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.	)	Case No. 2:17-CV-00148-TFM-C **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

TABLE OF CONTENTS

INTRODUCTION

Plaintiff and Class Representative Annie Arnold ("Plaintiff") and Additional Class Representatives Bobby Abney, Tina Daniel, and Kenneth Scruggs ("Additional Class Representatives"), respectfully submit this Memorandum in support of their Unopposed[1] Motion for Preliminary Approval of Class Action Settlement ("Motion"). The Stipulation and Settlement Agreement reached between Plaintiff, the Additional Class Representatives and Defendant State Farm Fire & Casualty Company ("State Farm") (the "Settlement" or "SA")) is attached as Exhibit A to the Motion.[2]

This statewide class action arises out of State Farm's practice of withholding certain labor costs in the payment of State Farm's policyholders' actual cash value ("ACV") insurance claims. This lawsuit only concerns claims for structural damage (buildings) and not contents (furniture, clothes, etc.).

Plaintiff and the Additional Class Representatives now seek the Court's preliminary approval of this Settlement under Federal Rule of Civil Procedure ("Rule") 23(e)(1) so that notice of the Settlement can be disseminated to the Class and the Final Approval hearing scheduled. At the Final Approval Hearing, the Court will have before it additional submissions in support of the Settlement, as well as any objections that may be filed, and will be asked to determine whether, in accordance with Rule 23(e)(2), the Settlement is fair, reasonable, and adequate.

As discussed below, the proposed Settlement was reached through arm's-length bargaining with the involvement of private mediator George M. Van Tassel, Jr., of Upchurch Watson White

[1] As Paragraphs 1.14-1.15 of the Settlement make clear, however, State Farm denies each and every allegation of liability, wrongdoing and damages, and believes it has substantial factual and legal defenses to all claims and class allegations.

[2] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Settlement Agreement, attached as Exhibit A to the Motion.

& Max. Due to the complexity of issues and substantial amounts at issue, several mediation sessions were required before the lawsuit was resolved.

Class Counsel estimates that, upon approval, the Settlement will make approximately $30MM available to Class Members. Those class members who submit timely and complete claim forms will be eligible for settlement class payments. This amount is exclusive of the amounts already paid by State Farm to its Alabama policyholders after this lawsuit resulted in the "change in practices" described below.

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,[3] 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.[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. 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.

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

[4] 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* Dkt. 178, at 3,n.1; Dkt. 179, at 3, n.1.

Accordingly, and for the reasons set forth herein, Plaintiff and the Additional Class Representatives submit that the Settlement warrants the Court's preliminary approval and respectfully requests that the Court enter the proposed Preliminary Approval Order attached as Exhibit 1 to the Settlement.

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. Dkt. 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* Dkt. 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). Dkt. 10. On May 2, 2017, Plaintiff filed a conditional motion to remand the Action to Alabama state court. Dkt. 19. After full briefing and oral argument, 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. Dkt. 32. 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) (Dkt. 31).

In response to the Court's August 3, 2017 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) (Dkt. 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"); Dkt. 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, filed concurrently herewith as Exhibit B ("Peterson Decl."). 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. Dkt. 87. State Farm filed its opposition thereto on September 19, 2019, (Dkt. 108), and Plaintiff later filed a reply brief in support of her motion. Dkt. 113. On October 16, 2019, State Farm filed a motion asking the Court to hold an evidentiary hearing on class certification-related issues, (Dkt. 114), including issues raised in State Farm's subsequently filed motion for summary judgment on Plaintiff's individual claim, (Dkt. 119), and State Farm's subsequently filed motion to exclude the opinions of Plaintiff's proffered expert witness, Toby Johnson. Dkt. 122. Plaintiff opposed State Farm's three motions. Dkts. 116, 128, 131.

On February 13, 2020, this Court granted State Farm's motion for an evidentiary hearing. Dkt. 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. Dkt. 177. Thereafter, on November 23, 2020, the Court denied State Farm's motion for summary judgment, (Dkt. 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) (Dkt. 178). The Court certified a class of State Farm policyholders 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. The certified class excluded: (1) all claims arising under policies with State Farm coverage form WH-2101 or endorsement form FE-3650, or any other policy form expressly permitting the "depreciation" of "labor" within the text of the policy form; and (2) any claims in which the actual cash value payments exhausted the applicable limits of insurance. The Court appointed Arnold, Abney, Daniel, and Scruggs as representatives of the class (collectively "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). That 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. Dkt. 185. The Court requested that the parties regularly file joint status reports with the Court. *See id.*

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. Peterson Decl. ¶ 17.[5] 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

[5] The Peterson Declaration, filed concurrently with this Memorandum and attached as Exhibit 2 to the Motion, addresses the history of settlement negotiations for this lawsuit and the timing and structure of the settlement negotiations. Peterson Decl. ¶¶ 17-20. The Declaration also addresses the considerations that led to the compromise in exchange for the proposed release. *Id.* at ¶¶ 21-29, 33-39; *see also generally* McWherter Decl., Snodgrass Decl. and Martin Decl. (attached as Exhibits C, D and E to the Motion).

an agreement in principle to settle the Action on a class-wide basis. *Id.* ¶ 17. With Mr. Van 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.* ¶ 18.

Class Counsel have significant experience with labor depreciation class actions against insurance companies, having represented insureds in dozens of putative and certified class actions pending throughout the United States. Based on this and other class action experience, Class Counsel believe the Class Representatives' claims and allegations relating to labor depreciation asserted in the Action have significant merit. Class Counsel also recognized and acknowledged, however, that prosecuting such claims through further fact and expert discovery, dispositive motions, class decertification motions, trial, and appeals would involve considerable uncertainty, time, and expense. *Id.* at ¶¶ 33-39.

Class Counsel have therefore concluded that it is in the best interests of the Settlement Class that the claims asserted by the Class Representatives against State Farm in the Action be resolved on the terms and conditions set forth in the Settlement Agreement. *Id.* at ¶ 39. After extensive consideration and analysis of the factual and legal issues presented in the Action, and extensive and multiple settlement negotiation sessions, Class Counsel have reached the conclusion

that the substantial benefits that Class Members will receive as a result of this Settlement are an excellent result in light of the risks and uncertainties of continued litigation, the time and expense that would be necessary to prosecute the Action through class certification, trial and any appeals that might be taken, and the likelihood of success at trial. *Id.*

SUMMARY OF SETTLEMENT TERMS

I. THE CLASS

The "Settlement Class" means all Class Members who do not opt out of the "Class" defined as follows:

> All persons and entities (except for those explicitly excluded below) 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.
>
> Excluded from the Class are: (1) all claims arising under policies with State Farm coverage form WH-2101 or endorsement form FE-3650, or any other policy form expressly permitting the "depreciation" of "labor" within the text of the policy form or endorsement; (2) all persons and entities that received actual cash value payments from State Farm that exhausted the applicable limits of insurance as shown on the declarations page; (3) State Farm and its affiliates, officers, and directors; (4) members of the judiciary and their staff to whom this Action is assigned; and (5) Class Counsel.

SA ¶¶ 2.9, 2.11, 2.35.

II. CLASS MEMBERS' RECOVERY UNDER THE SETTLEMENT

The proposed Settlement provides that State Farm shall pay the following amounts to four distinct categories of Class Members, subject to applicable policy limits and deductibles of the Class Members' policies:

1. **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 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. SA ¶ 6.4.1.

2. **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. SA ¶ 6.4.2.

3. **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. SA ¶ 6.4.3.

4. **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. SA ¶ 6.4.4.

The amount of any attorneys' fees, costs and expenses awarded by this Court will not reduce the award to any Class Member under this Settlement. SA ¶¶ 13.2.

III. AGGREGATE VALUE OF RELIEF TO THE CLASS

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 approximately $30MM,

exclusive of attorneys' fees, litigation expenses, administration costs, and any class representative service awards. Peterson Decl. at ¶ 32.

IV. AVERAGE POTENTIAL CLAIM RECOVERY

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 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. Peterson Decl. ¶ 27.

V. EXEMPLARS

To help illustrate how the settlement payments will be issued, Plaintiffs provide the following examples of potential claim payouts for hypothetical Class Members:

- **Example 1**: A class member (homeowner) had water damage to her home and received an ACV payment during Class Period in the amount of $6,500.00, from which $905.33 in Nonmaterial Depreciation was withheld. The class member made repairs herself and never sought any replacement cost benefits payments from State Farm on her claim. If this class member submits a claim, she will receive $905.33 plus interest.

- **Example 2**: A class member (homeowner) had a fire loss on January 1, 2016 and received an ACV payment in the amount of $100,000.00, from which $21,000.00 in Nonmaterial Depreciation was withheld. This class member completed all repair work and received a replacement cost benefit payment on January 1, 2017, through which she recovered all $21,000.00 of the initially withheld Nonmaterial Depreciation (after submitting a claim for replacement cost benefits). If this class member submits a claim form, she will receive $1,165.50 (5.55% for 365 days of $21,000.00).

VI. DISPUTES AND NEUTRAL EVALUATOR

Any Class Member may dispute the amount of the Claim Settlement Payment or denial of their claim by requesting a final and binding neutral resolution by the Neutral Evaluator within thirty (30) days of the date shown on the notice sent to that Claimant. SA ¶¶ 7.11, 7.12, and 7.13. The parties have agreed that George M. Van Tassel, Jr. will serve as the Neutral Evaluator. *Id.* ¶

2.23. All disputes received from Class Members will be provided to State Farm's Counsel and Class Counsel, and State Farm will then have thirty (30) days to evaluate the claim or supply any additional documentation to the Administrator. *Id.* ¶ 7.12. From there, the Neutral Evaluator shall issue a decision subject to the express terms and conditions of the Agreement, and the decision of the Neutral Evaluator shall be final and binding. *Id.* ¶ 7.13. State Farm will separately pay the reasonable fees incurred by the Neutral Evaluator as provided in the Agreement. *Id.* at ¶ 4.1.5.

VII. THE RELEASE OF CLAIMS

In return for the payment of Settlement Checks, the Class Representatives and Class Members will provide State Farm a release narrowly tailored to the subject matter of this dispute—*i.e.,* the specific depreciation option settings in Xactimate® software. *See* SA ¶¶ 2.30, 9.1-9.5. The release is expressly not intended to prevent an individual Class Member from recovering any RCBs that may still remain available under the terms of his or her Policy. *See id.* ¶ 2.30.

VIII. ATTORNEYS' FEES, COSTS AND SERVICE AWARDS

Class Counsel will seek 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 ¶¶ 13.1-13.4.

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. SA ¶ 13.5. If this remains the case at the time of the Final Approval Hearing, the Parties agree that the Court should proceed to enter Final Judgment pursuant to Rule 54(b), deferring service awards to Plaintiff and Additional Class Representatives, but retaining jurisdiction to allow Plaintiff and

Additional 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).[6] SA ¶ 13.6. If the Court enters such a Rule 54(b) judgment, Class Counsel, Plaintiff, and the Additional 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 Plaintiff and Additional 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.

IX. THE CLASS NOTICE

State Farm will separately pay for the Class Notice and notice Administrator. SA ¶ 4.1.4. Potential Class Members will be given direct-mailed notice of the terms of the proposed Settlement at least seventy-five (75) days prior to the Final Approval Hearing. *Id.* ¶¶ 5.3-5.4. Prior to mailing of the Class Notice by the Administrator through the United States Postal Service, the Administrator will run all Class Members' names and addresses through the "National Change of Address" ("NCOALink") database. *Id.* ¶ 5.3. Additionally, returned class notices will be further researched, and an e-mail will be sent to such persons soliciting an updated mailing address. *Id.* ¶

[6] As of the date of this filing, the Eleventh Circuit has not yet issued a decision on Plaintiff-Appellee Charles T. Johnson's Petition for Rehearing *En Banc*, which was filed on October 22, 2020.

5.5. Notice will also be published on the internet. *Id.* ¶ 5.7. A reminder postcard notice will also be issued prior to the expiration of the claims deadline. *Id.* ¶ 5.6.

ARGUMENT

I. THE SETTLEMENT MERITS PRELIMINARY APPROVAL.

This Court has already certified this case as a Rule 23(b)(3) class action after contentious litigation through the adversary process, including a two-day live-witness evidentiary hearing. The Eleventh Circuit declined State Farm's interlocutory petition to review this Court's certification decision under Rule 23(f).

Due to the earlier certification, this Court does not need to revisit Rule 23's class certification elements. *See, e.g.,* 4 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 13:16 (5th ed. Dec. 2021 update) ("If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes.") (hereinafter "NEWBERG"). Instead, the Court need only consider the fairness, reasonableness, and adequacy of the Settlement with respect to Class Representatives and the absent class members. David F. Herr, ANN. MANUAL FOR COMPLEX LIT. § 21.612 (4th ed. May 2021 update) ("Courts have held that approval of settlement class actions under Rule 23(e) requires closer judicial scrutiny than approval of settlements reached only after class certification has been litigated through the adversary process."). As discussed more thoroughly below, the Settlement warrants preliminary approval because it is fair, reasonable, and adequate, and results from extensive, multi-day, and arm's-length negotiations by qualified counsel overseen by an experienced mediator, George M. Van Tassel, Jr.

A. The Court Should Grant Preliminary Approval Because The Proposed Settlement Satisfies The Requirements Of Rule 23 And Eleventh Circuit Precedent.

Rule 23(e) was recently amended to codify the factors that affect whether a court should approve a class action settlement. In the context of preliminary approval, the amendments direct

putative class counsel to provide the Court with information sufficient to enable the court to determine that the settlement is fair, reasonable and adequate, and that notice is justified because the Court will likely grant final approval to the settlement. These amendments largely mirror current practice under applicable law. As discussed below, courts in the Eleventh Circuit have applied similar principles as part of the analysis of preliminary approval motions for many years. All such factors weigh in favor of preliminary approval here.

According to the amendments to Rule 23, before notice can issue, the putative class representative must demonstrate "that the Court will likely be able to" approve the settlement under Rule 23(e)(2); and (ii) "certify the class for purposes of judgment" arising from the settlement. Fed. R. Civ. P. 23(e)(1)(B). Under Rule 23(e)(2), a court may only approve a settlement based on a finding that the proposed settlement is "fair, reasonable and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (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
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e); *In re Blue Cross Blue Shield Antitrust Litig.*, 2020 WL 8256366, at *7 (N.D. Ala. Nov. 30, 2020). These factors overlap with the factors that courts in the Eleventh Circuit have traditionally considered on preliminary and final approval, which include:

> (1) the existence of fraud or collusion;
> (2) the complexity, expense and likely duration of the litigation;

(3) the stage of the proceedings and the amount of discovery completed;
(4) plaintiffs' probability of success;
(5) the range of possible recovery; and
(6) the opinions of class counsel, class representatives, and absent class members.

Dillard v. City of Foley, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995);[7] *see, e.g., In re Blue Cross*, 2020 WL 8256366, at *26 (granting preliminary approval of class action settlement); *Dalton v. Carworks Serv., LLC*, 2010 WL 5341939, at *6-7 (S.D. Ala. Nov. 19, 2010) (same).

When considering these factors, the Court should keep in mind the strong presumption in favor of finding a class action settlement fair. *In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir. 2021) ("[T]here is a 'strong judicial policy favoring settlement."). "The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals. Settlement is generally favored because it represents a compromise reached between the parties to the suit and relieves them, as well as the judicial system, of the costs and burdens of further litigation." NEWBERG § 13:44.

At the preliminary approval stage, the Court is not required to determine whether it will ultimately approve the settlement, but only whether "the proposed settlement will likely earn final approval." Fed. R. Civ. P. 23(e) Adv. Comm. Note at 27; *In re Blue Cross*, 2020 WL 8256366, at *14 ("Although a court need not make a final determination of the fairness, reasonableness, and adequacy of the proposed settlement at this stage of the proceedings, it must make a preliminary finding that the proposed settlement is sufficiently fair, reasonable, and adequate on its face to warrant presentation to the class members."). As this Court's sister district has observed:

> Where [ ] the proposed settlement is the result of serious, arms-length negotiations between the parties, has no obvious deficiencies, falls within the range of possible

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

> approval, achieves favorable outcomes for plaintiffs and the class, and does not grant preferential treatment to plaintiffs or other segments of the class, courts generally grant approval.

In re Blue Cross, 2020 WL 8256366, at *14. As set forth in detail below, consideration of the Rule 23(e) and Eleventh Circuit factors supports preliminary approval here. *See id.* at *15 (recognizing that because Rule 23(e) and Eleventh Circuit "factors overlap, it is appropriate to address them together, in combination").

B. The Settlement Achieves An Excellent Result For The Class, Particularly Given The Expense, Duration And Uncertainty Of Continued Litigation.

1. The Adequacy Of Representation

Class Counsel in this lawsuit are also putative or certified class counsel in a majority of the pending and resolved labor depreciation class actions throughout the United States and have decades of experience in insurance, class actions and complex litigation, including against State Farm, in particular. *See* Peterson Decl. ¶¶ 2-4; *In re Blue Cross*, 2020 WL 8256366, at *15 (finding class counsel adequate where they "have litigated scores of [similar] cases to resolution and are recognized as top authorities in their field"). Both the Class Representatives and Class Counsel have diligently and zealously represented the certified class. In the face of considerable legal complexities, Class Counsel have coordinated discovery efforts, filed hundreds of pleadings and other documents into the record, and zealously represented the Class Representatives and certified Class before this Court.

Among other things, 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* Dkts. 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* Dkts. 178

and 181. Class Counsel additionally succeeded in securing a Settlement with this formidable opponent. Further, this Court has previously held that the Class Representatives are clearly capable of fairly and adequately protecting the interests of the Class since they have been actively involved in this litigation and raise claims that are typical of those of other class members. *Arnold*, 2020 WL 6879271, at *7. The "adequacy of representation" factor is thus satisfied.

2. The Lack Of Fraud Or Collusion

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *In re United States Sugar Corp. Litig.*, 2011 WL 13173854, at *2 (S.D. Fla. Jan. 24, 2011) ("Given federal courts' time-worn policy favoring the voluntary resolution of complex class action cases, a strong initial presumption of fairness attaches to any class action settlement reached by experienced counsel following arms-length negotiations." (citations omitted)). Likewise, courts 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.").

The presumption in favor of settlement is warranted here as there is no indicia of fraud or collusion. Settlement negotiations only occurred after years of contentious litigation and significant discovery. The negotiations themselves were conducted at arm's-length, properly phased to follow the highest ethical standards, and were overseen by an experienced mediator, George M. Van Tassel, Jr. *See Family Med. Pharm., LLC v. Impax Labs., Inc.*, 2017 WL 4366740, at *5 (S.D. Ala. Sept. 29, 2017) (granting preliminary approval of class settlement where "parties (represented by experienced counsel) negotiated this settlement at arm's length over a period of

months, with the assistance of a qualified mediator and with the benefit of both formal and informal discovery"); *Camp*, 2014 WL 1764919, at *4 (finding there is no evidence of collusion where parties participated in multiple mediations and the settlement was the result of arm's-length negotiations); *accord George v. Academy Mortgage Corp. (UT)*, 369 F. Supp. 3d 1356, 1369-70 (N.D. Ga. 2019) ("The parties engaged in prolonged adversarial litigation and negotiations, demonstrating the absence of fraud or collusion behind the Settlement. The parties settled this Action by mediation with an experienced mediator, … which further confirms that the process was procedurally sound and not collusive."); *Morgan v. Public Storage*, 301 F. Supp. 3d 1237, 1247 (S.D. Fla. 2016) ("'Where the parties have negotiated at arms' length, the Court should find that the settlement is not the product of collusion.' Moreover, '[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.'").

3. The Complexity, Expense And Likely Duration Of The Litigation

"A settlement that 'will alleviate the need for judicial exploration of ... complex subjects, reduce litigation costs, and eliminate the significant risk that individual claimants might recover nothing' merits approval." *Swaney v. Regions Bank*, 2020 WL 3064945, at *4 (N.D. Ala. June 9, 2020). The Court should compare the immediate benefits and risks of the proposed settlement against the mere possibility of future relief given the uncertainties of protracted litigation. "In this respect, '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'" *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005).

"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). 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. Labor depreciation class actions such as this case are no exception.

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 Mitchell's Rule 23 certification motion 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 over six-years (and after an Eighth Circuit appellate decision). *Stuart*, Case No. 4:14-4001 (W.D. Ark.); *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). Similarly, the labor depreciation lawsuit, *Hicks v. State Farm Fire & Cas. Co.*, was filed on February 28, 2014, and remains pending in the Eastern District of Kentucky, just shy of its eighth-year anniversary. *Hicks*, No. 14-00053 (E.D. Ky.). On July 10, 2020, the Sixth Circuit resolved State Farm's *second* interlocutory appeal in *Hicks* and, a month later, denied rehearing *en banc*. *See generally Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452 (6th Cir. July

2020), *reh'g and reh'g en banc denied* (6th Cir. Aug. 26, 2020); *Hicks v. State Farm Fire & Cas. Co.*, 751 Fed. App'x 703 (6th Cir. 2018).

This case has been actively litigated for nearly five years. The most substantial discovery related to managing complex e-discovery on a class-wide basis, including voluminous data production, data manipulation, and retrieval issues associated with data from Xactware Solutions, Inc. (owner of Xactimate® and Xactanalysis®) and State Farm. Several fact depositions were undertaken, and multiple third-party subpoenas were issued. Class Counsel prepared and disclosed an expert witness on claims handling, and Xactimate® and Xactanalysis® issues. State Farm likewise disclosed three of its own experts. Expert depositions were conducted. Peterson Decl. ¶ 11. Counsel for both parties included "national class action practice" attorneys. This lawsuit, inclusive of additional appeals, could have continued for several additional years. "As a result, continued litigation would have risked delaying the class's potential recovery for years, further reducing the value of any such recovery." *Swaney*, 2020 WL 3064945, at *4.

Indeed, "[c]omplex litigation … 'can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.'" *Woodward v. NOR-AM Chem. Co.*, 1996 WL 1063670, at *21 (S.D. Ala. May 23, 1999). "Settlement will alleviate the need for judicial exploration of these complex subjects, reduce litigation cost, and eliminate the significant risk that individual claimants might recover nothing. This consideration strongly militates in favor of approving the Settlement." *Id.*; *Family Med.*, 2017 WL 4366740, at *5 ("it also bears consideration that the proposed settlement brings an end to the litigation now, without a delay of years (and the accompanying expense of litigation) to obtain a judgment").

4. The Stage Of The Proceedings

The Court's consideration of the stage of proceedings and the nature and extent of discovery in evaluating the fairness of a settlement is focused on whether the parties have obtained sufficient information to evaluate the merits of competing positions. *In re Blue Cross*, 2020 WL 8256366, at *16. That said, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Id.* (citation omitted). As discussed, *supra*, Arg. § I.B.3., after this Court made rulings concerning standing, contract interpretation, and prejudgment interest issues as part of the dismissal briefing process, the parties conducted significant discovery and extensively briefed further dispositive and certification issues both before this Court and the Eleventh Circuit on State Farm's Rule 23(f) Petition. Additionally, the parties engaged in a two-day, live-witness evidentiary hearing on certification issues.

This discovery and motion and appellate practice, as well as the live-testimony evidentiary hearing, resulted in further court rulings on both certification and the merits of this case. These litigation processes amply prepared the parties for mediation, and allowed them to engage in vigorous, arm's-length negotiations under the direction of an experienced and well-respected third-party mediator who fully explored the issues in the case and helped the parties reach the proposed Settlement.

Accordingly, "Plaintiffs have had ample opportunity to investigate the facts and law and to obtain substantive rulings from the court. Thus, it is clear that the factual record in this matter was sufficiently developed to allow Class Counsel to make a reasoned judgment as to merits of the settlement." *In re Blue Cross*, 2020 WL 8256366, at *16; *Swaney*, 2020 WL 3064945, at *5 (approving settlement where parties "have litigated this case for over seven years, through

dispositive motions" and "have had the opportunity to investigate the facts and law, review substantive evidence relating to the claims and defenses, and brief the relevant legal issues").

5. The Likelihood Of Success On The Merits And The Range Of Possible Recovery

The "likelihood of success" factor requires the Court to compare the relief offered by the proposed Settlement with the likely recovery if the case were to proceed to trial. *Swaney*, 2020 WL 3064945, at *3. However, "[t]he [c]ourt's role is not to engage in a claim-by-claim, dollar-by-dollar evaluation[ ] but to evaluate the proposed settlement in its totality." *Id.* at *4 (internal quotation marks and citation omitted). Further, when considering the possible range of recovery, given the plaintiffs' success on the merits, the Court must remain aware that "compromise is the essence of settlement" and "a just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. Unit B 1982). "Even a minimal settlement can be approved." *Swaney*, 2020 WL 3064945, at *4.

Labor depreciation class actions pending throughout the United States have resulted in decidedly mixed results concerning liability, with the majority of class actions resulting in no recovery. *Hicks*, 751 Fed. Appx. at 710 (the "substantial weight of authority" is against successfully establishing liability in labor depreciation class action). Further, while labor depreciation litigation classes have been initially certified for contractual claims as in the case here, no labor depreciation class action has ever gone to trial or faced the issue of decertification. *See, e.g., Hicks,* 965 F.3d at 467 (affirming class certification of similar State Farm labor depreciation class action); *Mitchell*, 954 F.3d at 712 (same).

Despite these hurdles, after this Court's denial of State Farm's motions to dismiss and for summary judgment, as well as the Eleventh Circuit's denial of State Farm's Rule 23(f) Petition, Class Counsel had a high level of confidence in establishing contractual liability and damages.

State Farm, however, has not conceded this point. Indeed, despite these rulings, State Farm still disputed breach and damages prior to settlement.

Because "the legal and factual issues presented in this case were hotly contested and 'would almost certainly continue to be hotly contested throughout the remaining litigation[,]'" the ultimate outcome on the merits was uncertain for both parties and settlement was appropriate. *Swaney*, 2020 WL 3064945, at *4. The "likelihood of success at trial"-factor therefore weighs in favor of approving the Settlement. *Id.*

Under the Settlement, eligible Class Members who submit timely, complete claim forms stand to receive 100% of their still-withheld labor depreciation. 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. *See, e.g., 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); *In re Blue Cross*, 2020 WL 8256366, at *18 (preliminarily approving settlement fund representing between 7.3% and 14.3% of the relevant expert analyses of potential class recovery); *Morgan*, 301 F. Supp. 3d at 1250-51 (approving settlement that obtained 20% the amount sought at trial and "guarantees that each Class member who files a claim will receive a recovery of up to 50% of his or her individual damages"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (approving $410 million class settlement that provided recovery of 9% to 45% of potential recovery that could have been obtained through trial,

noting that "a 9 percent settlement (the absolute lowest percentage anyone has attempted to ascribe to this Settlement) is still within the range of reasonableness" given the risks associated with remaining defenses and appeals).

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 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.

Further, "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 v. Gillette Co.*, 618 Fed. App'x 624, 628 (6th Cir. 2015) (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,[8] are significant achievements that were the direct results of this litigation. Accordingly, these business practice changes, coupled with the

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

monetary relief provided in the proposed Settlement, warrant a preliminary finding that the benefits provided by the Settlement of this litigation are fair, adequate and reasonable when compared to the range of possible recovery. *See Poertner* 618 Fed. App'x at 629 (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").

6. The Opinions Of Class Counsel And The Class Representatives, And The Reaction Of Class Members[9]

"In considering the settlement, the district court may rely upon the judgment of experienced counsel for the parties. Absent fraud, collusion, or the like, the district court 'should be hesitant to substitute its own judgment for that of counsel." *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. App'x 429, 434 (11th Cir. July 20, 2012); *see, e.g., Shuford v. Ala. State Bd. Of Educ.*, 897 F. Supp. 1535, 1549 (M.D. Ala. 1995) (holding court would respect views of class counsel, including number of prominent and respected civil rights attorneys, that proposed partial consent decree in employment discrimination class action was fair, adequate, and reasonable, for purposes of assessing propriety of consent decree).

Here, Class Counsel, who are putative or certified class counsel in a majority of the pending and resolved labor depreciation class actions throughout the United States and are experienced insurance class action litigators, strongly recommend the settlement. "Class Counsel were well-positioned to evaluate the strengths and weaknesses of the claims in this case as well as the appropriate basis upon which to settlement them." *In re Blue Cross*, 2020 WL 8256366, at *17 The Class Representatives, knowing that the proposed Settlement will result in a 100% recovery

[9] The reaction of absent class members cannot be determined prior to the dissemination of notice.

of still-withheld labor depreciation plus a portion of the GCOP depreciation plus prejudgment interest, are similarly pleased with the proposed Settlement.

C. Plaintiffs' Forthcoming Motion Requesting Attorneys' Fees, Costs And Service Awards Falls Within The Range Of Reasonableness Sufficient To Allow Preliminary Approval And Notice To The Class.

Class Counsel will seek 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. Class Counsel will also seek (with the caveat as to timing outlined above, *supra* at Summary of Settlement Terms § VIII) approval of the Parties' agreement that State Farm shall pay Plaintiff a service award in an amount not to exceed $20,000, and service awards in amounts not to exceed $15,000 to each of the Additional Class Representatives, which if approved, will not reduce Class Members' recoveries.

Under the Settlement Agreement, and pursuant to Rule 23(e) and (h), Class Members will receive notice that fees, costs, and litigation expenses will be sought, and will be provided information about how they can object, assuming the Court preliminarily approves the Settlement. Class Counsel will then file a motion for fees and expenses pursuant to both the Settlement and Rules 23(h)(1) and 54(d)(2). In turn, this Court will then award the attorneys' fees, costs, and expenses that it determines appropriate assuming the Settlement is finally approved.

Given Class Counsel's considerable efforts and success in achieving this recovery for Class Members, there is no reason to doubt the reasonableness of an anticipated request for attorneys' fees and expenses, or the fairness of the Settlement. *See In re Blue Cross*, 2020 WL 8256366, at *23 (granting preliminary approval of settlement where anticipated fee and expense request was in line with Eleventh Circuit benchmarks and settlement class members would receive notice of

request and have an opportunity to object prior to prior to final approval). Although fees are analyzed at the final approval stage, Class Counsel seek amounts made available on a "claims made available" basis pursuant to the percentage-of-the-fund method.

"[I]n 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." *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); *Family Med.*, 2017 WL 4366740, at *5 (preliminarily approving claims-made class settlement in which plaintiffs' counsel sought up to one-third of gross settlement fund less administration costs).

This Court has substantial discretion in determining the appropriate fee percentage. 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 Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019) ("In this Circuit, courts typically award between 20-30%, known as the benchmark range."); *Wilson v. EverBank*, 2016 WL 457011, at *18 (S.D. Fla. Feb. 3, 2016) ("[F]ederal district courts across the country, *routinely* award class counsel fees in excess of the 25 percent 'benchmark[.]'").[10] Counsel will demonstrate

[10] Under the percentage-of-the-fund method, "the calculation of the value of the common fund should include all cash used to pay attorneys' fees and the expenses of claims administration." *Phillips*, 2021 WL 3710134, at *7; *see also In re Home Depot Inc.*, 931 F.3d 1065, 1092 (11th Cir.

when submitting their anticipated motion concerning fees and litigation expenses (assuming district court preliminary approval) that the request will fall within these benchmarks.[11] *See* Peterson Decl. ¶ 32.

Further, because the attorneys' fees will not reduce any Settlement 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 plaintiffs' and defense counsel as to the amount to 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) (emphasis added); *see, e.g., 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

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2019) (recognizing that in constructive common-fund 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 in the "class benefit"); *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). Additionally, 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).

[11] *See, e.g., McWhorter v. Ocwen Loan Serv., LLC*, 2019 WL 9171207, at *14 (N.D. Ala. Aug. 1, 2019) (awarding class counsel $3.23 million in attorneys' fees, which represented one-third of the common fund, plus litigation expenses); *Comeens*, 2016 WL 4398412, at *4 (approving class counsel's fee request of 33⅓ percent of the common fund, plus costs); *see also In re Checking Account Overdraft Litig.*, 2020 WL 4586398, at *1, 21-22 (S.D. Fla. Aug. 10, 2020) (awarding class counsel $2,625,000 in attorneys' fees, equal to 35% of settlement fund, plus $92,899.19 in reimbursement of expenses).

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'" (internal citations omitted)); *accord Bailey v. AK Steel Corp.*, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008) ("courts are especially amenable to awarding negotiated attorneys' fees and expenses in a reasonable amount where that amount is in *addition to and separate from* the defendant's settlement with the class" (emphasis added)).

Finally, 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. 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), *with, e.g., 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). Yet, other 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 disposition 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) (noting this approach to be "the current best practice").[12]

Accordingly, if the permissibility of service awards remains in the same *status quo* described above at the time of the Final Approval Hearing, the Parties agree that this Court should proceed to enter Final Judgment pursuant to Rule 54(b), deferring a determination of service awards to Plaintiff and Additional Class Representatives, but retaining jurisdiction to allow Plaintiff and the Additional Class Representatives to renew their request for service awards after the final outcome of *NPAS Sols., supra. See* SA ¶¶ 13.5-13.7; *Phillips*, 2021 WL 3710134 at *6 (retaining jurisdiction over matter until ultimate disposition of *NPAS Sols.* 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"). Because this Court will fully analyze the appropriateness of the service award-provisions of the proposed Settlement at the Final Approval Hearing, these provisions do not provide grounds for delaying the grant of preliminary approval and notice to the Class.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court preliminary approve the Settlement. If the Court is so inclined, Plaintiffs further request the Court schedule a final approval hearing approximately 120 days from the date of preliminary approval.

[12] *See also 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).

Dated: February 9, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel of record.

/s/Erik D. Peterson