IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE CONDOMINIUMS AT NORTHPOINTE ASSOCIATION and CHRISTINA ERMIDIS, for themselves individually and on behalf of all others similarly situated, Plaintiffs, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	CASE NO. 1:16-cv-01273 JUDGE CHRISTOPHER A. BOYKO

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

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Defendant State Farm Fire and Casualty Company ("State Farm"), by and through its undersigned counsel, respectfully provides this separate submission in support of final approval of the Proposed Settlement of this case, as described in the Stipulation and Settlement Agreement entered into by State Farm and Plaintiffs The Condominiums at Northpointe Association ("Northpointe") and Christina Ermidis ("Ermidis") (together, "Plaintiffs" or the "Class Representatives"), as representatives of the asserted class (Doc. 157-1) (hereinafter, the "Settlement Agreement").[1]

INTRODUCTION

This case is one of a series of class actions filed against insurers in Ohio and certain states across the country challenging the common practice of calculating "actual cash value" ("ACV") claim payments for structural damage claims by estimating the cost to repair or replace the damaged property, then applying depreciation to that full estimated replacement cost—including both material costs and any labor or other non-material costs (hereinafter "labor depreciation"). The challenged practice is one that has divided courts across the country with varied results by jurisdiction. Indeed, in 2018, this Court granted State Farm's motion to dismiss the original complaint. However, the Sixth Circuit ultimately reversed that decision, adopting a ruling involving a different insurer that labor costs may not be depreciated in calculating ACV payments under Ohio law where the policy does not expressly and unambiguously permit such depreciation. *See Cranfield v. State Farm Fire and Cas. Co.*, 798 F. App'x 929, 930 (6th Cir. 2020) (per curiam) (adopting the ruling from *Perry v. Allstate Indem. Co.*, 953 F.3d 417, 421-23 (6th Cir. 2020)).

The complaint asserts a claim for breach of contract on behalf of policyholders who made structural damage claims for property located in Ohio under policies written by State Farm. Doc.

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

138 (Fourth Amended Complaint). State Farm has vigorously defended this litigation, and absent this class settlement, would continue to do so through summary judgment motion practice and trial.

For example, on remand from the *Cranfield* appeal, the claims of the individual plaintiffs remained vulnerable on the merits, as State Farm raised a contractual limitations defense (among others) barring the claims of both the original Plaintiff, Charles Cranfield,[2] and Plaintiff Northpointe. Docs. 66, 79, 109, 124. These individual defenses presented significant obstacles to Plaintiffs' efforts to obtain certification of a litigation class. In fact, the Court denied Plaintiffs' motion for class certification based in part on the individualized inquiry necessary to resolve these and other defenses. As the Court observed:

> [I]t will be necessary to review and analyze the facts of each putative class claim to determine "withheld" non-material depreciation; to determine whether any policyholder was "underpaid," as Plaintiffs contend, due to labor depreciation; whether some policyholders were paid full replacement costs up-front, without depreciation; and whether others may have been paid their policy limits.

Doc. 135 at 10 (Aug. 2, 2021 Opinion & Order); *see also id.* at 13 (finding that individual issues predominated over common issues, thereby precluding certification under Rule 23(b)(3), based on, among other things, the "variety of property loss policies," the "different contractual limitations defenses," and the "[d]istinctions . . . between putative class members who accepted ACV and those who pursued repair and replacement costs").

Despite the strength of these defenses, State Farm believes that the claims-made settlement described in the Agreement is in the best interests of its policyholders. First, this matter has been actively litigated for over eight years and would likely span several more years inclusive of trial

[2] Cranfield's individual claims were subsequently settled on an individual basis and dismissed. Doc. 155. Thus, he is no longer a proposed class representative and is not a member of the proposed Settlement Class.

and appeals. Second, a trial of this matter on a class-wide basis would be wholly unmanageable, and even reaching such a trial would present significant costs and risks for each side. State Farm seeks to resolve this case so that it can avoid further litigation expenses and uncertainty and continue providing excellent service to its policyholders.

As set forth below, State Farm believes that the Proposed Settlement is fair, reasonable, and adequate, especially in view of the strength of State Farm's defenses to the asserted claims and the difficulties Plaintiffs would face in establishing liability and proving damages in a litigation context. Moreover, as discussed further below, the full and successful implementation of the Notice Plan, the notification of appropriate state and federal officials in accordance with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, the lack of any objections by any of those officials, the absence of objections by any Class Member or other interested persons, and the other fairness factors considered at this stage demonstrate that the Settlement should be finally approved by the Court.

BACKGROUND

I. PROCEDURAL HISTORY

The original Complaint in this case, filed only by former named Plaintiff Cranfield on April 22, 2016, limited the asserted class to persons "insured under a State Farm homeowners' policy," like Cranfield, and excluded anyone who had been paid the applicable limits under their policy or who had "received payment of the withheld depreciation"—*i.e.*, who had sought and received at least a portion of the depreciation that had been deducted in calculating ACV. Doc. 1-1, ¶¶ 31, 39; *see also id*., ¶ 30 (alleging that State Farm breached its "homeowners' policies").

State Farm initially prevailed on a motion to dismiss the complaint (Doc. 47) before that decision was reversed by the Sixth Circuit in 2020. *Cranfield,* 798 F. App'x at 930. After the case was remanded to the district court, Cranfield filed the first of three amended complaints, purporting

to expand the proposed class to include policyholders "under any property policies" and removing the exclusion for those who had sought replacement cost benefits. Doc. 57, ¶ 63. That complaint also changed the proposed class period from the eight-year period preceding the filing of the lawsuit (Doc. 1-1, ¶ 39) to a proposed class period equal to the "maximum time period as allowed by applicable law." Doc. 57, ¶ 63.

State Farm moved to dismiss the First Amended Complaint based on the contractual suit limitations provision in Cranfield's policy. Doc. 66. In response, Cranfield filed a Second Amended Complaint, which State Farm again moved to dismiss. Docs. 67, 70. Cranfield moved to strike State Farm's dismissal motion and also sought leave to file a Third Amended Complaint adding Northpointe as a party. Docs. 74, 76. State Farm opposed both motions, arguing (among other things) that Northpointe's claim was also time-barred. *See* Doc. 79.

In March 2021, the Court granted Cranfield's motion for leave to file a Third Amended Complaint. Doc. 102. The Court held that the dispute over the viability of Northpointe's and Cranfield's claims would be "more appropriately addressed through dispositive motion practice." *Id*. at 4. In answering the Third Amended Complaint, State Farm asserted, among other defenses, that Plaintiffs' claims were both time-barred and that Northpointe's claim was further barred by State Farm's full payment and by the doctrine of accord and satisfaction. *See* Doc. 116 at 51-53. State Farm subsequently moved for summary judgment on these defenses. *See* Docs. 130, 134, 137.

Meanwhile, Plaintiffs moved for class certification on March 10, 2021. Docs. 98-99. Plaintiffs asked the court to certify an asserted class consisting of *all* State Farm policyholders who either (i) received an ACV payment where estimated labor and other non-material costs had been depreciated, or (ii) would have received such a payment but for that depreciation. Plaintiffs also

sought to appoint Ermidis as an additional class representative. *See id.* State Farm opposed Plaintiffs' motion (Doc. 109), and Plaintiffs filed a reply brief in support (Doc. 120).

On August 2, 2021, this Court denied Plaintiffs' class certification bid. Among other significant rulings, the Court held that:

- Northpointe's claim was "not part of the originally-asserted Class definition" (Doc. 135 at 9);
- Cranfield's and Northpointe's claims were both potentially susceptible to limitations defenses, which prevented them from meeting Rule 23's typicality requirement (*id.* at 8-11);
- Individualized fact-finding would be required to determine, for each putative class claim, (i) the amount of non-material depreciation that was applied to any claim payment, (ii) whether any policyholder was "underpaid" due to labor depreciation, (iii) whether State Farm paid the policy limits, and (iv) whether any policyholder was paid replacement costs up-front (without depreciation) (*id.*); and
- Individual issues predominated over common questions, including due to the variety of policies covered by the asserted class definition and the fact that "[d]istinctions can be drawn between" ACV-only insured and insureds who sought replacement cost benefits (*id.* at 12-13).

The Court allowed Plaintiffs to further amend their pleading to add Ermidis as a party and stated that it would "entertain a renewed motion for class certification" after it ruled upon State Farm's pending summary judgment motion. *Id.* at 13-14. On September 1, 2021, Plaintiffs filed a Fourth Amended Complaint to add Ermidis as a named Plaintiff (Doc. 138), which pleading State Farm answered on September 15, 2021 (Doc. 139).

On October 6, 2021, the parties filed a joint motion to stay all proceedings in this case to allow them to engage in mediation to explore a potential resolution of the matter. Doc. 142. The Court granted that motion on October 7, 2021, and directed the parties to file regular status reports regarding the progress of the proposed mediation. Doc. 143.

II. SUMMARY OF PROPOSED CLASS AND SETTLEMENT

On January 17, 2023, following four full-day mediation sessions with Michael N. Ungar of Ulmer & Berne LLP, and further direct settlement negotiations outside of those mediation sessions, the parties jointly reported that they had reached an agreement to settle this case on a class-wide basis and had executed a comprehensive class settlement agreement. Doc. 153. The parties filed the proposed class settlement agreement with this Court on February 17, 2023. *See* Docs. 157, 158.

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

The Class as defined in the Settlement Agreement includes "all persons and entities insured under a State Farm structural damage policy who: (1) made a structural damage claim for property located in the State of Ohio with a date of loss on or after April 22, 2015; and (2) received an actual cash value ("ACV") payment on that claim from which estimated Non-Material Depreciation was withheld from the policyholder, or who would have received an ACV payment but for the withholding of estimated Non-Material Depreciation causing the loss to drop below the applicable deductible." Doc. 157-1 at ¶ 2.8. Subject to State Farm's right to challenge or reduce Claim Settlement Payments as outlined in the Settlement Agreement, potential Class Members who submit an accurate and complete Claim Form within the Claim Period, and are deemed eligible, will receive a Claim Settlement Payment in accordance with the following provisions:

> **Group A: Settlement Claimants with Homeowners Policies Who Previously Received ACV Payments And Did Not Receive Full RCBs.** The Claim Settlement Payments to Claimants who (i) submitted insurance claims under a State Farm Homeowners Policy (specifically, forms FP-7955, FP-7954, FP-7956, or FP-7933), (ii) received an ACV payment from which estimated Non-Material

Depreciation was initially deducted, and (iii) did not subsequently recover all available depreciation through payments of replacement cost benefits ("RCBs"), will be equal to 100% of the estimated Non-Material Depreciation that was initially deducted from the ACV payment and was not yet recovered through payments of RCBs, plus 50% of the estimated General Contractor Overhead and Profit Depreciation (if any) that was initially deducted from the ACV payment and was not yet recovered through payments of RCBs, plus simple interest at 3.5% on those additional amounts to be paid from the date of the initial ACV payment through the date of Final Approval.

Group B: Settlement Claimants with Homeowners Policies Who Previously Received Full RCBs After Initially Receiving an ACV Payment. The Claim Settlement Payments to Claimants who (i) submitted insurance claims under a State Farm Homeowners Policy (specifically, forms FP-7955, FP-7954, FP-7956, or FP-7933), (ii) received an ACV payment from which estimated Non-Material Depreciation was initially deducted, and (iii) subsequently recovered all available depreciation through payments of RCBs will be equal to simple interest at 3.5% on the amount of estimated Non-Material Depreciation initially applied but subsequently recovered, plus simple interest at 3.5% on 50% 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 final replacement cost payment.

Group C: Settlement Claimants with Homeowners Policies Who Would Have Received an ACV Payment But For Application of Non-Material Depreciation. The Claim Settlement Payments to Claimants who (i) submitted insurance claims under a State Farm Homeowners Policy (specifically, forms FP-7955, FP-7954, FP-7956, or FP-7933), and (ii) did not receive an ACV payment due to the application of estimated Non-Material Depreciation, 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 the application of Non-Material Depreciation caused the calculated ACV figure to drop below the applicable deductible, plus simple interest at 3.5% on those amounts to be paid from the date of the initial ACV payment through the date of Final Approval.

Group D: Settlement Claimants with Non-Homeowners Policies. The Claim Settlement Payments to Claimants who fit within the Class Definition but who submitted insurance claims under a State Farm structural damage policy other than a State Farm Homeowners Policy (specifically, policies other than forms FP-7955, FP-7954, FP-7956, or FP-7933), shall be equal to 50% of the amount that would otherwise be calculated above in Groups A, B, and C if the Claimant had submitted a claim under a State Farm Homeowners Policy.

Id. at ¶ 6.4.[3]

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

> (a) If Defendant determines through its review of claim file materials that Non-Material Depreciation was not actually applied to any payment made in connection with the Covered Loss, then the Claimant is not a Settlement Class Member and is not entitled to claim the benefits afforded by this Agreement.
>
> (b) If Defendant determines through its review of claim file materials that the Claimant is not a Settlement Class Member because the Claimant already received ACV payments from Defendant for the Covered Loss in the full amount of any applicable limits under the Claimant's Policy, then the Claimant is not entitled to claim the benefits afforded by this Agreement.
>
> (c) If Defendant determines through its review of claim file materials that the non-interest portion of the Claim Settlement Payment amount as calculated above (i.e., either the amount of Non-Material Depreciation, the amount of General Contractor Depreciation, or the combined sum of those two amounts) would exceed any applicable limits of liability under the Class Member's Policy, then Defendant may reduce the non-interest portion of the Claim Settlement Payment accordingly and update the interest calculation to correspond to the reduced figure.

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

> (d) If Defendant determines through its review of claim file materials that the Non-Material Depreciation amount as determined above . . . was already recovered in full through RCB payments, then Defendant may calculate the Claim Settlement Payment as under Group B from Section 6.4 above.

Id. at ¶ 7.2.

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

III. THE COURT'S PRELIMINARY APPROVAL OF THE SETTLEMENT

On February 17, 2023, Plaintiffs filed a motion for preliminary approval of the Proposed Settlement. Doc. 157. On March 2, 2023, the Court granted the motion and issued a Preliminary Approval Order in which it preliminarily approved the Settlement as "fair, adequate, and reasonable." Doc. 160 at ¶ 4. The Court also found that the plan for Class Notice specified in the Agreement "constitutes the best practicable notice under the circumstances," and "meets the requirements of the Federal Rules of Civil Procedure, the requirements of due process under the United States Constitution, and the requirements of any other applicable rules or law." *Id.* at ¶ 16. The Court further found that "all notices concerning the Settlement required by the Class Action Fairness Act of 2005 . . . have been [or will be sent]." *Id.* at ¶ 17. The Court appointed JND Legal Administration ("JND") to act as third-party administrator for the Proposed Settlement and directed JND to disseminate the Class Notice pursuant to that plan. *Id.* at ¶¶ 9, 11. Finally, the Court conditionally certified the proposed class for settlement purposes and scheduled a Final Approval Hearing for July 25, 2023. *Id.* at ¶¶ 5, 19.

DISCUSSION

The federal courts have recognized an "'especially strong' presumption in favor of voluntary settlements 'in class actions,'" particularly as "substantial judicial resources can be conserved by avoiding formal litigation." *Mullins v. Data Mgmt. Co*., No. 1:20-CV-214, 2021 WL 2820560, at *4 (S.D. Ohio June 21, 2021) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 589, 594-95 (3d Cir. 2010)). In assessing the proposed settlement, the Court must consider the factors enumerated in Rule 23(e)(2), as well as factors developed by courts in this Circuit in deciding whether to approve a proposed settlement agreement. *See Cameron v. Bouchard*, No. CV 20-10949, 2021 WL 3087986, at *1 (E.D. Mich. July 22, 2021); *see also* Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment. As described below, the Proposed Settlement easily meets these standards.

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

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," which requires consideration of 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)(2).

In determining whether to grant final approval to a class action settlement, the Sixth Circuit has also identified the following factors as relevant to settlement approval: "(1) the risk of fraud

or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Gen. Motors Corp*., 497 F.3d 615, 631 (6th Cir. 2007). Of these, "[t]he most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *Poplar Creek Dev. Co. v. Chesapeake Appalachia, LLC*, 636 F.3d 235, 245 (6th Cir. 2011); *see also Int'l Union,* 497 F.3d at 631 ("The fairness of each settlement turns in large part on the bona fides of the parties' legal dispute . . . [and the court] cannot judge the fairness of a proposed compromise without weighing the plaintiffs' likelihood of success on the merits against the amount and form of the relief offered in the settlement.") (internal citation omitted). This includes assessing the litigation risks faced by class members, including the strength of the defendant's defenses and the potential for an unfavorable verdict. *See Does 1-2 v. Déjà Vu Servs., Inc*., 925 F.3d 886, 896-97 (6th Cir. 2019); *Thacker v. Chesapeake Appalachia, LLC*, 695 F. Supp. 2d 521, 532 (E.D. Ky. 2010) (approving settlement where "Plaintiffs' success on all of their claims at trial was by no means guaranteed"). Each of these factors supports the Court's approval of the Settlement.

A. Absence of Fraud and Collusion.

As a threshold matter, "[t]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Mullins*, 2021 WL 2820560, at *5 (quoting *Mullins v. S. Ohio Pizza, Inc*., No. 1:17-CV-426, 2019 WL 275711, at *2 (S.D. Ohio Jan. 18, 2019)). Here, Plaintiffs and State Farm were both represented by experienced counsel who vigorously defended their respective clients' interests. Prior to entering into the Settlement Agreement and agreeing to the Settlement, the parties undertook complex discovery and motion practice. Additionally, the

Agreement was reached only through multiple, arms' length settlement negotiations overseen by Michael N. Ungar of Ulmer & Berne LLP. As such, the "absence of fraud or collusion" requirement has been satisfied. *See, e.g.*, *Mullins*, 2021 WL 2820560, at **5* (finding that a proposed settlement is not the product of fraud or collusion where it "is the product of arms-length negotiations conducted by experienced counsel on both sides").

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

In assessing the second *International Union* factor—the complexity, expense, and likely duration of the litigation—courts consider the "costs, risks, and delay of trial and appeal," as well as the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims." *In re Flint Water Cases*, No. 516CV10444JELEAS, 2021 WL 5237198, at *23 (E.D. Mich. Nov. 10, 2021) (quoting Rule 23(e)(2)(C)), *motion to certify appeal denied*, No. 5:16-CV-10444, 2021 WL 5833416 (E.D. Mich. Dec. 8, 2021), *and reconsideration denied*, No. 5:16-CV-10444, 2022 WL 504415 (E.D. Mich. Feb. 18, 2022), *and judgment entered*, 2022 WL 509894 (E.D. Mich. Feb. 18, 2022), *and judgment entered*, 2022 WL 628688 (E.D. Mich. Mar. 3, 2022).

Here, the Action is undeniably complex, and the parties obtained sufficient information to evaluate the merits of the competing positions through more than eight years of litigation. Although this Court has made no rulings on the merits of Plaintiffs' claims, it has expressed skepticism that a litigation class properly could be certified in this matter as advanced by Plaintiffs due to the variety of individualized issues that must be adjudicated for each claim. *See* Doc. 109 at 28-39. State Farm understands that Plaintiffs intended to eventually file a renewed motion for class certification. But there is no guarantee that the case would have survived until such a renewed motion, as State Farm had pending a summary judgment motion demonstrating that both

Cranfield's and Northpointe's claims were deficient as a matter of law, and was prepared to file a similar motion directed at the claim by Ermidis. *See* Doc. 124-2.

State Farm also demonstrated that Northpointe's claim—and all other putative class claims brought under non-homeowners policies—could not take advantage of the class-action tolling doctrine established by the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), because they were not within the scope of the class asserted in the original complaint filed in this case. *See* Doc. 130-1 at 23-26. As a result, State Farm submits that these claims would eventually have been eliminated from the case.

Even assuming that one of the named Plaintiffs' individual claims survived summary judgment, that would not have strengthened Plaintiffs' request for class certification—for the reasons this Court has already identified. For example, to prevail on the breach of contract claim, Plaintiffs and each class member would need to prove that State Farm's ACV payment(s) did not sufficiently compensate them for the actual cash value of their damaged property. But resolution of this question turns not on whether the ACV payment made by State Farm included a deduction for labor depreciation, but rather on whether the amount paid was or was not less than the amount the policy promised—namely, the ACV of the damaged property. And because State Farm calculates ACV payments using *estimates* of replacement costs, State Farm's estimate of ACV may not reflect the *actual* ACV of any damaged property. Indeed, depending upon the inputs to the estimated ACV and for a myriad of reasons, the amount paid by State Farm to a policyholder may be much higher than the actual ACV of the policyholder's damaged property, regardless of the application of labor depreciation. *See generally* Doc. 109, Exs. H & I. Only by examining the actual costs to repair the damaged property can the true ACV be derived and compared to the ACV payment each policyholder received. In other words, as this Court recognized, it will be "necessary

to review and analyze the facts of each putative class claim to determine . . . whether any policyholder was 'underpaid,' as Plaintiffs contend, due to labor depreciation." Doc. 135 at 10. The need for such an individualized analysis of each putative class claim would have been a significant hurdle to any class-wide adjudication in this case.

The language in State Farm's policies also creates additional, fact-specific liability questions that would have been incredibly complicated, if not impossible, to litigate in a class-wide trial. For example, because State Farm's policies expressly cap the amount owed for ACV at the policyholders' cost to complete repairs, State Farm submits that members of the class who received full payment of their cost to complete repairs through an ACV payment will be unable to establish breach of contract as a matter of law. Simply put, those class members were not underpaid for ACV, and thus the policy was not breached. Similarly, State Farm's policies provide that, once repairs are completed, State Farm's overall payment obligation shall not exceed the policyholder's "cost to repair or replace" the damaged property or the applicable policy limits, whichever is lower.

Further, if a policyholder requested RCBs and through that process already received payment from State Farm for their full "cost to repair or replace" or for the applicable policy limits, then there can be no breach of the policy (for ACV or otherwise) as a matter of law. Northpointe's own claim illustrates one such scenario; specifically, State Farm paid the full costs Northpointe incurred for repairs, including all initially applied depreciation, after reaching agreement on those costs with Northpointe's attorney and representative. *See* Doc. 130-1 at 9-10, 27. Many other putative class members will face these same defenses. *See* Doc. 109 at 29 (noting that more than one-third of random sampling of putative class claims received payment of replacement cost benefits).

Northpointe's individual claim also illustrates one of a variety of contract-based defenses that would have made a class-wide trial unmanageable. Specifically, discovery revealed that Northpointe was represented by counsel throughout the claim handling process and in fact negotiated a final settlement of its claim through that attorney. *See id.* at 29-30. State Farm has asserted that those facts made Northpointe's claim susceptible to the defense of accord and satisfaction. *See id.* This defense could not have been litigated on a class-wide basis. In fact, courts in other "labor depreciation" class actions have denied class certification based on similar contract-based defenses. *See, e.g.*, *Brasher v. Allstate Indem. Co.*, No. 4:18-CV-00576-ACA, 2020 WL 4673259, at *14 (N.D. Ala. Aug. 12, 2020) (denying class certification motion based on insurer's asserted (and potential) defenses for accord and satisfaction, set-off, and recoupment).

In sum, there may be any number of policyholders for whom an individualized review of the facts associated with their claim would show there is no viable claim for breach of contract or no entitlement to damages, including (for example) because the policyholder: (i) did not in fact receive an ACV payment with labor depreciation applied; (ii) already received full payment of the applicable limits under their policy; (iii) sought or received RCB payments, as discussed above; (iv) was able to complete repairs in full for the amount of their ACV payment; or (v) received an ACV payment that was overstated by more than the amount of any labor depreciation applied in calculating the payment. State Farm has already demonstrated that numerous such examples of these claims exist within the putative class. *See* Doc. 109 at 18-30.

Because a proposed class settlement need not satisfy the litigation manageability requirement under Federal Rule of Civil Procedure 23, *Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), the Proposed Settlement avoids the intractable litigation manageability issues

presented by such individualized liability proofs. For all of these reasons, State Farm submits that the second *International Union* factor is satisfied here.

C. The Amount of Discovery Engaged in by the Parties.

International Union requires that the Court consider "the amount of discovery engaged in by the parties" in evaluating the fairness of the settlement. 497 F.3d at 631. In *Olden v. Gardner*, for example, the Sixth Circuit suggested that the absence of discovery can weigh against granting final approval of the settlement. 294 F. App'x 210, 218 (2008). It noted that "[o]btaining expert opinions and engaging in formal discovery are usually essential to establishing a level playing field in the settlement arena because it enables the class counsel to develop the merits of their case." *Id*. (citing *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 813–14 (3rd Cir. 1995)).

The parties' efforts in discovery in this case were more than sufficient to meet the threshold requirement discussed in *Olden*. Discovery in this case has been substantial, and the parties devoted a significant amount of time and motion practice to expert discovery. *See, e.g.*, Doc. 99-6 (Pls.' expert report supporting class certification); Docs. 107-8, 107-9 (Def.'s expert reports supporting opposition to class certification); Docs. 111–115, 118 (documenting discovery disputes); Docs. 119, 128, 129 (briefing on motion to strike expert opinion). Accordingly, this factor also weighs in favor of the Proposed Settlement.

D. The Likelihood of Success.

This factor does not require the Court to "decide the merits of the case or resolve unsettled legal questions"; however, it recognizes that the Court cannot reasonably "judge the fairness of a proposed compromise" without "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Int'l Union*, 497 F.3d at 631. In evaluating this factor, the Court's

> task is not to decide whether one side is right or even whether one side has the better of these arguments. Otherwise, we would be compelled to defeat the purpose of a settlement in order to approve a settlement. The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement.

Id. at 632. The strength of the defendant's defenses and the potential for an unfavorable verdict also weighs heavily in favor of settlement. *See Does 1-2*, 925 F.3d at 896-97; *Thacker*, 695 F. Supp. 2d at 532.

Here, as discussed above, the risks to Plaintiffs and class members of proceeding through to a trial on the merits (and any appeals) are significant—not to mention the fact that the Court already rejected Plaintiffs' first attempt at class certification. State Farm submits that, even if a class eventually was certified in this matter, a trial would have revealed that a number of class members in fact had no entitlement to damages, including (for example) because the policyholder (i) did not in fact receive an ACV payment with labor depreciation applied, (ii) already received full payment of the applicable limits under their policy, (iii) already recovered far more than the initially applied depreciation through payment of RCBs; (iv) was able to complete repairs in full for the amount of their ACV payment; or (v) received an ACV payment that was overstated by more than the amount of any labor depreciation applied in calculating the payment. Similarly, based on the express policy language capping the amount State Farm must pay for ACV at the policyholders' cost to complete repairs, State Farm submits that a number of class members would have been unable to establish a breach of contract at trial because the amount they received for ACV enabled them to complete repairs in full to their damaged property.

From State Farm's perspective, the risks to Plaintiffs and class members of litigating their claims through trial and any post-trial appeal weigh strongly in favor of the fairness and reasonableness of the Settlement, thereby satisfying this *International Union* factor.

E. The Opinions of Class Counsel and Class Representatives.

As outlined in the Settlement Agreement and in Class Counsel's memoranda in support of preliminary and final approval, counsel for Plaintiffs and State Farm have significant experience in complex class action litigation and have negotiated numerous other class action settlements, including settlements of other class actions challenging the depreciation of labor in the calculation of ACV claim payments. All parties, including Plaintiffs, agree that the settlement as reflected in the Agreement is fair, adequate, and reasonable. It is well-established that the opinion of class counsel that the proposed settlement is fair to the class is entitled to considerable weight. *Bert v. AK Steel Corp*., No. 1:02-CV-467, 2008 WL 4693747, at *3 (S.D. Ohio Oct. 23, 2008) (citing *Turner v. Murphy Oil USA, Inc*., 472 F.Supp.2d 830, 852 (E.D. La. 2007)). Thus, this factor also supports the Court's final approval of the Settlement.

F. The Reaction of Absent Class Members.

The reaction of the absent Class Members also supports the approval of the Settlement. As reflected in the Settlement Agreement, the parties agreed to a form and manner of mailing notice to potential class members, all of which was approved by the Court in its Preliminary Approval Order. Doc. 159. In accordance with the Preliminary Approval Order, notice has been disseminated to potential class members. Importantly, the deadline for objections has passed and not a single potential class member has objected to the terms of the Settlement. Therefore, this *International Union* factor also supports the Court's final approval of the Settlement.

G. The Public Interest.

Public policy favors settlement of class action lawsuits. *E.g*., *Swigart v. Fifth Third Bank*, No. 1:11-cv-88, 2014 WL 3447947, at *4 (S.D. Ohio July 11, 2014). This case is no exception. The Settlement provides agreed-upon relief to the Class Members, avoids further litigation in a

complex case, and frees this Court's judicial resources. Thus, this final *International Union* factor also weighs in favor of approving the proposed Settlement.

II. ADEQUATE NOTICE HAS BEEN PROVIDED TO THE CLASS AND TO THE APPROPRIATE STATE AND FEDERAL OFFICIALS.

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

The Court-approved Class Notice plan has now been fully implemented by the parties and the Administrator, JND. As set forth in more detail in the affidavit filed by JND (*see* Doc. 161):

- State Farm provided JND with a spreadsheet list of 19,397 potential Class Members. JND ran the list of potential Class Members' addresses through the National Change of Address database and updated the addresses in the Class list accordingly. *Id.* at ¶¶ 6-7.

- On April 14, 2023, JND mailed a total of 20,729 Class Notices, via U.S. Mail postage paid to potential Class Members. *Id.* at ¶¶ 8-9.

- As of July 10, 2023, 790 Class Notices were returned as undeliverable. JND performed advanced address searches in an effort to obtain updated addresses for these Class Notices. As a result, JND was able to mail Class Notices to 314 updated addresses. *Id.* at ¶ 9.

- JND also received notice that 143 Class Notices were forwarded to updated addresses by the United States Postal Service. *Id*.

- On July 10, 2023, JND mailed Postcard Notices to all Class Members who had not yet submitted either a Claim Form or a complete and timely request for exclusion. *Id.* at ¶ 10.

- JND established, and continues to maintain, a toll-free number with an automated system providing information about the Settlement, with the ability to request copies of the long-form notice or the Agreement in English or Spanish, and to speak with a live customer service representative or leave a voicemail message. As of July 10, 2023, there have been 594 calls to JND's toll-free number. *Id.* at ¶¶ 13-14.

- JND established, and continues to maintain, a settlement website with a copy of material documents related to the litigation and the proposed Settlement (including but not limited to the Agreement and the long-form notice in English and Spanish), a series of Frequently Asked Questions and Answers regarding the Settlement, contact information for Class Counsel and for JND, key dates for the submission of Claim Forms, exclusion requests, and opt-out requests, and information regarding the details

of the final approval hearing. As of July 10, 2023, the settlement website has tracked 2,436 unique users who registered 12,721 page views. *Id.* at ¶¶ 11-12.

- The deadline to postmark or upload a Claim Form is August 24, 2023, and thus JND has not yet provided a final tabulation for receipt of Claim Forms. *Id.* at ¶¶ 19-20.

- Under the Agreement, any Class Member could have obtained exclusion from the Class by mailing an opt out request no later than thirty (30) days prior to the originally-scheduled final approval hearing date. The same deadline existed for objections, which therefore needed to be filed with the Court or postmarked by June 24, 2023. The deadlines for objections and opt-outs have now passed. As of July 10, 2023, JND has received no timely and completed requests for exclusion and has received no objections. *Id*. at ¶¶ 15-18.

Such notice plans are commonly used in class actions like this one and constitute valid, due, and sufficient notice to proposed class members. *See, e.g.*, *Carr v. Guardian Healthcare Holdings, Inc*., No. 2:20-CV-6292, 2022 WL 501206, at *4–5 (S.D. Ohio Jan. 19, 2022); *Harsh v. Kalida Mfg., Inc*., No. 3:18-CV-2239, 2021 WL 4145720, at *4 (N.D. Ohio Sept. 13, 2021).

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

CAFA requires that notice of all federal class action settlements be sent to the appropriate state and federal officials as a condition to obtaining court approval of the settlement. *See* 28 U.S.C. § 1715. In non-banking cases, the "appropriate federal official" is the Attorney General of the United States. *See id.* at § 1715(a)(1)(A). Notice must also be sent to the "appropriate State official of each State in which a class member resides." *Id.* at § 1715(b). The "appropriate State official" is:

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

Id. at § 1715(a)(2).

In this case, the Ohio Department of Insurance is the entity with the primary regulatory authority over State Farm in Ohio. In addition, given that potential Class Members likely reside in

other states, CAFA notice was sent to the U.S. Attorney General, the state attorney general for the states in which State Farm identified potential class members may reside (including the District of Columbia), the insurance commissioners of those same states, and, in an abundance of caution, to the Chairman of the Federal Reserve Bank. *See* Doc. 161 at ¶ 5. Accordingly, notification to appropriate federal and state officials has been given in accordance with CAFA.

Moreover, no recipient of the CAFA notice has objected or otherwise expressed any reservations to the proposed Settlement.

CONCLUSION

For all of the foregoing reasons, State Farm respectfully requests that the Court (1) find that the Proposed Settlement represents a fair, reasonable, and adequate resolution of the claims in this suit and (2) issue an Order granting final approval of the Stipulation of Settlement and entering Final Judgment in this case.

Dated: July 18, 2023

Respectfully submitted,

/s/ *Jacob L. Kahn*

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2023, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Jacob L. Kahn

One of the Attorneys for Defendant State Farm Fire and Casualty Company