages, including (for example) because the policyholder did not in fact receive an ACV payment with labor depreciation applied. This Court has already acknowledged that such an analysis may be necessary for each potential class member's claim—that is, that it may be necessary to examine the individual claim files for as many as 50,000 potential class members to exclude approximately 1,000 policyholders paid replacement costs upfront. *See* Doc. 178, at 7-8.

Individualized review of class members' claim files may also reveal a lack of damages in situations where class members (i) already received full payment of the applicable limits under their policy, (ii) sought or received replacement cost benefits payments; (iii) were able to complete repairs in full for the amount of their ACV payment; or (iv) received an ACV payment that was overstated by more than the amount of any labor depreciation applied in calculating the payment (as State Farm believes it would prove at trial with respect to Plaintiff's individual claim, *see* Doc. 119, at 4-9).

The Proposed Settlement eliminates these litigation manageability challenges that would otherwise be presented in a class-wide trial requiring such individualized damages proofs. The Proposed Settlement will provide agreed-upon relief to those class members who arguably experienced an economic impact because of an ACV payment that included depreciation of labor

and other non-material costs and who submit a claim. While State Farm will have the right to review any claims submitted as part of the Proposed Settlement for purposes of determining the entitlement to any settlement payment and the amount (pursuant to the terms agreed to in the Proposed Settlement), the Proposed Settlement will avoid individualized disputes as to liability and damages that would prevent this case from being tried on a class-wide basis.

E. The Stage of Proceedings at Which Settlement Was Achieved

Approval of a settlement is appropriate where the stage of proceedings is sufficiently advanced to ensure that plaintiffs "had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324. This case has been vigorously litigated for five years, including extensive motion practice testing the pleadings and class certification, fact discovery including multiple depositions, voluminous expert reports and depositions, and a two-day evidentiary hearing addressing class certification, *Daubert* and summary judgment motions. *See, e.g.*, *Marcrum*, 2021 WL 3710133, at *4. Accordingly, this factor weighs in favor of settlement approval.

F. The Lack of Opposition to the Settlement

As outlined in the Settlement Agreement and in Class Counsel's memoranda in support of preliminary and final approval, counsel for Plaintiff and State Farm have significant experience in complex class action litigation and have negotiated numerous other class action settlements, including settlements of other class actions challenging the depreciation of labor in the calculation of ACV. All Parties, including Plaintiff and the Additional Class Representatives, agree that the settlement as reflected in the Agreement is fair, adequate, and reasonable. That class counsel views the proposed settlement as fair to the class is entitled to considerable weight. *Knight*, 469 F. Supp. 2d at 1034; *see also Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215 (11th Cir. 1978). Thus, this factor also supports the Court's final approval of the Settlement.

The reaction of the absent Class Members also supports the approval of the Settlement. As reflected in the Settlement Agreement, the Parties agreed to a form and manner of mailing notice to potential class members, all of which was approved by the Court in its Preliminary Approval Order. Doc. 199. In accordance with the Preliminary Approval Order, notice has been disseminated to potential class members. ***The deadline for objections has passed, and not a single potential class member has objected to the terms of the Settlement.*** *See* Declaration of Kimberly K. Ness, Doc. 204 at ¶¶ 17-18. Therefore, this factor also supports the Court's final approval of the Settlement. *See Lipuma*, 406 F. Supp. 2d at 1324 (holding lack of opposition "points to the reasonableness of [the] proposed settlement and supports its approval").

II. Adequate Notice Has Been Provided to the Class and to the Appropriate State and Federal Officials.

A. The Notice Plan Has Been Fully and Successfully Implemented and Was More Than Sufficient.

The Court-approved Class Notice plan has now been fully implemented by the Parties and the Administrator, JND. As set forth in more detail in the affidavit filed by JND (*See* Doc. 204):

- State Farm provided JND with a spreadsheet list of 54,377 potential Class Members. JND ran the list of potential Class Members' addresses through the National Change of Address database and updated the addresses in the Class list accordingly. *Id.* at ¶¶ 6-7.
- On June 9, 2022, JND mailed a total of 58,521 Class Notices, via U.S. Mail postage paid, to potential Class Members. *Id.* at ¶¶ 8-9.
- As of September 8, 2022, 396 Class Notices were forwarded to updated addresses by the U.S. Postal Service, and 2,459 Class Notices were returned as undeliverable. JND performed advanced searches, using a skip trace, in an effort to obtain updated addresses for these Class Notices. As a result, JND was able to mail Class Notices to 1,020 updated addresses. *Id.* at ¶ 9.
- On September 9, 2022, JND mailed Postcard Notices to all Class Members who had not yet submitted either a Claim Form or a complete and timely request for exclusion. *Id.* at ¶ 10.

- JND established, and continues to maintain, a toll-free number with an automated system providing information about the Settlement, with the ability to request copies of the long-form notice or the Agreement in English or Spanish, and to speak with a live customer service representative or leave a voicemail message. As of September 8, 2022, there have been 2,046 calls to JND's toll-free number. *Id.* at ¶¶ 13-14.

- JND established, and continues to maintain, a settlement website with a copy of material documents related to the litigation and the proposed Settlement (including but not limited to the Agreement and the long-form notice in English and Spanish), a series of Frequently Asked Questions and Answers regarding the Settlement, contact information for Class Counsel and for JND, key dates for the submission of Claim Forms, exclusion requests, and opt-out requests, and information regarding the details of the final approval hearing. As of September 8, 2022, the settlement website has tracked 4,556 unique users who registered 17,604 page views. *Id.* at ¶¶ 11-12.

- The deadline to postmark or upload a Claim Form is October 24, 2022, and thus JND has not yet provided a final tabulation for receipt of Claim Forms. *Id.* at ¶¶ 19-21.

- Under the Agreement, any Class Member could have obtained exclusion from the Class by mailing an opt out request no later than thirty (30) days prior to the originally scheduled final approval hearing date. The same deadline existed for objections, which therefore needed to be filed with the Court or postmarked by August 24, 2022. The deadlines for objections and opt-outs have now passed. As of September 8, 2022, JND has received seven timely and completed requests for exclusion and has received no objections. *Id.* at ¶¶ 15-18.

Such notice plans are commonly used in class actions like this one and constitute valid, due, and sufficient notice to proposed class members. *See, e.g.*, *Camp*, 2014 WL 1764919, at *5.

B. Sufficient Notice of the Settlement Has Been Given to the Appropriate Federal and State Officials as Required Under CAFA.

CAFA requires that notice of all federal class action settlements be sent to the appropriate state and federal officials as a condition to obtaining court approval of the settlement. *See* 28 U.S.C. § 1715. CAFA further requires that the notice provided include either the names of class members who reside in the state "if feasible," or if not feasible "a reasonable estimate of the number of class members residing" in the state. Id. at § 1715(b)(7)(A)-(B). In non-banking cases, the "appropriate federal official" is the Attorney General of the United States. *See id.* at §

1715(a)(1)(A). Notice must also be sent to the "appropriate State official of each State in which a class member resides." *Id.* at § 1715(b). The "appropriate State official" is:

> the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the state, if some or all of the matters alleged in the class action are subject to regulation by that person.

Id. at § 1715(a)(2).

In this case, the Alabama Department of Insurance is the entity with the primary regulatory authority over State Farm in Alabama. In addition, given that potential Class Members likely reside in other states, CAFA notice was sent to the U.S. Attorney General, the state attorney general for the states in which State Farm identified potential class members may reside (including the District of Columbia), the insurance commissioners of those same states, and, in an abundance of caution, to the Chairman of the Federal Reserve Bank. *See* Doc. 204, Ex. A. Accordingly, notification to appropriate federal and state officials has been given in accordance with CAFA.

Neither the Alabama Department of Insurance nor the Alabama Attorney General expressed any objections or reservations regarding the proposed Settlement. Moreover, no other recipient of the CAFA notice has objected or otherwise expressed any reservations to the proposed Settlement.

CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that the Court find that the Proposed Settlement represents a fair, reasonable, and adequate settlement of the claims in this suit, issue an Order granting final approval of the Stipulation of Settlement, and enter Final Judgment in this case.

Dated: September 16, 2022

Respectfully submitted,

/s/ Jacob L. Kahn

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated: September 16, 2022

/s/ *Jacob L. Kahn*
Jacob L. Kahn