UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

JAMES STUART and CAREDA L. HOOD, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 14-cv-04001-SOH
STATE FARM FIRE AND CASUALTY COMPANY,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF AGREED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. BACKGROUND 2
III. SUMMARY OF SETTLEMENT TERMS 5
A. The Class 5
B. Class Members' Recovery Under the Settlement 5
C. The Release of Claims 7
D. The Class Notice 7
IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL 8
A. Standards Governing Approval of Class Action Settlements 8
B. The Court "Will Likely Be Able to" Approve the Proposed Settlement Under Rule 23(e)(2) 11
1. "Procedural" Aspects of the Settlement Satisfy Rule 23(e)(2) 11
2. The Settlement's Terms Are Adequate 12
a. The Settlement Provides Substantial Relief, Especially in Light of the Costs, Risks, and Delay of Further Litigation 13
b. The Proposed Settlement Does Not Unjustly Favor Any Class Member 15
c. The Anticipated Request for Attorneys' Fees is Reasonable 17
d. Plaintiffs Have Identified All Agreements Made in Connection with the Settlement 18
V. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE 18
VI. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Cameron Mut. Ins. Co.,
2013 Ark. 475, 430 S.W.3d 675 (Ark. 2013) 1,2

In re BankAmerica Corp. Sec. Litig.,
210 F.R.D. 694 (E.D. Mo. 2002) 15

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)....................17

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2nd Cir. 1974)....................13

Cohn v. Nelson,
375 F. Supp. 2d 844 (E.D. Mo. 2005).................... 8-9

Cullan & Cullan LLC v. M-Qube, Inc.,
No. 8:13-cv-172, 2016 WL 5394684 (D. Neb. Sept. 27, 2016)....................19

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001)....................12

DeBoer v. Mellon Mortg. Co.,
64 F.3d 1171 (8th Cir. 1995) 10

In re Domestic Air Transp. Antitrust Litig.,
148 F.R.D. 297 (N.D. Ga. 1993)....................15

In re Facebook, Inc., IPO Sec. & Derivative Litig.,
343 F. Supp. 3d 394 (S.D.N.Y. 2018)....................11

Franklin v. Kaypro Corp.,
884 F.2d 1222 (9th Cir. 1989) 9

Gascho v. Global Fitness Holdings, LLC,
822 F.3d 269, 294 (6th Cir. 2016) 14, 17

Joel A v. Giuliani,
218 F.3d 132 (2d Cir. 2000)....................10

Johnston v. Comerica Mortg. Corp.,
83 F.3d 241 (8th Cir. 1996) 18

Larey v. Allstate Property and Casualty Insurance Co.,
No. 4:14-cv-4008, 2018 WL 811103 (W.D. Ark. Feb. 9, 2018) (Hickey, J.)................7, 14, 17

Liles v. Del Campo,
350 F.3d 742 (8th Cir. 2003) 9

Masters v. Wilhelmina Model Agency, Inc.,
473 F.3d 423 (2d Cir. 2007)..17

Hamilton v. Suntrust Mortg., Inc.,
No. 13-60749-CIV, 2014 WL 5419507 (S.D. Fla. Oct. 24, 2014) 17

Martin v. Cargill, Inc.,
295 F.R.D. 380 (D. Minn. 2013)..9

In re Med. X-Ray Film Antitrust Litig.,
1998 WL 661515 (E.D.N.Y. Aug. 7, 1998)...13

In re M.L. Stern Overtime Litig.,
No. 07-cv-0118-BTM (JMA), 2009 WL 995864 (S.D. Cal. Apr. 13, 2009)............................9

Mullane v. Cent. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950)...19

Nelson v. Mead Johnson & Johnson Co.,
484 F. App'x 429 (11th Cir. 2012) 12

Newman v. Stein,
464 F.2d 689 (2d Cir. 1972)...13

Petrovic v. Amoco Oil Co.,
200 F.3d 1140 (8th Cir. 1999) 18, 19

Poertner v. Gillette Co.,
618 F. App'x 624 (11th Cir. 2015) 14, 17

In re Polaroid ERISA Litig.,
240 F.R.D. 65 (S.D.N.Y. 2006) 12

Saccoccio v. JPMorgan Chase Bank, N.A.,
297 F.R.D. 683 (S.D. Fla. 2014)..14

Schulte v. Fifth Third Bank,
805 F. Supp. 2d 560 (N.D. Ill. 2011) 14

Schwartz v. Dallas Cowboys Football Club, Ltd.,
157 F. Supp. 2d 561 (E.D. Pa. 2001) 9

Shames v. Hertz Corp.,
No. 07-cv-2174-MMA (WMC), 2012 WL 5392159 (S.D. Cal. Nov. 5, 2012)........................14

Shaw v. Toshiba America Infor. Sys.,
91 F. Supp. 2d 942 (E.D. Tex. 2000)..17

Waters v. Int'l Precious Metals Corp.,
190 F.3d 1291 (11th Cir. 1999) 17

White v. Nat'l Football League,
822 F. Supp. 1389 (D. Minn. 1993)..11

White v. Nat'l Football League,
836 F. Supp. 1458 (D. Minn. 1993)..9

Williams v. MGM-Pathé Commc'ns Co.,
129 F.3d 1026 (9th Cir. 1997) 17

In re Wireless Telephone Federal Cost Recovery Fees Litigation,
396 F.3d 922 (8th Cir. 2005) 11

Yarrington v. Solvay Pharm., Inc.,
697 F. Supp. 2d 1057 (D. Minn. 2010)...17

Statutes

Arkansas Code Section 23-78-208...6

Other Authorities

FED. R. CIV. P. 23(e) .... *passim*

Manual for Complex Litig., Third, § 30.41 (1995) 9-10

Denise Martin, *et al.*, Nat'l Econ. Research Ass'n,
Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions? (1996) 17-18

I. INTRODUCTION

Plaintiffs James Stuart and Careda L. Hood ("Plaintiffs"), on behalf of themselves and the Court-certified Class, respectfully submit this memorandum of law in support of the Agreed Motion For Preliminary Approval of Class Action Settlement ("Motion"). The Stipulation of Settlement reached between Plaintiffs and Defendant State Farm Fire and Casualty Company ("State Farm") (the "Settlement") is attached as **Exhibit A** to the Motion.[1]

This statewide class action arises out of State Farm's practice of depreciating labor costs in the payment of Arkansas insureds' homeowner's insurance claims during the Class Period of May 1, 2010 to December 6, 2013. The central issue in this certified class action—whether State Farm breached the terms of its homeowner's insurance contracts in Arkansas by depreciating labor costs—was significantly resolved by the Arkansas Supreme Court's holding in *Adams v. Cameron Mutual Insurance Co.* ("*Adams*") that "the costs of labor may not be depreciated" under homeowner's insurance contracts. 2013 Ark. 475, at 7, 430 S.W.3d 675, 679 (Ark. 2013).

By their Motion, Plaintiffs now seek the Court's preliminary approval of the 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.[2] As discussed below, the proposed Settlement was reached through arm's-length bargaining with the involvement of a federal magistrate judge acting as mediator and will result in a substantial recovery for Class Members, including those insureds who have since recovered previously withheld labor depreciation from State Farm but still have claims under Section 23-79-208 of the Arkansas Code,

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

[2] At the Final Approval Hearing, the Court will have before it more extensive submissions in support of the Settlement and will be asked to determine whether, in accordance with Rule 23(e)(2), the Settlement is fair, reasonable, and adequate.

the penalty statute for overdue payment of valid insurance claims. Accordingly, for the reasons set forth herein, Plaintiffs 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.

II. BACKGROUND

This action involves allegations that State Farm breached the terms of the homeowners' insurance policies it entered into with Plaintiffs and other class members by wrongfully depreciating labor costs when adjusting property loss claims in violation of Arkansas law. Below is a brief procedural history.

On November 21, 2013, the Supreme Court of Arkansas held in *Adams* that "the costs of labor may not be depreciated when determining the actual cash value of a covered loss under an indemnity insurance policy that does not define the term 'actual cash value.'" 2013 Ark. 475, at 7, 430 S.W.3d at 679. The Supreme Court of Arkansas explained that, unlike materials, labor is not depreciable. *See id.*, 2013 Ark. 475, at 6, 430 S.W.3d at 678 ("The very idea of depreciating the value of labor is illogical.") (citation and internal quotation marks omitted).

On November 21, 2013, Jeff Dennington filed a class action complaint in the Circuit Court of Miller County, Arkansas, asserting breach of contract and unjust enrichment claims against State Farm related to its depreciation of labor costs. ECF No. 1, ¶ 1. This action was removed to the United States District Court for the Western District of Arkansas on January 2, 2014. ECF No. 1. On September 16, 2014, Dennington and James Stuart filed their First Amended Class Action Complaint, again asserting breach of contract and unjust enrichment claims against State Farm related to its depreciation of labor costs. ECF No. 39. On June 1, 2015, Dennington and Stuart filed a Second Amended Class Action Complaint ("SAC"), which added Careda L. Hood

as a plaintiff, again asserting breach of contract and unjust enrichment claims against State Farm related to its depreciation of labor costs. ECF No. 69.

On June 15, 2015, State Farm moved to dismiss the SAC in its entirety. ECF No. 71. On March 14, 2016, the Court granted in part and denied in part State Farm's motion to dismiss, sustaining Plaintiffs' claims but dismissing Dennington's claims as previously released. ECF No. 110.

On December 2, 2015, Plaintiffs moved to certify the following class:

> All persons and entities that received "actual cash value" payments, directly or indirectly, from State Farm for loss or damage to a dwelling or other structure located in the State of Arkansas, such payments arising from events that occurred between November 21, 2008 and December 6, 2013, where the cost of labor was depreciated. Excluded from the class are: (1) all persons and entities that received payment from State Farm in the full amount of insurance shown on the declarations page; (2) State Farm and its affiliates, officers and directors; (3) members of the judiciary and their staff to whom this action is assigned; and (4) Plaintiffs' counsel.

ECF No. 83 at 10. The class on whose behalf Plaintiffs brought this suit includes insureds who purchased both "actual cash value" ("ACV") policies and "replacement cost value" ("RCV") policies from State Farm. ECF No. 159-1 at 2-3. Insureds covered under ACV and RCV policies are similarly situated, as for covered losses under RCV policies, State Farm's practice was to make an initial ACV payment to an insured (which deducted depreciation), followed by a second RCV payment (which included previously-deducted depreciation) after the insured repaired the covered property. ECF No. 159-1 at 2-3, 7. Therefore, an insured who is covered under an RCV policy, but who did not recover any of the initially withheld labor depreciation and chose not to complete his or her repairs, is treated the same as an insured covered under an ACV policy. ECF No. 159-1 at 8-9.

On January 19, 2016, State Farm opposed Plaintiffs' motion for class certification. ECF No. 87. On August 24, 2016, the Court granted Plaintiffs' motion for class certification. ECF No. 142.

On September 7, 2016, pursuant to Rule 23(f), State Farm petitioned the United States Court of Appeals for the Eighth Circuit for permission to appeal the Court's order granting class certification ("Rule 23(f) Petition"). ECF Nos. 144; 146-1. The Eighth Circuit granted State Farm's Rule 23(f) Petition on September 29, 2016. ECF No. 148. On January 25, 2017, the Court stayed all proceedings pending resolution of State Farm's Rule 23(f) Petition. ECF No. 156.

On December 6, 2018, the Eighth Circuit affirmed the Court's order granting class certification and modified the definition of the class to exclude class members to a class settlement in *Chivers v. State Farm Fire & Casualty Co.*, No. CV-2010-251-3 (Ark. Cir. Ct.). ECF No. 159-1. The Court granted an order consistent with the Eighth Circuit's opinion on February 6, 2019. ECF No. 161. The Court lifted the stay of proceedings the same day. ECF No. 160.

On February 11, 2019, the Court modified the class definition to conform to the Eighth Circuit's order, as follows:

> All persons and entities that received "actual cash value" payments, directly or indirectly, from State Farm for loss or damage to a dwelling or other structure located in the State of Arkansas, such payments arising from events that occurred between May 1, 2010 and December 6, 2013, where the cost of labor was depreciated. Excluded from the Class are: (1) all persons and entities that received payment from State Farm in the full amount of insurance shown on the declarations page; (2) State Farm and its affiliates, officers and directors; (3) members of the judiciary and their staff to whom this action is assigned; and (4) Plaintiffs' counsel.

ECF No. 163 at 2.

The parties conducted discovery throughout 2019. On September 24, 2019—approximately two months before the Court-ordered fact discovery cutoff of November 22, 2019—Plaintiffs filed a motion for summary judgement on liability and damages. ECF Nos. 224, 225.

Shortly thereafter, the parties engaged in settlement discussions. These discussions culminated with a settlement conference on November 5, 2019, before the Honorable Barry Bryant, Magistrate Judge of this Court, which yielded an agreement among the parties to resolve the litigation. ECF No. 244.

III. SUMMARY OF SETTLEMENT TERMS

A. The Class

The "Class" is defined as:

> All persons and entities that received "actual cash value" payments, directly or indirectly, from State Farm for loss or damage to a dwelling or other structure located in the State of Arkansas, such payments arising from events that occurred between May 1, 2010 and December 6, 2013, where the cost of labor was depreciated. Excluded from the Class are: (1) all persons and entities that received payment from State Farm in the full amount of insurance shown on the declarations page; (2) State Farm and its affiliates, officers and directors; (3) members of the judiciary and their staff to whom this action is assigned; and (4) Plaintiffs' counsel.

Settlement, ¶ 7.

The "Class Period" is defined as the period of May 1, 2010 through December 6, 2013. Settlement, ¶ 11.

B. Class Members' Recovery Under the Settlement

The proposed Settlement provides that State Farm shall pay the following amounts to three distinct categories of Class Members:

1. **Group A**: Claimants from whom estimated labor depreciation was initially deducted and not subsequently recovered, and who did not complete repairs in full, will receive payment of 100% of the estimated unpaid labor depreciation, plus interest at 5.25% per annum.

2. **Group B**: Claimants from whom estimated labor depreciation was initially deducted, and who either recovered partially the initially deducted labor depreciation and/or completed repairs in full, will receive a payment of 75% of the estimated unpaid labor depreciation, plus interest at 5.25% per annum.

> 3. **Group C**: Claimants from whom estimated labor depreciation was initially deducted, and who subsequently recovered all depreciation, shall receive a payment of 10% of the estimated labor depreciation initially withheld but later paid in full.

Settlement, ¶ 31.

Under the Settlement, Class Members who fall within Group B are entitled to less consideration than Class Members in Group A because State Farm has maintained throughout this action that, pursuant to a policy provision purporting to cap liability, Class Members who completed repairs to their damaged property and received the full cost of those repairs from State Farm are barred from further recovery. *See, e.g.*, ECF No. 72 at 20-22; ECF No. 87 at 37-42; ECF No. 124, at 24, 26, 30; ECF No. 170 at 2-5. In recognition of State Farm's defense (which Plaintiffs contest), the parties have agreed, for settlement purposes, to acknowledge that the Class Members entitled to recovery under Group B above face a legal defense that cannot be raised against Class Members in Group A.[3] Accordingly, the Settlement assigns a lesser recovery to Class Members who fall into Group B, as compared to those in Group A.

The Class Members in Group C are those insureds who subsequently received all of their withheld labor costs from State Farm, but nonetheless are entitled to recover something under the Settlement in recognition of the provisions of Section 23-79-208 of the Arkansas Code.[4] Such

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[3] Plaintiffs have always maintained that State Farm's obligation to pay full actual cash value at the time of loss (i.e., with no depreciation of labor) does not turn on whether the insured was able to complete the repairs to his or her property for less than the deficient ACV payment.

[4] Plaintiffs and the Class seek as damages all wrongfully depreciated labor costs, together with the penalties and attorneys' fees provided for by Section 23-79-208 of the Arkansas Code. That section provides that where an insurance company fails to pay a covered loss "within the time specified by the policy after demand is made," the company "shall be liable to pay the holder of the policy or his or her assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss."

insureds will receive 10% of the withheld labor depreciation—which is *more than 80%* of their maximum recovery under the statute.[5]

C. <u>The Release of Claims</u>

In return for these payments, Plaintiffs and the Class will release and covenant not to sue State Farm from or for:

> any and all known and Unknown Claims, rights, demands, actions, causes of action, allegations, or suits of whatever kind or nature, whether *ex contractu* or *ex delicto*, debts, liens, contracts, liabilities, agreements, attorneys' fees, costs, penalties, interest, expenses, or losses (including actual, consequential, statutory, extra-contractual and/or punitive or exemplary damages) arising from or in any way related to depreciation of any kind on claims within the class period (including, but not limited to, calculation, deduction, determination, inclusion, modification, omission, and/or withholding of depreciation), which have been alleged or which could have been alleged by Plaintiffs in the Litigation, on behalf of themselves and/or on behalf of the Class, to the full extent of *res judicata* protections but only as related to depreciation on claims within the class period, and whether arising under or based on contract, extra-contractual or tort theories, common law or equity, or federal, state or local law, statute, ordinance, rule or regulation.

Settlement, ¶ 25.

D. <u>The Class Notice</u>

All Class Members will be given direct-mailed notice of the terms of the proposed Settlement at least ninety days prior to the Final Approval Hearing. Settlement, ¶ 48(c).

Prior to mailing of the Class Notice by the Settlement Administrator through the United States Postal Service, the Settlement Administrator will run all Class Members' names and addresses through the "National Change of Address" ("NCOALink") database. *Id.*, ¶ 48(c). After

[5] This "three-bucket" settlement structure is not without precedent. This Court approved a nearly identical settlement in *Larey v. Allstate Property and Casualty Insurance Co.*, No. 4:14-cv-4008, 2018 WL 811103 (W.D. Ark. Feb. 9, 2018) (Hickey, J.) ("*Larey*"). Further, in 2015, the Circuit Court of Polk County, Arkansas approved a similar settlement in *Vinson v. Metropolitan Insurance Co.*, Independence County, Arkansas, Circuit Court, No. 2014-272-4, another labor depreciation class action.

the mailing of the Class Notice by the Settlement Administrator through the United States Postal Service, for any Class Notices or Claim Forms returned as undeliverable, the Settlement Administrator shall utilize LexisNexis AllFind research and make an attempt to obtain a more current mailing address for each returned Class Notice and Claim Form. *Id.*, ¶ 50. The address obtained through such a search shall be used for the mailing of the Settlement Payments for Class Members whose Class Notices or Claim Forms were returned undeliverable. *Id.*.

A Publication Notice will also be published twice. *Id.*, ¶ 52. State Farm shall, within thirty days after the entry of the Preliminary Approval Order, and then again forty-five days prior to the Final Approval Hearing, cause to be published a Publication Notice of the Settlement in the Arkansas Democrat-Gazette. *Id.*, ¶ 52. Further, a settlement website will be established and maintained to provide information on the Stipulation, relevant pleadings, opt out and objection procedures, the Claim Form, and information regarding how to obtain a copy of the Settlement, including exhibits. *Id.*, ¶¶ 48(a), 53.

Finally, fifteen days prior to the Final Approval Hearing, the Settlement Administrator will mail to Class Members who have not yet submitted a Claim Form and have not excluded themselves from the Settlement a Postcard Reminder Notice with information about important deadlines and how to obtain additional copies of the Class Notice and Claim Form. *Id.*, ¶54.

Pursuant to the Settlement, all costs associated with providing notice and administering the Settlement will be paid by State Farm. *Id.*, ¶ 48(d), 59.

All other terms and conditions of the Settlement are set forth in the parties' Settlement.

IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Standards Governing Approval of Class Action Settlements

The law favors settlement; this is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See, e.g.*,

Cohn v. Nelson, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.") (citations omitted); *accord Franklin v. Kaypro Corp*., 884 F.2d 1222, 1229 (9th Cir. 1989).

Pursuant to Rule 23(e), class action settlements must be approved by the Court before they become effective. Fed. R. Civ. P. 23(e) ("The claims . . . of a certified class . . . may be settled . . . only with the court's approval."). Judicial approval of a class action settlement is a two-step process—*first*, the court performs a preliminary review of the terms of the proposed settlement to determine whether to send notice of the proposed settlement to the class, *see* Fed. R. Civ. P. 23(e)(1); and *second*, after notice has been provided and a hearing has been held, the court determines whether to grant final approval of the settlement. *See* Fed. R. Civ. P. 23(e)(2); *see also In re M.L. Stern Overtime Litig*., No. 07-cv-0118-BTM (JMA), 2009 WL 995864, at *3 (S.D. Cal. Apr. 13, 2009) (quoting *Manual for Complex Litig., Fourth*, § 21.632 (2004)) (noting first that "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and date of the final fairness hearing"); *accord Liles v. Del Campo*, 350 F.3d 742, 745-46 (8th Cir. 2003).

At the preliminary approval stage, a court's review is less stringent than at the final approval stage, "with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *See, e.g.*, *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 383 (D. Minn. 2013) (emphasis omitted); *White v. Nat'l Football League*, 836 F. Supp. 1458, 1466 (D. Minn. 1993); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 (E.D. Pa. 2001); *Manual for Complex Litig., Third*, § 30.41 at 237

(1995) (in granting preliminary approval, a court needs to find that the proposed settlement is "within the range of possible approval" and "does not disclose grounds to doubt its fairness"). In making this preliminary determination, courts should consider issues such as whether the settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain class members, or excessively compensates attorneys. *See Joel A. v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000) ("[A] settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate, and fair."). Moreover, the settling parties' views as to the propriety of the settlement are also entitled to weight. *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995).

Rule 23(e), as amended, does not change this fundamental inquiry. Amended Rule 23(e), among other things, specifies that the crux of a court's preliminary approval evaluation is whether "giving notice [to the class] is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal," Fed. R. Civ. P. 23(e)(1)(B) (emphasis added), and "focus[es]" a court's inquiry on "the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal," Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment—that is, 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 attorneys' 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)(2).[6] Each of these factors is satisfied here.

B. The Court "Will Likely Be Able to" Approve the Proposed Settlement Under Rule 23(e)(2)

1. "Procedural" Aspects of the Settlement Satisfy Rule 23(e)(2)

Rule 23(e)(2)'s first two factors "look[] to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Courts may consider "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, [which] may indicate whether counsel negotiating on behalf of the class had an adequate information base." *Id.*

The Settlement embodies all the hallmarks of a procedurally fair resolution under Rule 23(e)(2). Here, the Settlement was reached only after discovery was nearly complete and Class Counsel filed a motion for summary judgment on a fully developed factual record. Thus, Class Counsel had extensive knowledge of the merits of Plaintiffs' and the Class's claims before entering into settlement negotiations and were able to adequately assess the strengths and weaknesses of Plaintiffs' case and balance the benefits of settlement against the risks of further litigation. *See, e.g.*, *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 412 (S.D.N.Y. 2018) (finding support for settlement where plaintiffs and their counsel had a "sufficient understanding

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[6] In determining whether to grant *final* approval of the Settlement, the Court will also be asked to consider the factors set forth in *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922 (8th Cir. 2005)—some of which overlap with the Rule 23(e)(2) factors:

> (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement.

Id. at 932; *see also* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment (noting that the Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the Courts of Appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal").

of the case to gauge the strengths and weaknesses of their claims as well as the adequacy of the settlement") (citation and internal quotation marks omitted); *White v. Nat'l Football League*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (courts afford "considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved").

Equally important, counsel for State Farm vigorously defended their client's position and demonstrated their commitment to litigate this action to its conclusion. Further, the parties' settlement negotiations were at arm's-length and facilitated by Judge Bryant. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] . . . mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 435 (11th Cir. 2012). Thus, the Settlement represents concessions by all parties after hard-fought negotiations conducted by experienced counsel on both sides who were thoroughly familiar with the issues.

Additionally, Plaintiffs—who have suffered damages as a result of State Farm's alleged conduct—have claims that are typical of those of other Class Members. And, like the rest of the Class, Plaintiff have an interest in obtaining the largest possible recovery from State Farm. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

2. The Settlement's Terms Are Adequate

Rules 23(e)(2)(C) and 23(e)(2)(D) direct the Court to evaluate whether "the relief provided for the class is adequate" and "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C)-(D). Here, the Settlement represents a favorable result for the Class.

Furthermore, Class Counsel has proposed a plan for allocating the Settlement proceeds that ensures that all Class Members will be treated equitably relative to their respective losses.

a. The Settlement Provides Substantial Relief, Especially in Light of the Costs, Risks, and Delay of Further Litigation

A key factor to be considered in assessing the approval of a class action settlement is the plaintiff's likelihood of success on the merits, balanced against the relief offered in settlement. Here, the value of the proposed Settlement falls well within the range of a reasonable settlement. The determination of a "reasonable" settlement "is not susceptible to a mathematical equation yielding a particularized sum." *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998) (citation omitted); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) ("[I]n any case there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion."). As such,

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. . . . In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 & 455 n.2 (2d Cir. 1974) (citations omitted) (abrogated on other grounds by *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)).

Under the Settlement, State Farm has agreed to pay *100%* of the estimated labor depreciation to any Class Member who has received no withheld labor depreciation back from State Farm and who has not completed repairs to the damaged property, plus interest at 5.25% per annum on that amount. Settlement, ¶ 31(a). In addition, Class Members who received a partial repayment of withheld labor deprecation and/or completed repairs will receive a settlement

payment of 75% of the estimated labor depreciation that was not recovered, plus interest at 5.25% per annum on that amount. *Id.*, ¶ 31(b). Finally, those Class Members who subsequently received all of their withheld labor costs from State Farm, but nonetheless have claims under Section 23-79-208 of the Arkansas Code, will receive 10% of the withheld labor depreciation, just over 83% of their maximum recovery under the statute. Settlement, ¶ 31(c). We respectfully submit this is an excellent result for Class Members.

Courts have routinely affirmed claims-made settlements in class actions of the type agreed to by the parties here, including labor-depreciation case settlements previously approved by this Court. *See*, *e.g.*, *Larey*, 2018 WL 811103, at *6; *see also Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 294 (6th Cir. 2016) (rejecting challenges to class action settlement based on use of a claims-made process); *Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015) (same; "while monetary relief was available to only those class members who submitted claims, the use of a claims process is not inherently suspect"); *Shames v. Hertz Corp.*, No. 07-cv-2174-MMA (WMC), 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) ("[C]lass action settlements often include [a claims] process, and courts routinely approve claimsmade settlements."); *accord Saccoccio v. JPMorgan Chase Bank, N.A.*, 297 F.R.D. 683, 696 (S.D. Fla. 2014); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011).

Further, State Farm has agreed to pay attorneys' fees and costs *in addition to* the relief provided to the Class. Settlement, ¶ 44. The agreed maximum amount for attorneys' fees is $2,833,333.33, and the agreed maximum amount for costs is $400,000.00, exclusive of a $24,620.73 reimbursement for the costs of class notice. *Id.* When combined with the amount paid to Class Members, the total monetary benefit is approximately $11,757,333.33, an amount that well exceeds 100% of the actual damages estimated to have been incurred by the Class. The

attorneys' fees of $2,833,333.33 represent 33⅓% and of the estimated amount available to be paid to the Class ($8,500,000.00).

In comparison, the Settlement avoids the need for continued protracted and costly litigation. As the Court is well aware, a class action plaintiff runs the risk of adverse determinations at all stages of the litigation, including at the dispositive motion phase, trial, and post-trial. These appellate avenues increase both the length and the complexity of the proceedings, and increase the chance that Plaintiffs and the Class may ultimately lose on the merits of their claims. State Farm has denied any liability or wrongdoing with respect to the action and would continue to vigorously litigate Plaintiffs' claims had the Settlement not been reached. These concerns militate in favor of settlement. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 326 (N.D. Ga. 1993) (noting that "it has been held proper to take the bird in the hand instead of a prospective flock in the bush") (citation omitted); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 701 (E.D. Mo. 2002) (same).

b. <u>The Proposed Settlement Does Not Unjustly Favor Any Class Member</u>

The Court must also ultimately assess the Settlement's effectiveness in equitably distributing relief to members of the Class. Fed. R. Civ. P. 23(e)(2)(C)(ii). Here, too, the Court can readily find the Settlement will likely earn approval. The Settlement provides that State Farm shall allocate the Settlement proceeds to three distinct categories of Class Members, referred to

herein as: (i) Group A[7]; (ii) Group B[8]; and (iii) Group C.[9] This proposed allocation provides a straightforward and effective means of distributing the Settlement proceeds to Class Members based on their respective losses, and treats Class Members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(D).

As noted above, Class Members who fall within Group B will be entitled to less consideration than Class Members in Group A group because State Farm has maintained throughout this action that, pursuant to a policy provision purporting to cap liability, Class Members who completed repairs to their damaged property and received the full cost of those repairs from State Farm are barred from further recovery.[10] In recognition of this defense, the parties have agreed, for settlement purposes, to acknowledge that Class Members in Group B face a legal defense that cannot be raised against Class Members in Group A and accordingly, Class Members in Group B should receive less than Class Members in Group A. Further, Class Members in Group C, although subsequently receiving all of their withheld labor costs from State Farm, are being allocated something under the Settlement in recognition of the provisions of Section 23-79-208 of the Arkansas Code.[11] This Court approved a nearly identical allocation structure in *Larey*

[7] Group A consists of claimants from whom estimated labor depreciation was initially deducted and not subsequently recovered, and who did not complete repairs in full, will receive payment of 100% of the estimated unpaid labor depreciation, plus interest at 5.25% per annum.

[8] Group B consists of Claimants from whom estimated labor depreciation was initially deducted, and who either recovered partially the initially deducted labor depreciation and/or completed repairs in full, will receive a payment of 75% of the estimated unpaid labor depreciation, plus interest at 5.25% per annum.

[9] Group C consists of Claimants from whom estimated labor depreciation was initially deducted, and who subsequently recovered all depreciation, shall receive a payment of 10% of the estimated labor depreciation initially withheld but later paid in full.

[10] *See, e.g.*, ECF No. 72 at 20-22; ECF No. 87 at 37-42; ECF No. 124, at 24, 26, 30; ECF No. 170 at 2-5.

[11] Each of these three categories of payment is subject to State Farm's right to challenge or reduce the amount owed on the basis that (i) labor depreciation was not actually applied, (ii) repairs

and the Circuit Court of Polk County, Arkansas approved a similar settlement structure in *Vinson v. Metropolitan Insurance Company*, Independence County, Arkansas, Circuit Court, No. 2014-272-4, another labor depreciation class action.

c. <u>The Anticipated Request for Attorneys' Fees is Reasonable</u>

The attorneys' fees to be sought—which represent 33⅓% of the value of the Settlement amount ($8,500,000) and roughly 24.1% of the total monetary benefit achieved for the Class's common benefit ($11,733,333.33)—fall within the range of fees routinely awarded to class counsel in class actions.[12] In the Eighth Circuit, courts have awarded attorney fees ranging from 25% to 36% of a common fund under the "percentage of the benefit" method. *See, e.g.*, *Larey*, 2018 WL 811103, at *6; *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (*citing In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005)); *see also Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("based on the opinions of other courts and the available studies of class action attorney's fee awards (such as the NERA study), this court concludes that attorney's fees in the range from twenty-five percent (25%) to [33⅓%] . . . have been routinely awarded in class actions"); *Waters*, 190 F.3d at 1297-98 (approving 30% benchmark); Denise Martin, *et al.*, Nat'l Econ. Research Ass'n ("NERA"), *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?*, at 10-11

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were made, or (iii) the Claimant is not a Class Member. Settlement, ¶ 32.

[12] The Supreme Court recognizes that a class member's "right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of class representatives and their counsel." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (emphasis added). Consequently, "an allocation of fees by percentage should . . . be awarded on the basis of the total funds made available, whether claimed or not." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-37 (2d Cir. 2007); *accord Gascho*, 822 F.3d at 285; *Poertner*, 618 F. App'x at 630; *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999); *Hamilton v. Suntrust Mortg., Inc.*, No. 13-60749-CIV, 2014 WL 5419507, at *4-6 (S.D. Fla. Oct. 24, 2014), *Williams v. MGM-Pathé Commc'ns Co.*, 129 F.3d 1026, 1026-27 (9th Cir. 1997).

(1996) ("Regardless of case size, fees average approximately 32 percent of the settlement. This finding holds even for cases with settlements in excess of $50 million.").[13]

Given Class Counsel's considerable efforts and success in achieving this recovery for Class Members, coupled with the legal precedent discussed above, there is no reason to doubt the reasonableness of Class Counsel's anticipated request for attorneys' fees and expenses, or the fairness of the Settlement. Plaintiffs will provide additional support for the fees and expenses sought after Class Members have the opportunity to comment on the Settlement and fee request.

d. Plaintiffs Have Identified All Agreements Made in Connection with the Settlement

Prior to entering into the Settlement, the parties entered into a term sheet memorializing the material terms of their agreement in principle to settle the action. The Settlement and term sheet are the only agreements concerning the Settlement that have been entered into by the parties.

V. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE

The notice of a class action settlement "[n]eed only satisfy the 'broad "reasonableness" standards imposed by due process.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975)). A proposed notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

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[13] The percentage-of-recovery method has also been approved by the Eighth Circuit where, as here, the attorney fees are to be paid directly by the defendant, as opposed to coming out of the recovery by the class. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996) ("Although under the terms of [the] settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.").

Here, the proposed form and method of providing notice to the Class satisfies all due process considerations and requirements of Rule 23. The proposed Class Notice, attached as Exhibit 2 to the Settlement, informs Class Members about the action, the terms of the proposed Settlement, and provides them the information to make informed decisions about their rights, including how and when to opt out of the Class, and how and when to make an objection. The Class Notice provides this information in a clear, concise manner. Accordingly, the proposed Class Notice should be approved. *See Petrovic*, 200 F.3d at 1153; *Cullan & Cullan LLC v. M-Qube, Inc.*, No. 8:13-cv-172, 2016 WL 5394684, at *7 (D. Neb. Sept. 27, 2016) (approving notice when it was "written in plain English and . . . designed to be read and understood").

The method for distributing Class Notice is also reasonable and is designed to reach all Class Members. *See Mullane*, 339 U.S. at 315. The Administrator shall cause the Class Notice, along with the Claim Form, to be mailed by first-class mail to the current or last known address for each potential Class Member, according to State Farm's business records and the NCOALink. Settlement, ¶ 48. Notice will also be published on two occasions in the Arkansas Democrat-Gazette and will be made available on the settlement website. *Id.* And a reminder postcard will be sent to Class Members prior to the Final Approval Hearing who have not yet submitted a Claim Form and have not excluded themselves from the Settlement. Thus, the form of notice and proposed procedures for notice are reasonable and satisfy the requirements of due process and the Court should approve the notice plan as adequate.

VI. CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order attached as Exhibit 1 to the Settlement.

Dated: December 10, 2019

Respectfully submitted,

/s/ *Matt Keil*
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ATTORNEYS FOR PLAINTIFFS AND THE CLASS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed pursuant to the electronic filing requirements of the United States District Court for the Western District of Arkansas on this the 10th day of December 2019, which provides for service on counsel of record in accordance with the electronic filing protocols in place.

/s/ Matt Keil
Matt Keil