IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

LORINE MITCHELL — PLAINTIFF

VS. — CAUSE NO: 3:17-CV-170-MPM-RP

STATE FARM FIRE AND CASUALTY COMPANY — DEFENDANT

STATE FARM'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This is an asserted class action based on a property insurance claim Plaintiff made under her State Farm Homeowners policy.[1] Plaintiff complains about the way State Farm estimates and pays the "actual cash value" ("ACV") of damaged structures. She concedes that in Mississippi, ACV may be calculated as "replacement cost less depreciation." *See* [1], ¶¶ 18, 31, 35, 77. She contends, however, that the labor component of replacement cost is *not* depreciable, and that State Farm commits breach of contract, negligence, and bad faith by depreciating *all* components of replacement cost, including labor, for its ACV calculations. *Id.* ¶¶ 77, 85, 92. State Farm has moved to dismiss, showing that its ACV calculations are lawful[2] and consistent with industry practice, that State Farm fairly pays the pre-loss value of insureds' property, and that all insureds who choose to complete repair can do so at *no* cost beyond their deductible. [9] at 6-13; [17] at 7-9; *see also infra* at 6-7. State Farm's motion remains pending.

Plaintiff now moves for class certification. [115.] She seeks Rule 23(b)(3) certification for the action as a whole, issue class certification under Rule 23(c)(4), and/or Rule 23(b)(1) certification of a mandatory punitive damages class. [115] at 1-2. But even if her case survives State Farm's dismissal motion, her "grab bag" approach to class certification fails.

Plaintiff's legal argument is unsound, for she misapplies this Circuit's law, misstates case holdings, and even cites vacated decisions. Indeed, the centerpiece of her argument is a class certification order that later was *reversed* by the Eighth Circuit *specifically* for lack of

[1] Plaintiff Lorine Mitchell is referred to herein as "Plaintiff" and Defendant State Farm Fire and Casualty Company is referred to herein as "State Farm."

[2] The Mississippi Insurance Department recently confirmed its view that "labor depreciation" is permitted under Mississippi law. [17-2.] Plaintiff concedes this. *See* Plaintiff's Memorandum in Support of Motion for Class Certification of a Monetary Damages Class, or in the Alternative, an Issues Class, [116] (hereinafter "Plaintiff's Brief" or "Pl. Br."), at 6.

predominance. *See* Pl. Br. 1, 10-11, 13-14, 19 (relying on *LaBrier v. State Farm Fire & Cas. Co.*, 315 F.R.D. 503 (W.D. Mo. 2016), *rev'd by In re State Farm Fire & Cas. Co.*, 872 F.3d 567 (8th Cir. 2017)). Plaintiff's evidentiary showing likewise fails. The record here is voluminous and includes all of State Farm's Mississippi property insurance policy forms, its pertinent claim handling guidelines and training materials, a 150-claim file sampling, massive data reports, and extensive expert evidence. Yet Plaintiff's motion cites to little more than her own claim documents and the report of her expert, and that expert concedes that he merely glanced at the vast majority of State Farm's 150-file claim sampling for his "analysis." *See infra* at 12.

State Farm respectfully requests denial of Plaintiff's class certification motion in its entirety. Resolving *individual* suits alleging claim underpayment routinely requires reinspection of the property, review of claim payments and contractor estimates, and expert evidence as to the property's pre-loss value. That same individualized evidence would be required to resolve each putative class member's claim if this action proceeds. The dispositive question for each insured is whether the *total* claim payment they received was sufficient in light of the damage to their property and their cost for completed repairs. One thus cannot reliably identify class members, determine the fact of injury, or calculate damages without extensive, individualized review of State Farm's claim records, repair documentation now in the sole possession of putative class members (or their contractors), and inspection of some individuals' property.

THE RECORD ON CLASS CERTIFICATION

Plaintiff's asserted class includes: (i) insureds who made a structural damage claim for a Mississippi property under a State Farm policy; (ii) whose policy did not include Endorsement FE-3650 on the date of loss; (iii) whose first claim payment was (or would have been) issued on or after June 23, 2014; (iv) who were not paid up to coverage limits; (v) who received an ACV

payment with "non-material depreciation" applied; and (vi) "non-material" or "labor" depreciation purportedly is "*still being withheld*" for the loss. *See* [115] at 1 (emphasis supplied).[3]

I. Plaintiff Has Not Supported a Multi-Policy Class.

Plaintiff's asserted class includes persons insured under *any* form of State Farm property insurance policy that did not include Endorsement FE-3650. [115] at 1.[4] There are seven such forms, consisting of Homeowners, Rental Dwelling, Manufactured Home, Condominium Unitowners, Rental Condominium Unitowners, Farm/Ranch, and Commercial Multi-Peril. Ex. 1, ¶ 10. The policy forms are not all identical. *See, e.g., id.* at Ex. F, SF19952-53[5]; *see also* Ex. 2, ¶ 7 n.1. The only policy form in the record is the Homeowners policy (Pl. Br. 1-2), and Plaintiff has not presented any evidence addressing the loss settlement language of the other policy forms.

II. The Loss Settlement Provision in the State Farm Homeowners Policy.

The Homeowners policy allows payment of structural damage claims in two steps. Ex. 3, SF130. State Farm first will pay the ACV of the damaged parts of a structure, but only up to either the coverage limits or the cost to repair (and less deductible). *Id*. Thereafter, replacement cost benefits are paid for additional, reasonable costs the insured incurs to complete repair (again, up to the policy limit):

> **COVERAGE A – DWELLING**
>
> 1. **A1- Replacement Cost Loss Settlement – Similar Construction**

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[3] The term "still withheld" is a mischaracterization, as the full cost for labor to *repair* property is not owed (and thus cannot be "withheld") until an insured completes repair. *See infra* at 3-4, 6. State Farm does not adopt Plaintiff's mischaracterization by referring to this class criterion herein.

[4] That Endorsement defines ACV to permit "labor" and other "non-material" depreciation. Ex. 1 at Ex. A, at SF52629. State Farm submitted the Endorsement to the Mississippi Insurance Department for review before introducing it. *Id.* at SF52626.

[5] For ease of reference, documents produced by State Farm are referenced in abbreviated form, so that SFMITCHELL00000130PROD is cited as "SF130."

> a. We will pay the cost to repair or replace with similar construction and for the same use . . . , the damaged part of the property. . . except for wood fences, subject to the following:
>
> (1) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the **Declarations**, *not to exceed the cost to repair or replace the damaged part of the property*;
>
> (2) when the repair or replacement is actually completed, we will pay the covered *additional amount you actually and necessarily spend* to repair or replace the damaged part of the property, or an amount up to the applicable limit of liability shown in the **Declarations**, whichever is less;

Id. (italic and underline emphases supplied, bold emphases original). The policy thus *never* requires payment – whether for ACV or replacement cost benefits – beyond an insured's reasonable cost to complete necessary, loss-related repairs. *Id.*

III. State Farm's Estimating and Claim Handling Practices in Mississippi.

Plaintiff argues that State Farm uniformly used an electronic estimating software program called "Xactimate" to prepare cookie-cutter estimates and to apply depreciation in a uniform manner. Pl. Br. 3-4. In fact, State Farm's claim handling is highly individualized.

A. Initial Inspection and Estimate Preparation.

When a loss is reported, a claim adjuster generally is assigned to perform an inspection. Ex. 2, ¶ 9. The adjuster is expected to observe all damage, take photographs as needed, take measurements, interview the insured regarding the pre-loss age and condition of the damaged property, and review any repair contracts or bids the insured may have. *Id.* The adjuster then prepares a detailed estimate of the work and materials needed to restore the property. *Id.*

[redacted]

[redacted]

[redacted] In Mississippi, it is State Farm's practice to depreciate the entire unit cost for a particular repair item (including its labor component) when depreciation is applied at all. Ex. 18 at 4-5. [redacted]

B. Initial Claim Payment and Reconciliation.

[redacted].

[7] Some line items are for "materials only," and others are solely for labor. *See* Ex. 5 at Ex. F, SF24550-52. State Farm's practice in Mississippi (and elsewhere) generally was *not* to apply depreciation to stand-alone labor charges, such as for roof tear-off or debris removal. *See* Pl. Br. 5 (citing [18-3] at ¶ 5); Ex. 18 at 4; Ex. 5 at Ex. E, SF21799 (no depreciation for roof tear-off).

State Farm's initial claim payment often is made at the time of the inspection. *See* Ex. 5 at Ex. D, SF22733. With that payment, the adjuster gives the insured a copy of the Xactimate estimate and two brief explanatory guides. *See id.*; *id.* at Ex. B, SF22373; *id.* at Ex. F, SF24541, SF24546, SF24549. One, the "Explanation of Building Replacement Cost Benefits," explains that State Farm will consider paying replacement cost benefits to the insured early, *before* repairs are complete, if the repairs are under contract or work is well underway. Ex. 2, ¶ 5; Ex. 5 at Ex. F, SF24549. The other, entitled "Structural Damage Claim Policy," explains that (i) State Farm will pay the *lower* of its own estimated replacement cost or the insured's contracted repair cost, and (ii) if a contractor quotes a *higher* price than State Farm's estimate, the insured should contact State Farm before work begins. Ex. 5 at Ex. F, SF24546. [redacted]

Finally, if a dispute over State Farm's valuation of a loss cannot be resolved, the insured can demand binding appraisal. Ex. 3, SF133. This process facilitates prompt resolution of valuation disputes without the expense of litigation. *See id.*

C. Repairs, Further Claim Handling, and Final Payment.

After State Farm issues its initial claim payment, the insured may or may not have further contact with State Farm. *See* Ex. 2, ¶¶ 16, 25. Where full replacement cost has been paid up front, no further contact is needed. *See id.* ¶ 17. [redacted]

Notably, insureds in Mississippi frequently *can* repair at a cost equal to or below State Farm's

estimate of ACV, particularly for roof repairs. *See* Ex. 6 at 260:3-261:9; Ex. 4 at 23-24. [redacted]

D. State Farm's Claims Documentation and Data.

Plaintiff concedes that members of her proposed class cannot be identified just by running data queries against electronic claim and estimate data. *See* Pl. Br. 9 (citing expert's opinions about how long it will take to *manually* review "data points" to determine class membership). She is correct. [redacted].

IV. State Farm's Handling of Plaintiff's Individual Claim.

A. Plaintiff's Loss and Her Contractor's Estimate.

Plaintiff claims that her home sustained storm damage on or about May 13, 2017. [1], ¶¶ 11-13. She reported the loss on May 16, 2017, and stated that her roof was damaged and that there was a water leak in her bedroom. Ex. 5 at Ex. F, SF24491. At that time, she gave State Farm a repair estimate she had obtained from a contractor, Jessie Hughes ("Hughes"). *Id.* at SF24499-500.[8] The Hughes estimate was a "lump sum" bid for roof replacement, repair of the bedroom ceiling, and additional items, as it did not break out costs by task or include a breakdown of labor and material costs. *Id.* at SF24531; *see also* Ex. 4 at 9. The estimate gives two conflicting "totals" – one for $5,000 and one for $4,500. Ex. 5 at Ex. F, SF24531.

Plaintiff's claim was handled in accordance with State Farm's guidelines as described above. Claim adjuster Charlie Foster ("Foster") inspected the damage to Plaintiff's home on May 24, 2017. Ex. 5 at Ex. F, SF24490-91. He measured the roof, prepared a rough diagram of the roof damage, and took representative photographs. *Id.* at SF24490-91, SF24522-30, SF24555. He also inspected, measured, and photographed the interior damage. *Id.* at 24532-34, SF24554. He then prepared an Xactimate estimate based on his observations and information Plaintiff gave as to the age of her property. *Id.* at SF24546-55. The estimate breaks out the necessary repairs into ten line-items, and it excludes repair items that Hughes identified, but which were not covered under Plaintiff's policy.[9] *Compare id. with id.* at SF24531. Foster estimated a total replacement cost of $3,246.42. *Id.* at SF24548. Though he fairly could have applied higher depreciation for

[8] Plaintiff insists that the estimate was prepared *after* her loss (Ex. 7 at 147:22-148:20), though it is dated two days earlier, Ex. 5 at Ex. F, SF24531.

[9] Foster determined that the roof decking and the "drip edge" were not damaged by a covered cause of loss. Ex. 6 at 186:11-187:19; *see also* Ex. 5 at Ex. F, SF24490-91; Ex. 4 at 9, 20.

Plaintiff's roof (*see* Ex. 4 at 19), he generously designated the existing roof as higher quality than it was (25-year shingles instead of 20-year shingles), which reduced the applied depreciation and resulted in a higher claim payment for Plaintiff. *Id*; Ex. 5 at Ex. F, SF24550. He designated the bedroom ceiling as 1 year / average condition, resulting in 6.67% depreciation. Ex. 5 at Ex. F, SF24550. He only applied depreciation to four line-items in the estimate. *Id.* at SF24550-52.[10] The resulting depreciation totaled $1,600.23 (*id.* at SF24548), with $737.87 attributable to "non-material depreciation." Ex. 8 at 10. Foster's resulting estimate of ACV totaled $1,646.19, and after subtracting Plaintiff's $1,000 deductible from that amount, he issued payment of $646.19. Ex. 5 at Ex. F, SF24488, SF24548; Ex. 6 at 134:1-22.

B. Plaintiff Chose to Sue for $738 Rather Than Repair With No Added Cost.

Plaintiff complained to Foster that she could not even buy replacement shingles with her initial claim payment. Ex. 7 at 100:15-102:12. And in her brief, she suggests that State Farm was not willing to pay replacement cost benefits for her claim.[11] The record, however, shows that Foster told Plaintiff orally and in writing that she could recover an estimated $1,600.23 in replacement cost benefits if she repaired and incurred higher costs to do so, and that State Farm would consider paying that amount up front if Plaintiff simply sent in a signed repair contract. Ex. 5 at Ex. F, SF24541-42, SF24546-49; Ex. 7 at 172:22-176:4; Ex. 6 at 235:24-238:21.

Foster also explained that Hughes' bid included repairs (replacement of drip edge and roof decking) that were not covered under her policy, and that Hughes had overstated the quantity of materials needed for her roof replacement. Ex. 5 at Ex. F, SF24491. He offered to resolve those

[10] No depreciation was applied to the line items for roof removal, sealant application, furniture removal, or re-texturing of the portions of the bedroom ceiling. Ex. 5 at Ex. F, SF24550-51.

[11] *See* Pl. Br. 2 (stating that State Farm "informed Plaintiff that her loss *would be* settled on an actual cash value basis") (emphasis supplied).

issues with Hughes. *Id.* Plaintiff said she would have Hughes call Foster. *Id.* A day later, Foster spoke with Hughes. *Id.* at SF24490. Foster explained the differences between his estimate and Hughes' repair bid. *Id.* Hughes said he could complete the repairs in State Farm's estimate at the stated prices. *Id.* Foster then provisionally "closed" Plaintiff's claim pending receipt of a request from her for replacement cost benefits. *Id.*

To date, Plaintiff has not repaired her home or recovered any of the $1,600.23 available to her. Ex. 7 at 189:2-6. Instead, she sued State Farm for $737.87 in "labor depreciation."

V. Plaintiff's Expert Would Use Individualized Review to Identify Class Members and Calculate Damages.

Plaintiff retained Toby Johnson, a claim adjuster, to opine [redacted]

[redacted]

12 [redacted]

[redacted]

[redacted]

VI. State Farm's Experts.

State Farm presented three experts for this phase of the case – forensic accountant Michael O'Connor, General Contractor Michael Berryman, and economist Dr. Stephen Prowse.

[redacted]

15 [redacted]

[redacted]

[redacted]

[redacted]

17 [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

19 [redacted]

[redacted]

[redacted]

ARGUMENT

The party requesting class certification bears the burden to establish Rule 23's prerequisites with admissible evidence. *Unger v. Amedisys Inc.*, 401 F.3d 316, 319-20 (5th Cir. 2005). This Court "may look past the pleadings to determine whether the requirements of rule 23 have been met," for the Court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Given the "important due process concerns of both plaintiffs and defendants inherent in the certification decision," the Supreme Court requires district courts to conduct a rigorous analysis under Rule 23. *Unger*, 401 F.3d at 320; *see also Castano*, 84 F.3d at 740. All of Plaintiff's requests for class certification fail under this standard.

[redacted]

I. Ascertainability Is Not Satisfied.

Plaintiff acknowledges that "ascertainability" is an implied prerequisite for her proposed classes. Pl. Br. 8; *see also DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (it is "elementary" that a proposed class "must be adequately defined and clearly ascertainable"). She professes that she has demonstrated ascertainability simply because her class definition uses purely "objective" eligibility criteria. Pl. Br. 8-9. She is in error.

A class is not "adequately defined" if it encompasses a substantial number of uninjured individuals. *See Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 307-08 (5th Cir. 2009) (a properly defined class should not include a substantial number of uninjured individuals); *Warnock v. State Farm Mut. Auto. Ins. Co.*, No. 5:08-cv-001-DCB-JMR, 2011 WL 1113475, at *9 (S.D. Miss. Mar. 24, 2011) (class not ascertainable where definition was overbroad and would encompass a substantial number of unharmed individuals). And it is not "administratively feasible" to identify class members if determining who satisfies "objective" membership criteria will require review, analysis, and fact-finding on a person-by-person basis. *See Johnson v. Kansas City S.*, 224 F.R.D. 382, 388 (S.D. Miss. 2004), *aff'd sub nom. Johnson v. Kansas City S. Ry. Co.*, 208 F. App'x 292 (5th Cir. 2006); *accord Middleton v. Arledge*, Nos. CIV.A. 3:06-CV-303WBH-LRA, 3:07-cv-350-TSL-JCS, 2008 WL 906525, at *8 (S.D. Miss. Mar. 31, 2008).

Here, Plaintiff's asserted class is defined according to whether each insured has "non-material depreciation" that is "still being withheld" for their claim. [115] at 1.[22] [redacted]

[22] Though Plaintiff's asserted class definition refers to "non-material depreciation," much of her argument focuses on the application of depreciation to labor costs, *i.e.*, "labor depreciation." The two are not the same. Nonetheless, for consistency, State Farm will refer to Plaintiff's arguments as addressing "labor depreciation."

[redacted] And State Farm's evidence shows that identifying such insureds will require individualized review for *all* putative class members, and must include consideration of repair records that insureds may not have submitted to State Farm and, potentially, inspection of some properties. *See supra* at 4-7, 12-15. That is because if the insured received payment(s) sufficient to pay the full *actual* cost of all labor and material to *complete* repairs, there cannot be *any* depreciation "still being withheld" for the claim. *See supra* at 12-15. Such insureds must be excluded from the class because they cannot have sustained an "injury in fact."

Plaintiff's class definition fails because it is indistinguishable from the failed class definition in *Johnson v. Kansas City Southern*. In *Johnson*, a proposed class of landowners sued several defendants for their allegedly wrongful installation of fiber optic cable on the plaintiffs' properties. *Johnson*, 224 F.R.D. at 383. The proposed class was defined to include individuals who owned land in a defined geographic area during a specified period, and who had not granted the defendants a right of way. *Id.* at 383-84. Though these criteria were objective, the district court recognized that identifying class members would require review and analysis of "thousands of title documents containing differing and diverse conveyance language." *Id*. at 389. The district court thus denied certification (and the Fifth Circuit affirmed) based on the "abundance of individualized issues" that would have to be resolved to *determine* the objective criteria for class membership. *Id.*

Plaintiff contends that some courts have found ascertainability satisfied even where individualized review, including manual file review, was needed to identify class members. *See* Pl. Br. 8-9. Her authorities, however, are readily distinguishable. None involved a class for which identification of class members would require person-by-person *fact finding* based on evidence only partially in the defendant's possession. *See*, *e.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269,

298-99 (W.D. Tex. 2007) (individuals could self-report their race and national origin to qualify as class members in race discrimination action).[23] Plaintiff has not demonstrated ascertainability.

II. Plaintiff's Claims Cannot Be Certified Under Rule 23(b)(3).

A. Predominance Is Not Satisfied.

The predominance element of Rule 23(b)(3) requires consideration of how class claims would be tried, and a district court thus must "'understand the claims, defenses, relevant facts, and applicable substantive law'" when ruling on class certification. *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2003) (citation omitted); *see also Castano*, 84 F.3d at 744. The plaintiff must "advance a viable theory employing generalized proof to establish liability with respect to the class involved." *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 328 (5th Cir. 2008). Certification cannot be ordered if liability determinations will require case-by-case inquiries. *Id.* at 328-29. Here, Plaintiff provides no viable trial plan or classwide proofs for her asserted breach of contract, negligence, or "bad faith" claims.

1. The Assertedly "Common" Issues Plaintiff Identifies Do Not Predominate.

Plaintiff's argument raises two assertedly predominating issues: Whether "labor depreciation" is allowed under State Farm's policy language, and whether State Farm applied "labor depreciation" as a matter of general practice. Pl. Br. 10-11, 13-15.[24] Both questions at most

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[23] *See also Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525-27 (6th Cir. 2015) (holding that class of purchasers could be identified through defendant's sale records or insured's submission of a receipt); *Lindquist v. Farmers Ins. Co.*, No. 06-59, 2008 WL 343299, at *1, *3 (D. Ariz. Feb. 6, 2008) (finding that, at *pleading* stage, plaintiff insureds sufficiently *alleged* an ascertainable class).

[24] Plaintiff appears to assume the answer to the second question is "yes." *See* Pl. Br. 11 (arguing that the first question should be considered "in the context" of State Farm's purportedly "*uniform* claims handling practices" (emphasis supplied)). As the record demonstrates, however, State Farm does not "uniform[ly]" apply labor depreciation. For example, [redacted] Thus, the

are purely preliminary and non-dispositive issues, for they only address the application of "labor depreciation" in the first instance.[25] But passing that threshold test merely lets an insured avoid *exclusion* from the class. Thereafter, all evidence needed to confirm class membership, determine liability, and calculate damages will be wholly personal from insured to insured. *See supra* at 4-7, 12-15. There are no common proofs to establish what repairs each insured completed, their incurred costs therefor, or the sufficiency of State Farm's payments for each loss. *That* is the evidence that will determine State Farm's potential liability and govern the computation of damages.

It is well-established in the Fifth Circuit that if the liability standard for a proposed class claim requires inquiry "into the reasonableness" of disputed charges or payments "on a transaction-by transaction basis," predominance fails. *Mims*, 590 F.3d at 307 (reversing grant of class certification). Further, it is immaterial whether the matters requiring transaction-by-transaction inquiry arise as part of the plaintiff's case or instead from affirmative defenses. *See Gene & Gene*, 541 F.3d at 327-29 (denying 23(b)(3) certification in part because question of fax recipients' consent would require individualized proofs; it did not matter whether that issue was part of plaintiff's case or an affirmative defense).[26] Plaintiff's action fails this test.

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question of whether an insured received a payment that included applied labor depreciation *cannot* be resolved reliably through common proofs.

[25] The "labor depreciation" question is already pending before the Court pursuant to State Farm's motion to dismiss. [8.] If the Court denies that Motion, it will have rendered a preliminary ruling on that issue, and for that reason, the question cannot properly support a finding of commonality, predominance, or superiority. *See Robertson v. Monsanto Co.*, 287 F. App'x 354, 361-62 (5th Cir. 2008) (*per curiam*) (where a court decides the central legal issue "*before* the class [i]s certified . . . there simply is no gain to be had from using the class action form") (emphasis in original); *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 631-32 (6th Cir. 2011) (threshold legal issue that the district court had already decided could not satisfy commonality requirement).

[26] Plaintiff argues that fact issues arising from affirmative defenses do not always preclude class certification. *See* Pl. Br. 10 n.3. But the cases she cites addressed individualized defenses in the

First, this case is essentially indistinguishable from *Nguyen v. St. Paul Travelers Insurance Co.*, No. 06-4130, 2008 WL 4691685 (E.D. La. Oct. 22, 2008). There, the plaintiff alleged that State Farm routinely underpaid the general contractor's overhead and profit ("GCOP") component of claim payments at a uniformly understated rate. *Id.* at *1. The court denied certification, holding that State Farm at trial would be "entitled to demonstrate that its overall payment was reasonable" as to each insured. *Id*. at *5, *9. In reasoning directly applicable here, the court concluded that certification could not be granted simply because the plaintiff claimed to challenge a purportedly uniform claim payment practice:

> [Plaintiff] cannot foreclose State Farm from trying to show not only that the percentage of GCO & P it paid was reasonable, but also that as to each plaintiff, the overall amount paid was contractually sufficient, for any number of reasons, *including that . . . State Farm's underlying ACV number was too high, or the amount included in the payment for GCO&P was sufficient because the Xactimate pricing data State Farm used for unit repair costs included in the estimate was above market rate or because contractors would do the work for the amount included*.

Id. at *5 (emphasis supplied).

The denial of certification in *Schafer v. State Farm Fire and Casualty Co.*, No. 06-8262, 2009 WL 2391238 (E.D. La. Aug. 3, 2009), likewise is instructive. In *Schafer*, the plaintiff challenged State Farm's allegedly uniform underpayment of property damage claims through supposed use of understated pricing in Xactimate. *Id*. at *1, *8. The court found predominance lacking because even assuming some unit pricing *had* been understated, State Farm nevertheless would have the right at trial to contest whether its payment to each insured was sufficient "as a

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context of the commonality, not predominance, requirement. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543-45 (6th Cir. 2012) (individualized defenses did not defeat commonality, but as to predominance, "district court would be free to revisit this issue if discovery shows that" some policyholders were harmed by something other than the defendants' actions); *Dockery v. Fischer*, 253 F. Supp. 3d 832, 849 (S.D. Miss. 2015) (noting that individualized defenses did not defeat *commonality* in a suit by prisoners challenging confinement conditions and seeking certification under Rule 23(b)(2) for *injunctive* relief).

whole," and the action thus could not be resolved without an overwhelming number of mini-trials. *Id.* at *6, *8 (emphasis supplied). After considering a "bevy of previous insurance-based class actions that have been denied due to lack of predominance," the court concluded that it was unlikely that any asserted class suit attacking purportedly uniform insurance adjustment practices could survive under the Fifth Circuit's standard for predominance, for *all* such cases require assessment of whether an insurer's payment was sufficient *in total* under the relevant policy. *See id.* at *8; *Caruso v. Allstate Ins. Co.*, No. 06-2613, 2007 WL 2265100, at *5 (E.D. La. Aug. 3, 2007) (predominance failed in suit challenging an insurer's alleged practice of paying less than the face value of insureds' policies following total losses; trial of the claims would require individualized proof regarding each insured's cause of loss and individual damages).

The *Nguyen* and *Schafer* courts correctly recognized that in the Fifth Circuit, predominance fails even where a class seeks to challenge assertedly common practices if (as here) liability and damages determinations nevertheless can only be resolved through individualized evidence. The Fifth Circuit so held in *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), where the plaintiffs sued for the defendant's alleged practice of blocking free transmission of caller identification information for calls placed using its long-distance network. *Id.* at 296. Despite the existence of a supposed common practice, predominance was lacking because individualized proof would be needed for each class member to determine whether the blocking had caused injury and to quantify that person's resulting damages. *Id.* at 304. More recently, in *In re Wilborn*, 609 F.3d 748 (5th Cir. 2010), the Fifth Circuit vacated an order of class certification where the plaintiff challenged a bank's allegedly common practice of charging unreasonable fees to debtors. *Id*. at 750-51. There again the Fifth Circuit found predominance lacking because trial of the matter

would require individualized proofs to determine which bankruptcy debtors in the plaintiff class were charged unreasonable or unapproved fees. *Id*. at 755.[27]

District courts within this Circuit continue to apply with fidelity the exacting standard that the Fifth Circuit requires.[28] Under that standard, Plaintiff has not remotely carried her burden as to predominance. This authority establishes that predominance is lacking here.

2. Predominance Fails for Additional Reasons as to Plaintiff's Tort Claims.

Plaintiff has not made any predominance showing in respect to her bad faith and negligence claims, nor can she. Even if those claims had been adequately pleaded (and they were not),[29] determining whether State Farm's adjustment of any particular insured's claim was reasonable will require consideration of what State Farm paid to each insured for each necessary repair. *See Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1183 (Miss. 1990) (courts in bad faith cases must "review[] *all* the evidence" potentially bearing on the insurer's challenged conduct) (emphasis in original). That is because Plaintiff concedes through her expert and class definition that only insureds with "labor depreciation" amounts "*still being withheld*" sustained injury. Consequently, Plaintiff's proposed tort claims are no different than comparable "bad faith" claims

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[27] *See also Madison v. Chalmette Refining*, 637 F.3d 551, 556-57 (5th Cir. 2011) (reversing class certification for district court's failure to consider whether the need for individualized damages determinations in the second phase of a proposed bifurcated trial would defeat predominance); *Sandwich Chef*, 319 F.3d at 211, 220-21 (predominance lacking in RICO suit alleging misapplication of workers compensation rates; at trial, defendants would be entitled to contest whether particular insureds knew they were being charged non-filed rates or had individually negotiated those rates).

[28] *See*, *e.g.*, *Shular v. LVNV Funding LLC*, No. H-14-3053, 2016 WL 685177, at *12-13 (S.D. Tex. Feb. 18, 2016); *Crutchfield v. Sewerage & Water Bd.*, Civil Action No. 13-4801, 2015 WL 3917657, at *9-10 (E.D. La. June 25, 2015); *Conrad v. Gen. Motors Acceptance Corp.*, 283 F.R.D. 326, 329-30 (N.D. Tex. 2012); *Schydlower v. Pan Am. Life Ins. Co.*, No. EP-04-CA-441-DB, 2007 WL 9702858, *8-9 (W.D. Tex. Jan. 18, 2007).

[29] *See* [9] at 14-19; [20] at 6-7 (State Farm's submissions in support of its pending motion to dismiss).

(asserted under Louisiana law) that the Fifth Circuit deemed ineligible for class treatment in *In re Katrina Canal Breaches Litigation*, 401 F. App'x 884 (5th Cir. 2010). In that case, insureds claimed bad faith based on an alleged "over-arching scheme . . . with respect to adjusting Hurricane Katrina claims" that violated the insurers' statutory duty to settle claims within 30 days of receiving a proof of loss. *Id*. at 886-87. The Fifth Circuit held that determining whether an insurer acted in bad faith is, by its nature, a fact-intensive inquiry requiring individualized assessment of the circumstances surrounding each insurance claim at issue:

> [E]ven in the face of such a [common alleged] scheme, individualized issues will predominate, such as the nature and extent of a class member's damage, whether and how much a class member was paid and for what type of damage, and whether any payment was sufficient and timely.

Id. at 887.[30]

3. Plaintiff's Authorities Addressing Predominance Are Inapt.

Plaintiff essentially ignores the foregoing Fifth Circuit authority as to predominance. She instead bases her argument on a purportedly unbroken string of orders certifying classes in "labor depreciation" suits. *See* Pl. Br. 1, 10-11, 13. She has not accurately presented these authorities.

Plaintiff relies most heavily on the district court order that *initially* granted class certification in *LaBrier*, 315 F.R.D. 503. Pl. Br. 1, 10-11, 13-14, 19. That is inexplicable, as the order later was *reversed specifically for lack of predominance. See In re State Farm Fire*, 872

[30] *See also Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 891 (7th Cir. 2011) (predominance lacking because class members could not recover in bad faith without showing that the total payment they received was inadequate); *Soseeah v. Sentry Ins.*, 808 F.3d 800, 811-12 (10th Cir. 2015) (predominance lacking for bad faith class claim challenging insurers' uniform failure to disclose applicable legal decisions; even if non-disclosure constituted bad faith, insureds could not demonstrate resulting underpayment or injury with common proofs); *Spiers v. Liberty Mut. Fire Ins. Co.*, Civil Action No. 06-4493, 2006 WL 4764430, at *2 (E.D. La. Nov. 21, 2006) (predominance lacking in asserted class suit for bad faith based on insurer's allegedly uniform claim handling procedure; even if the practice was proved, individualized evidence would be required to resolve each individual insured's claim and to calculate damages).

F.3d at 577. The Eighth Circuit held that the *LaBrier* district court erred in determining that "labor depreciation" was prohibited in Missouri. *Id*. at 573. The Eighth Circuit explained that when an insured chooses to contest the values in their State Farm estimate, determining the ACV of property becomes a question for the factfinder and *both* parties are free to present additional evidence as to the ACV of the damaged property. *Id*. at 574. The Court accordingly concluded that there were "*no* predominant common facts at issue" in the suit and reversed specifically on that ground. *Id*. at 576. *LaBrier* thus directly *undermines* Plaintiff's class certification motion here.

Plaintiff's remaining "labor depreciation" authorities from federal courts (*see* Pl. Br. 1 & n.1, 10-11, 13) are equally unpersuasive.[31] The class certification order she cites from *McCain v. Baldwin Mutual Insurance Co.*, No. 2010-901266 (Montgomery Cty., Ala. Oct. 18, 2016), also is not helpful to her, as it was reversed by the Alabama Supreme Court. *Baldwin Mut. Ins. Co. v. McCain*, No. 1160093, --- So. 3d ----, 2018 WL 1443878, at *10 (Ala. Mar. 23, 2018). And the remaining decisions she cites are state court rulings that did not apply the type of rigorous predominance analysis that Rule 23 requires.[32]

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[31] The class certification order in *Dennington v. State Farm Fire and Casualty Co*., No. 4:14-cv-04001 (W.D. Ark. Aug. 24, 2016), ECF No. 142, is on appeal. *See* Order, *Stuart v. State Farm Fire and Cas. Co.,* No. 16-8017/16-3784 (8th Cir. Sept. 29, 2016). As to the class certification order in *Green v. American Modern Home Insurance Co.*, No. 4:14-cv-04074 (W.D. Ark. Aug. 24, 2016), ECF No. 68, the parties settled while the defendant's accepted Rule 23(f) appeal was pending. *See* Judgment, *Green v. Am. Modern Home Ins. Co.*, No. 16-8016 (8th Cir. Sept. 29, 2016) ("The petition for a 23(f) appeal is granted."); *Green v. Am. Modern Home Ins. Co.*, Case No. 4:14-cv-4074, 2017 WL 2389709, at *6-7 (W.D. Ark. June 1, 2017) (approving class settlement). And *Johnson v. Hartford Casualty Insurance Co.*, Case No. 15-cv-04138-WHO, 2017 WL 2224828 (N.D. Cal. May 22, 2017), addressed a policy with materially different loss settlement language – there was no repair cost "cap" for ACV. *Id*. at *5-6 ("[T]he 'cap' language is in the RCV, not ACV, section of the policy.").

[32] *See Farmers Union Mut. Ins. Co. v. Robertson*, 370 S.W.3d 179, 188-89 (Ark. 2010) (recognizing that Arkansas state courts adhere to a "'certify now, decertify later' approach to class-action litigation"); *McLaughlin v. Fire Ins. Exch.*, No. 1316-CV-11140, at 4 (Jackson Cty, Mo. July 12, 2017) (noting that, under Missouri's approach to class certification, "the court accepts plaintiff's allegations as true").

Plaintiff concludes her predominance argument by misstating the record. She asserts that class members' damages here "are data driven and can be mechanically calculated" (*see* Pl. Br. 14 (quoting *LaBrier*, 315 F.R.D. at 522)), though [redacted] That is nothing like the simple damages computations envisioned in the case Plaintiff cites.[33]

B. Superiority Is Not Satisfied.

To show superiority, Plaintiff asserts – without admissible evidence[34] – that her action raises "small value" claims and thus satisfies "'the most compelling rationale for finding superiority in a class action.'"[35] *See* Pl. Br. 15 (quoting *Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 412 (N.D. Miss. 2000). She then cites a series of cases for the proposition that litigating small value claims can be expensive and time-consuming. *See* Pl. Br. 16.

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[33] *See* Pl. Br. 14 (citing *In re Monumental Life Ins. Co.*, 365 F.3d 408, 419 (5th Cir. 2004)). The court in *Monumental Life* held that the need to construct numerous grids to deal with variations in policy language did not defeat predominance because, once constructed, the grids would facilitate nearly automatic damages calculations for *every single* class member. *Monumental Life*, 365 F.3d at 419. In contrast to the damages analysis required in this case, there were zero "variables…unique to particular plaintiffs" in *Monumental Life*, and the damages calculations did not require data outside of the defendant's possession. *Id.* at 419-20.

[34] Plaintiff's "evidence" consists of a hearsay affidavit signed by one of her attorneys. [115-7.] As set forth more fully below (*see infra* at n.40) and in State Farm's Motion to Strike the Declaration of T. Joseph Snodgrass [126], the affidavit is incompetent and should be disregarded.

[35] Notably, Plaintiff ignores the recognition in *In re Katrina Canal Breaches Consol. Litig.*, 258 F.R.D. 128 (E.D. La. 2009), that claims involving a significant impact on each plaintiff's life – such as personal injury claims or claims addressing damage to a plaintiff's home – are *not* of the type that likely will not be pursued absent certification of a class. *See id.* at 142.

To begin with, it is not true that insureds have no way other than through class litigation to address disputes over State Farm's ACV payments. *See* Pl. Br. 15-16. Such matters frequently are resolved through the "reconciliation" process, and insureds further can invoke the appraisal process in the Homeowners policy to resolve disputes over the value of their loss. *See supra* at 6.

Moreover, Plaintiff's breezy analysis of superiority ignores that in the Fifth Circuit, a proposed class suit is deemed unmanageable if it will require individual mini-trials on liability and/or damages issues. *See Castano*, 84 F.3d at 750; *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744-45 (5th Cir. 2003); *Simms v. Jones*, 296 F.R.D. 485, 505 (N.D. Tex. 2013). As demonstrated above, that is exactly the process that will be required here.

Plaintiff nevertheless attempts to minimize the manageability problems this case presents, arguing that State Farm has been able to issue "refunds" for labor depreciation in the past. *See* Pl. Br. 14. Again, however, she misstates the record. [redacted]

[redacted]

[redacted]

[redacted]

[redacted] This evidence directly refutes Plaintiff's assertions of superiority.

C. Plaintiff's Showing Is Inadequate Under Rule 23(a).

Plaintiff's showing as to numerosity fails as a matter of law, for the only evidence she provides in support of that Rule 23(a) requirement is an incompetent, hearsay affidavit prepared by one of her attorneys. Pl. Br. 10 (citing [115-7], the Snodgrass Declaration).[40]

Further, Plaintiff's standing fails in three ways, which impairs her showing of adequacy, commonality, and typicality. A class representative "must 'possess the same interest and suffer the same injury' as the class members," and does not have "standing to litigate injurious conduct to which he was not subjected." *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 550 (5th Cir. 1988) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). To have standing, a plaintiff must either (i) have already suffered the same injury as class members or (ii) face a threat of suffering the same injury that is "'real and real and immediate,' not 'conjectural'

[38] [redacted]

[39] [redacted]

[40] Mr. Snodgrass' Declaration constitutes inadmissible hearsay, as he merely refers to vague data sorting processes he did not personally perform, and he has not provided the Court with the underlying data, an explanation of the sorting process used, or documentation of the results obtained. *See* [127] at 4-5; *Unger*, 401 F.3d at 325 (a court considering a motion for class certification "must…base its ruling on admissible evidence").

or 'hypothetical.'" *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1199-1200 (5th Cir. 1984) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). When a plaintiff lacks standing, the Rule 23(a) prerequisites of commonality, typicality, and adequacy all fail as well. *See id*. at 1200-01.

Here, Plaintiff lacks standing as to the entire class with respect to the asserted tort claims. Plaintiff's claim was paid, not denied, and she thus cannot state a viable claim for negligence *or* bad faith under Mississippi law. [9] at 14-19; [20] at 6-7. Plaintiff's standing also fails as to insureds other than Homeowners insureds, for she has not shown that the loss settlement provisions in other State Farm policy forms are comparable to the Homeowners policy she purchased. Finally, Plaintiff – who did not repair – lacks standing to represent insureds who *pursued* repairs and completed them at a cost equal to or less than ACV. Only those insureds are in a position to challenge the "cap" in the Homeowners policy that limits State Farm's ACV payment obligation at the cost to repair. *See Vuyanich*, 723 F.2d at 1200 (plaintiff who was injured by bank's hiring and termination practices could not challenge other employment practices).

For the foregoing reasons, even if certification otherwise were to be granted, the negligence and bad faith claims could not be certified and the class definition would have to be limited as set forth above. *See id.*

III. Plaintiff's Request for "Issue Certification" Under Rule 23(c)(4) Fails.

As an alternative to Rule 23(b)(3) certification, Plaintiff asks the Court to certify a purported "Rule 23(c)(4) issues class" to resolve (i) the "labor depreciation" issue raised by her Complaint, and (ii) interpretation of the "cap" language in the Homeowners policy. Pl. Br. 16.

Even putting aside Plaintiff's lack of standing as to the second issue (which is fatal under Rule 23(c)(4)[41]), her request for issue certification still fails.

A. The Fifth Circuit Rejects Plaintiff's Proposed Application of Rule 23(c)(4).

The Fifth Circuit expressly has rejected use of Rule 23(c)(4) to manufacture the Rule 23 prerequisites of predominance and superiority. In *Castano*, the Fifth Circuit held unequivocally that "core liability issues" cannot be carved out for class treatment if individualized proceedings thereafter will be required to resolve asserted class claims:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. *Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended*.

84 F.3d at 745 n.21, 749 (emphasis supplied; citations omitted). Thereafter, the Fifth Circuit applied *Castano* in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), *reh'g denied* (Oct. 2, 1998), when affirming the denial of certification for the initial phase of a pattern and practice civil rights suit. The court recognized that issue certification would merely delay, not preclude, the inevitable need to address issues requiring individualized determinations. *Id*. at 409, 421-22, 426. And the Fifth Circuit applied *Castano* again in 2006 to affirm the denial of class certification in a case where the suit "as a whole" did not satisfy Rule 23(b)(3)'s predominance requirement. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601, 605 (5th Cir. 2006).[42]

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[41] *See Rock v. Nat'l Collegiate Athletic Ass'n*, No. 112CV01019TWPDKL, 2016 WL 1270087, at *12 (S.D. Ind. Mar. 31, 2016) ("Certainly, if [the named plaintiff] fails to meet his own Core Issues class definition, he is an inadequate class representative.").

[42] Courts in other jurisdictions take a similar approach. *See*, *e.g.*, *Henke v. Arco Midcon, L.L.C.*, No. 4:10CV86 HEA, 2014 WL 982777, at *22 (E.D. Mo. Mar. 12, 2014) (following *Castano)*;

Plaintiff attempts, unsuccessfully, to suggest that the Fifth Circuit has retreated from *Castano*. *See* Pl. Br. 17-18. She cites *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012), for that point, but the court there simply affirmed certification of a 23(b)(2) class seeking injunctive relief and did not abandon *Castano*. *Id*. at 369 n.13, 372.[43] Plaintiff likewise errs in contending that bifurcation could be employed to cure any failure of predominance for her proposed issues class. *See* Pl. Br. 18 & n.6. To be sure, the Fifth Circuit recognizes that bifurcation can be appropriate. *Crutchfield v. Sewerage & Water Bd.*, 829 F.3d 370, 378 (5th Cir. 2016). But regardless of bifurcation, predominance still is assessed by considering "*all* the issues in a case—including damages—and deciding whether the common ones will be more central than the individual ones." *Id.* (emphasis supplied). The "constancy" of the predominance analysis thus "serves as an important limitation on the use of bifurcation by preventing a district court from manufacturing predominance through the 'nimble use' of rule 23(c)(4)." *In re Katrina Canal Breaches Consol. Litig.*, No. CIV A 05-4182, 2007 WL 2363135, at *1 (E.D. La. Aug. 16, 2007) (quoting *Smith v. Texaco, Inc.*, 263 F.3d 394, 409 (5th Cir. 2001), *opin. withdrawn & cause dismissed*, 281 F.3d 477 (5th Cir. 2002)).

The other cases Plaintiff cites (Pl. Br. 18 n.6, 21 n.10, 22) do not establish a different rule. Plaintiff relies on *Watson v. Shell Oil Co.*, 979 F.2d 1013 (5th Cir. 1992), and *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999), but those cases should be disregarded. *Watson*

O'Neill v. The Home Depot U.S.A., Inc., 243 F.R.D. 469, 482 (S.D. Fla. 2006) (same); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 651 (M.D. Fla. 2001) (same); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 316 (S.D. Ala. 2006) (plaintiff could not "shear[] individual issues off the case until only common issues remain, and certifying a class for the remainder").

[43] Plaintiff also relies on a Sixth Circuit case, which read *Steering Committee* as a relaxation of *Castano*. *See* Pl. Br. 17 (citing *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 412 (6th Cir. 2018)). But in the cited portion of *Steering Committee*, the Fifth Circuit simply declined to consider subclassing and bifurcation arguments that had not been presented to the trial court when affirming the denial of class certification. *Steering Committee*, 461 F.3d at 603.

was vacated,[44] and at least one court has described the class certification analysis applied in *Watson* and in *Mullen* as an outdated approach that no longer fits with current Fifth Circuit precedent. *Katrina Canal Breaches*, 258 F.R.D. at 138-39. Plaintiff's reliance on *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986), is equally unsound, for *Jenkins* use the same class certification analysis that *Watson* applied. *See Watson*, 979 F.2d at 1017-18 & n.9. To the extent Plaintiff relies on *In re Deepwater Horizon*, that case is inapt, as it was resolved by settlement. *See* 739 F.3d 790, 815-18 (5th Cir. 2014). And Plaintiff's remaining authorities are unpersuasive as well, as they are out-of-Circuit decisions that did not even order issue certification. *See* Pl. Br. 17-20.[45]

In sum, the *Castano* analysis for issue class certification controls here. *See Paternostro v. Choice Hotel Int'l Servs. Corp.*, 309 F.R.D. 397, 405 (E.D. La. 2015) ("Rule 23(c)(4) is not a stand-alone clause" and "Plaintiffs cannot sever issues in an attempt to circumvent Rule 23(b) requirements."). Plaintiff's request for issue certification fails because, as shown above, both predominance and superiority are lacking for this action as a whole.

B. Plaintiff's Request For Issue Certification Fails Even Under the More Lenient Standard Applied Elsewhere.

Even if a relaxed application of Rule 23(c)(4) *could* be applied here, Plaintiff's motion still would fail. Courts adopting the approach Plaintiff urges still require a showing that issue certification will "*materially* advance the resolution of the overall dispute." *Valenzuela v. Union Pac. R.R. Co.*, No. CV-15-01092-PHX-DGC, 2017 WL 1398593, at *5 (D. Ariz. Apr. 19, 2017) (emphasis supplied); *see also, Romig v. Pella Corp.*, Nos. 2:14-mn-00001-DCN, 2:14-cv-00433-DCN, 2016 WL 3125472, at *14-15 (D.S.C. June 3, 2016); *In re ConAgra Foods, Inc.*, 302 F.R.D.

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[44] *Watson v. Shell Oil Co.*, 990 F.2d 805 (Mem.) (5th Cir. Apr. 28, 1993); 5th Cir. R. 41.3.

[45] *See Healey v. Int'l Bhd. of Elec. Workers, Local Union No. 134*, 296 F.R.D. 587, 596-97 (N.D. Ill. 2013) (discussing Rule 23(c)(4) in dicta); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (ordering bifurcated trial, not issue certification).

537, 581 (C.D. Cal. 2014). For example, in *Valenzuela*, the court denied issue certification after concluding that class resolution of the identified issues would not "materially advance" the litigation. 2017 WL 1398593, at *4. The plaintiffs there requested certification of three questions pertinent to liability. *See id.* at *3. Though all three issues would be raised in all putative class members' claims, the court found that they would not be *determinative* of the defendant's liability to any individual plaintiff. *Id.* at *4. Rather, each plaintiff still would have to present individualized proofs, and the defendant would have to be given an opportunity to present affirmative defenses as to individual plaintiffs. *Id.* at *5.

Plaintiff's case is of a piece with *Valenzuela*. As shown above (*see supra* at 19), the two issues Plaintiff seeks to certify for class treatment will not establish State Farm's liability as to any insured, and thus constitute "but a minor part of each potential class member's case." *See In re Am. Commercial Lines, LLC*, Nos. CIV.A. 00-252, 2967, 3147, 2002 WL 1066743, at *13-14 (E.D. La. May 28, 2002) (denying issue certification where the need for individualized proceedings likely would "consume more judicial resources than certification will save"); *In re ConAgra Peanut Butter Prod. Liab. Litig.*, 251 F.R.D. 689, 701 (N.D. Ga. 2008) (similar).

IV. There is No Basis for Punitive Damages or a Punitive Damages Class.

Plaintiff's final bid under Rule 23 is her request for a mandatory punitive damages class under Rule 23(b)(1). As noted above, Plaintiff's tort claims are inadequately pleaded ([9] at 14-19; [20] at 6-7), so there is no basis for punitive damages here to begin with. But even if there were, Plaintiff's request for punitive damages to be imposed through a separate trial phase *following* determination of putative class members' compensatory damages must be rejected. *See* Pl Br. 21. Rule 23(b)(1) applies only if individual adjudication of class members' claims either would create a risk of inconsistent judgments, such that a defendant would be subject to "incompatible standards of conduct for the party opposing the class," or unfairly "impair or

impede" some individuals' ability to protect their own interests. Fed. R. Civ. P. 23(b)(1). Plaintiff is proposing a clear misapplication of Rule 23(b)(1) and a process that would violate State Farm's Seventh Amendment rights.

A. Claims for Monetary Relief Cannot Be Certified Under Rule 23(b)(1)(A).

Certification under Rule 23(b)(1)(A) is reserved for cases where the primary relief sought is not monetary. *See, e.g., Caruso*, 2007 WL 2265100, at *4 (class certification is inappropriate under Rule 23(b)(1)(A) for individualized damages claims).[46] Here, Plaintiff's claims all demand monetary relief and she *expressly* seeks class certification to recover money damages. *See* [115] at 1 ("Plaintiff…moves for an order certifying a class to seek monetary damages.").

B. Rule 23(b)(1)(B) Only Applies If There Is A Limited Fund.

Certification under Rule 23(b)(1)(B) likewise is unavailable. Plaintiff cites *Mays v. National Bank of Commerce*, 1998 U.S. Dist. LEXIS 20698 (N.D. Miss. Nov. 20, 1998), for the proposition that "[t]his District has determined that mandatory certification of punitive damages claims is more appropriate under Rule 23(b)(1)." Pl. Br. 21. But the Fifth Circuit ***reversed*** exactly that aspect of *Mays*. *Brand v. Nat'l Bank of Commerce*, 213 F.3d 636, 2000 WL 554193, at *3 (5th Cir. 2000). Moreover, Plaintiff has not made the "presumptively necessary" evidentiary showing required for certification under Rule 23(b)(1)(B): (1) that a fund exists with a definitely ascertained limit; (2) the entire fund would be distributed to satisfy the class's claims; and (3) the fund will be distributed on an equitable, pro rata basis. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841-42 (1999). A limited fund is established where, for example, all damages must be paid from

[46] *See also Terrebonne v. Allstate Ins. Co.*, 251 F.R.D. 208, 212-13 (E.D. La. 2007) (certification under Rule 23(b)(1)(A) inappropriate given the "predominance of monetary damages requested"); *Corley v. Entergy Corp.*, 222 F.R.D. 316, 321-22 (E.D. Tex. 2004) (certification under Rule 23(b)(1)(A) is inappropriate "if plaintiffs seek predominantly monetary, not injunctive, relief.").

the assets of a bankrupt entity, or a specified trust. *See id.* at 834-35. Plaintiff has not identified any such limited and identified pool of funds for this case. Accordingly, her motion under Rules 23(b)(1)(B) fails as a matter of law. *See, e.g., In re Simon II Litig.*, 407 F.3d 125, 137-38 (2d Cir. 2005) (reversing class certification under Rule 23(b)(1)(B) where no limited fund was shown); *Caruso*, 2007 WL 2265100, at *4 (striking allegations requesting a Rule 23(b)(1)(B) class for compensatory damages and penalties where plaintiffs did not identify a limited fund).

C. Punitive Damages Cannot Be Separately Tried Through Bifurcation.

Plaintiff's request for certification of a mandatory punitive damages class further fails because State Farm's Seventh Amendment rights would be violated if compensatory and punitive damages are imposed in different trial phases by different factfinders. Under the Seventh Amendment, in suits at common law (like this one), "the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise reexamined in any Court of the United States*, than according to the rules of the common law." U.S. Const. amend. VII (emphasis supplied). Moreover, Supreme Court precedent establishes that punitive damages awards can only be awarded based on the specific harm suffered by a plaintiff. *See Phillip Morris USA v. Williams*, 549 U.S. 346, 353-55 (2007) (punitive damages may not be awarded to punish a defendant for harming others); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (conduct sufficient to award punitive damages "must have a nexus to the specific harm suffered by the plaintiff"). And Mississippi requires that when imposing punitive damages, the jury "shall" consider several factors, including "the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff." Miss. Code Ann. § 11-1-65(1)(e) (2004). Under Plaintiff's bifurcation approach, however, the very factors that must be considered at the punitive damages phase already will have been considered and determined in earlier proceedings to address compensatory damages. That signals an incurable Seventh Amendment defect. *Castano*, 84 F.3d

at 750; *accord Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303-04 (7th Cir. 1995); *see also See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 320 (5th Cir. 1998). Thus, it is no surprise that *none* of Plaintiff's cited authorities support a class trial bifurcating compensatory damage determinations from the assessment of punitive damages.[47]

V. Consideration of Class Notice is Premature.

Plaintiff argues that mailed notice to the putative class should issue. Pl. Br. 22-23. The question of class notice, however, is wholly premature, as this action may be dismissed and no class has been certified. *Yeoman v. Ikea U.S. W., Inc.*, No. 11CV701 WQH (BGS), 2013 WL 12069024, at *19 (S.D. Cal. Feb. 27, 2013) (request for class notice denied as moot when court had modified the class definition and class period on motion to decertify); *McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46*, No. 05 C 0760, 2006 WL 681054, at *7 (N.D. Ill. Mar. 13, 2006) (issue of class notice was premature where class definition and class claims were unresolved).

CONCLUSION

Wherefore, for all of the foregoing reasons, State Farm respectfully requests that this Court deny Plaintiff's motion for class certification in all respects.

Dated: August 22, 2018

Respectfully submitted,

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[47] *See Deepwater Horizon*, 739 F.3d at 795 (case resolved by class settlement); *Mays*, 1998 U.S. Dist. LEXIS 20698, at *38-39 (no bifurcation ordered); *Watson*, 979 F.2d at 1023 (decision vacated by 990 F.2d 805); *Schmermund v. Nationwide Mut. Ins. Co.*, No. 1:07-cv-1213-LTS-RHQ, 2008 WL 5169396, at *3-4 (S.D. Miss. Dec. 5, 2008) (bifurcated trial in single plaintiff case with one jury).

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CERTIFICATE OF SERVICE

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

This 22nd day of August 2018.

/s/ Heidi Dalenberg