No. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LORINE MITCHELL,

Plaintiff-Respondent,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Petitioner.

ON PETITION FOR PERMISSION TO APPEAL FROM THE MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, OXFORD DIVISION, GRANTING CLASS CERTIFICATION IN CIVIL ACTION NO. 3:17-CV-00170-MPM-RP

PETITION OF STATE FARM FIRE AND CASUALTY COMPANY FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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October 8, 2018

[REDACTED]

Case No. _____

LORINE MITCHELL,
Plaintiff-Respondent
v.
STATE FARM FIRE AND CASUALTY COMPANY,
Defendant-Petitioner.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that judges of this Court may evaluate possible disqualification or recusal.

Petitioner State Farm Fire and Casualty Company ("State Farm")[1] is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company. No publicly held corporation has any ownership interest in State Farm Mutual Automobile Insurance Company.

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QUESTION PRESENTED

Whether this Court should grant permission to appeal under Federal Rule of Civil Procedure 23(f) where the district court certified a class challenging State Farm's application of "labor depreciation" when calculating actual cash value ("ACV") claim payments for damaged structures. The district court's ruling conflicts with class action authority in this Circuit and with the Eighth Circuit's recent decertification of a substantially similar "labor depreciation" class action for lack of predominance.

PRELIMINARY STATEMENT

The district court's order ("Order")[2] certified a class of more than 10,000 Mississippi insureds asserting breach of contract, negligence, and bad faith claims challenging State Farm's application of "labor depreciation" when calculating "actual cash value" payments for covered damage to their homes. The Order rests on legal rulings in conflict with authority in this Circuit and other jurisdictions across the country, and it concerns important and frequently litigated issues.

I. The Order relies upon erroneous legal rulings as to the requirements of Rule 23 and as to underlying substantive law as it affects class certification. *First*, the district court erred in holding that predominance and superiority were satisfied despite fact-intensive, individualized issues that must be resolved for each class member to determine both liability and damages. The Eighth Circuit recently granted 23(f) review and decertified a nearly identical class of Missouri

[2] The Order is attached as Exhibit A.

policyholders asserting substantially the same "labor depreciation" breach-of-contract claim. The Eighth Circuit held that the term "actual cash value" was unambiguous and that State Farm's method of estimating ACV by depreciating both materials and labor was not only permissible, but "eminently practical and reasonable." *In re State Farm Fire & Cas. Co*., 872 F.3d 567, 573, 576 (8th Cir. 2017) ("*LaBrier*"). The Eighth Circuit further ruled that when policyholders challenge ACV estimates with labor depreciation applied, the value of each property remains a fact question for the jury and thus "there are *no* predominant common facts at issue." *Id.* at 577.

The district court here held that the use of "labor depreciation" in estimating ACV was in itself an actionable breach of contract—regardless of whether a policyholder received the full amount necessary to repair or replace damaged property and despite the clear policy provision capping payments at that amount. That conflicts with authority in this Circuit. *See, e.g.*, *Legacy Condos., Inc. v. Landmark Am. Ins. Co.*, 2008 WL 80373, at *2 (S.D. Miss. Jan. 4, 2008). Courts in this Circuit recognize that State Farm is "entitled to show that its overall adjustment of each putative class member's claim satisfied its contractual obligation to pay" the insured's full repair cost, which defeats predominance as to the class contract claim. *Nguyen v. St. Paul Travelers Ins. Co.*, 2008 WL 4691685, at *5 (E.D. La. Oct. 22, 2008). And predominance fails as to Plaintiff's claims for negligence and bad faith for these same reasons and more. *See In re Katrina Canal Breaches Litig.*, 401 F. App'x 884, 887 (5th Cir. 2010).

Second, members of the certified class cannot be reliably identified without

extensive individualized discovery and factfinding as to each potential class member, and the class definition does not limit the class to persons injured by State Farm's application of "labor depreciation."

Third, many policyholders who would fall within the class definition have received the maximum payment due under their policies and thus lack the requisite standing.

II. The issues at stake here have widespread importance. This action is one of a series of asserted "labor depreciation" class actions that have been filed in states across the country, and it is likely that more will be filed in this Circuit. Other Circuits are addressing such cases—indeed, the Eighth Circuit has done so twice, decertifying the *LaBrier* class in one Rule 23(f) appeal, and accepting review of a class order in another, which is pending.[3] In addition, the Sixth Circuit has before it State Farm's section 1292(b) appeal from denial of State Farm's motion to dismiss an asserted "labor depreciation" class action brought under Kentucky law in *Hicks v. State Farm Fire & Cas. Co.*, No. 18-5104 (6th Cir.), and the Tenth Circuit affirmed summary judgment against an insured in another. *See Graves v. Am. Family Mut. Ins. Co.*, 686 F. App'x 536, 540 (10th Cir. 2017). Several state supreme courts have reviewed the labor depreciation theory as well by accepting certified questions, and the majority have found the theory unsound. This Court's definitive resolution of the class action issues raised in this case will aid the development of law and give needed guidance.

[3] *See Stuart v. State Farm Fire & Cas. Co.*, No. 16-3784 (8th Cir., granted 9/29/2016).

III. There is a need for review now because it would take thousands of mini-trials to resolve the class members' claims on the merits and because the district court's rulings would deprive State Farm of a fair opportunity to present its defenses. The erroneous certification of a class may create undue pressure to settle, and this Petition may be the only real opportunity for review of the important issues presented in this case.

FACTUAL AND PROCEDURAL BACKGROUND

I. THIS CLASS ACTION CHALLENGES ACV CALCULATIONS

This action concerns State Farm's initial ACV payments under its replacement cost homeowners policies in Mississippi. The policies at issue promise that State Farm will pay the insured's full incurred cost to complete all necessary repairs in the event of a covered loss. DE137-3, 27.[4] Payment often is made in a two-step process. Initially (and before repair), State Farm will pay ACV—which is the value of the damaged portions of the home at the time of the loss given their age and condition—*up to and not exceeding* the insured's cost to repair. *Id*; DE137-2, ¶¶5, 7, 22. After repair, State Farm will pay replacement cost benefits for additional costs an insured incurs that exceed the insured's initial payment. *Id.*; DE137-3, 27; DE137-2, ¶¶5, 7, 22.

When evaluating a claim, a State Farm adjuster inspects the damage and usually prepares a detailed estimate of the work and materials needed to restore the

[4] "DE" means "docket entry" in the district court PACER docket. Unless otherwise noted, page references are to the file-stamped page numbers at top of each document filed in the district court.

property, generally (but not always) using a software program called Xactimate. DE137-2, ¶¶9-10. The adjuster identifies and measures all damages areas, identifies the tasks and materials needed for repair or replacement, and enters that information into the software. *Id.* ¶¶9-10. Repair estimates frequently identify dozens, or even hundreds of line item repairs (*see* DE137-5, Ex. F, SF24550-57; DE137-2, ¶6), and as each repair task is entered, the adjuster also applies depreciation (if any) for each part of the property, depending upon its age and pre-loss condition. DE137-2, ¶6. In Mississippi, it is State Farm's practice to depreciate the entire unit cost for a repair line item (including its labor component) when depreciation is applied at all. DE140-3, 5-6.

If an insured has a signed repair contract at the time of inspection, State Farm sometimes will pay that full replacement cost to the insured "up-front," without ever issuing an ACV payment. DE137-2, ¶¶5, 8, 17; DE137-5, Ex. D, SF22733. Otherwise, State Farm's initial claim payment generally is for ACV. DE137-5, Ex. D, SF22733. [redacted] Insureds are informed that replacement cost benefits are available upon completion of repair or, in some instances, if the insured provides a signed repair contract. DE137-2, ¶5; DE137-5, Ex. F, SF24549. [redacted]

[redacted]

Plaintiff Lorine Mitchell's claim was handled in the above manner. She made a claim for storm damage to her home in May 2017. DE1, ¶¶11-13. State Farm prepared an estimate using Xactimate and issued an ACV payment for the loss, and Plaintiff was told that replacement cost benefits were available if she pursued repair. *Id.*, ¶15; DE137-5, EX. F, SF24541-42, SF24546-49; DE137-7, 172:22-176:4; DE137-6, 235:24-238:21. Plaintiff had a contractor who said he could complete all covered repairs for State Farm's estimated cost. DE137-5, Ex. F, SF24490. Plaintiff did not repair, however, and instead filed this putative class action alleging claims for breach of contract, negligence, and bad faith. DE1, ¶¶71-102. Plaintiff interprets the term "actual cash value" in her policy to mean replacement cost less depreciation that is applied *only* to the "materials" component thereof, and not to labor costs. *Id.* ¶¶28-29, 35-36. Her asserted class includes more than 10,000 potential members.

On September 24, 2018, the district court denied State Farm's motion to dismiss. The court determined that the term "actual cash value" was ambiguous because it was not defined in Plaintiff's policy, and accepted Plaintiff's interpretation of the term as reasonable.[5] DE162, 5-8.

II. THE CLASS CERTIFICATION ORDER

The district court's Order certifies a class defined to include all homeowners

[5] State Farm intends to move for certification of the denial of its motion to dismiss for interlocutory appeal under 28 U.S.C. § 1292(b).

insureds who received (or would have received) their first claim payment on or after June 23, 2014, and who:

> made a structural damage claim for property located in the State of Mississippi which resulted [or would have resulted] in an actual cash value payment during the class period from which "non-material depreciation" is still being withheld from the policyholder (i.e., has not been paid back as replacement cost benefits).

Order at 7-8.

Accepting Plaintiff's "labor depreciation" liability theory, the district court held that predominance and superiority were satisfied. *Id.* at 15, 18. The court determined that there was no need to obtain complete repair documentation from insureds[6] or to consider individualized evidence showing insureds' incurred cost to complete repairs because "the issue is not whether the actual cash value payments paid by State Farm were reasonable or sufficient, but rather whether State Farm was entitled to deduct labor depreciation in the first place." *Id.* at 14. The court relied on essentially the same reasoning to conclude that standing was satisfied even as to insureds who already were fully paid by State Farm for all incurred costs to complete repairs. *Id.* at 6.

On the issue of ascertainability, the court "recognize[d] that identifying class members in this case may pose some clerical and administrative challenges," but concluded that it would be "feasible" to do so by "sorting and working through State

[6] State Farm's files often do not contain a complete record of insureds' repairs, as insureds are only asked to submit such materials when they request replacement cost payments. DE-137-2, ¶¶24-25.

Farm claim records" for more than 10,000 insureds. *Id.* at 9.

ARGUMENT

The decision to accept a Rule 23(f) appeal lies within the Court's "unfettered discretion." Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendment. In exercising this discretion, other circuits generally consider three factors: (1) whether the class certification decision is manifestly erroneous; (2) whether the decision implicates important issues of law; and (3) whether class certification creates undue pressure for defendants to settle. *See, e.g., Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). All of these factors strongly support 23(f) review here.

I. THE DISTRICT COURT'S DECISION IS MANIFESTLY ERRONEOUS

"The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only' … and [] certification is proper only if the trial court is satisfied, after a rigorous analysis,'" that the plaintiffs have satisfied all pertinent requirements of Rule 23. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted). This Court will reverse certification where there has been an abuse of discretion or an error of law. *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003).

A. The District Court Committed Manifest Error in Finding Predominance and Superiority Satisfied.

Rule 23(b)(3) requires that common questions of law or fact predominate over individualized questions and that proceeding as a class action is the superior method of adjudication. This Court, on appeal and on 23(f) review, "may address arguments

that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision." *Regents of Univ. of Calif. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007).

1. The individual issues here are overwhelming.

The class contract claims raise crucial, individualized factual issues regarding (i) whether State Farm's ACV payments were sufficient regardless of labor depreciation; (ii) whether State Farm's total payments covered an insured's full incurred cost to complete repairs (e.g. where estimated costs were overstated); (iii) whether State Farm acted arbitrarily or in bad faith toward each or any insured class member; and (iv) what damages (if any) may be owed to individual class members.

First, to determine liability, the jury will have to make individualized determinations for each insured as to the pre-loss value of that specific insured's damaged property based on its age and unique condition. The Eighth Circuit's recent decision in *LaBrier* is directly on point. In *LaBrier*, as here, the sole basis for the certified class claims was State Farm's alleged underpayment of ACV by applying "labor depreciation." The Eighth Circuit granted Rule 23(f) review and decertified the class. 872 F.3d at 576-77. *LaBrier* correctly recognized that, prior to repair, ACV "is a value that must be estimated," and, in the event of a dispute, "[c]onflicting estimates must be determined by a jury." *Id.* at 574. *LaBrier*'s reasoning applies here: even assuming State Farm's policies do not permit "labor depreciation" (which State Farm contests, *see* Point I.A.2 *infra*), State Farm has a right to present all relevant evidence as to the ACV of each insured's damaged property regardless of values in its repair estimate. Thus, common issues do not predominate. *See LaBrier*,

872 F.3d at 574; *Ahmad v. Old Republic Nat'l Title Ins. Co.*, 690 F.3d 698, 704-05 (5th Cir. 2012) (reversing class certification; "the jury will have to engage in file-by-file review to determine whether individual plaintiffs" had a potential claim).

Moreover, there are numerous class members who have no viable claim because they have repaired and have been fully paid all costs they incurred. Under the policies at issue, an initial ACV payment is "*not to exceed the cost to repair or replace the damaged part of the property*," and a subsequent replacement cost payment is limited to the additional amount the policyholder "*actually and necessarily spend[s]*" for repair or replacement. DE137-3, 27 (emphasis added). This language unequivocally caps each insured's recovery at the total cost to repair or replace, regardless of whether State Farm's estimates overstated or understated what contractors ultimately charged. *See*, *e.g.*, *Legacy Condos.,* 2008 WL 80373, at *2; *Stiers v. State Farm Ins.*, 2012 WL 2405982, at *4 (E.D. Tenn. June 25, 2012).

As discussed above, [redacted]. Thus, whether an insured completed repairs, and at what cost, are fact issues that go to the heart of liability. The district court erred in finding predominance and superiority satisfied. Order at 14 ("[i]f the policy is held to not have allowed for labor depreciation then the inquiry will be the amount of labor depreciation withheld by State Farm").

Second, predominance as to Plaintiff's tort claims fails for all the reasons

above and because of *additional* fact issues those claims raise. The district court acknowledged that Plaintiff's negligence and bad faith claims would require common proofs showing that State Farm acted unreasonably, arbitrarily, and or recklessly. DE162, 8-9. Plaintiff relied on evidence that State Farm applied labor depreciation for that showing, but the district court acknowledged that State Farm's interpretation of ACV as allowing labor depreciation was *reasonable*. DE162, 7. Moreover, this Court in any event has held that the reasonableness of a defendant's conduct must be assessed on an individualized basis, and that these inquiries defeat predominance. *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); *Katrina Canal Breaches*, 401 F. App'x at 887 (tort claims based on insurer's alleged bad faith are not amenable to class treatment). The district court failed to employ the required rigorous analysis when granting class certification of Plaintiff's tort claims.

Third, the district court found predominance satisfied despite its recognition that many class member's damages must be calculated individually (Order at 18), and that extensive fact-finding will be required for those calculations. Plaintiff's expert [redacted]

[redacted] and the district court erred in failing to recognize that these additional individualized questions defeat predominance. *See Crutchfield v. Sewerage & Water Bd.*, 829 F.3d 370, 378 (5th Cir. 2016).

2. The district court's findings of predominance and superiority were based upon serious errors as to the law governing Plaintiff's claims.

The district court's class certification Order rests on significant errors regarding the substantive law governing Plaintiff's breach-of-contract claims. A breach-of-contract claim requires, *inter alia*, an actual, *material* breach, *see, e.g.*, *Marmillion v. Am. Int'l Ins. Co.*, 381 F. App'x 421, 425-26 (5th Cir. 2010), and a breach exists only where the plaintiff did not "receive[] what it was owed under its contract." *Operaciones Tecnicas Marinas, S.A.S. v. Diversified Marine Servs., L.L.C.*, 658 F. Appx. 732, 738 (5th Cir. 2016).

Before repair, as *LaBrier* shows, there is no breach if the amount State Farm paid for ACV is sufficient, regardless of any labor depreciation, when compared to the jury's determination of the ACV of property. Simply put, "the method State

Farm uses to calculate replacement cost depreciation" is not "a breach of contract *every time State Farm employs it*." 872 F.3d at 576-77. Moreover, if repairs have been completed, there is no breach if State Farm's total claim payment(s) exceed or equal the total cost the insured incurred for the completed work. As the court explained in *Legacy Condominiums*, "where actual repairs have been completed …, prior estimates of those repairs are irrelevant," and the insured is not entitled to receive more than his or her incurred cost to repair. 2008 WL 80373, at *2. Further, under both the ACV provision and the replacement cost provision, the sufficiency of payment must be evaluated based on the *total* claim payment, not upon an alleged underpayment of a single discrete item. *See Nguyen*, 2008 WL 4691685, at *5 ("the issue is whether the total amount paid, not just a discrete, uniformly applicable component of that payment, was sufficient to satisfy State Farm's contractual obligation"). Thus, at trial, State Farm is " entitled to point to case-specific facts reflecting whether or not the bottomline dollar amount State Farm paid each insured was sufficient." *Id.* at 7; *see also Schafer v. State Farm Fire & Cas. Co.*, 2009 WL 2391238, at *6-8 (E.D. La. Aug. 3, 2009) (denying class certification because proof at trial would require "individualized assessments" of damage to each insured's property and State Farm "would have the right at trial to contest whether its payment to each insured was sufficient 'as a whole'").[7]

[7] As an illustration, A promises to pay B the sum of two figures, one of which should be calculated as 3 and the other 4, but A instead calculates them as 2 and 5. A therefore pays B the correct total of 7, notwithstanding the miscalculation. B has no plausible basis for alleging breach. That situation occurred here for numerous class

In addition, and more fundamentally, the district court erred as a matter of law in concluding "'actual cash value' is ambiguous and reasonably can be interpreted to bar labor depreciation for ACV calculations. DE162 at 7. Mississippi law is a part of every Mississippi contract,[8] and under Mississippi common law, ACV is "the replacement cost of property, less depreciation." *Estate of Minor v. USAA*, 247 So. 3d 1266, 1276 (Miss. Ct. App. 2017); *see also, e.g.*, *Bossier v. State Farm Fire and Cas. Co.*, 2009 WL 3271880, at *2 (S.D. Miss. Oct. 9, 2009).[9] A majority of courts that have addressed the issue have agreed that the undefined term "ACV" in an insurance policy is unambiguous when the term is defined by state law. *See*, *e.g.*, *LaBrier*, 872 F.3d at 576-77 (policy unambiguous because "actual cash value" is defined by statute);[10] *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780, 783-85 (Minn. 2016) (policy unambiguous because Minnesota precedent defined "actual cash value"); *Henn v. Am. Family Mut. Ins. Co.*, 894 N.W.2d 179, 190-91 (Neb. 2017) (policy unambiguous because Nebraska precedent defined "actual cash

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members who were paid the correct *total* ACV even if the line item for labor depreciation was incorrect.

[8] *See*, *e.g.*, *Williams v. Moran*, 233 So. 2d 110, 115 (Miss. 1970) (state law is incorporated into insurance policies).

[9] The definition of ACV under Texas law is identical, and policies using that term without further definition have been held to unambiguously call for depreciation of all components of replacement cost, including both material and non-material components thereof. *See Tolar v. Allstate Texas Lloyd's Co.*, 772 F. Supp. 2d 825, 831 (N.D. Tex. 2011).

[10] Notably, *LaBrier* considered the merits of the labor-depreciation issue on Rule 23(f) review, and this Court may do so, as well.

value"); *Redcorn v. State Farm Fire and Casualty Co.*, 55 P.3d 1017, 1021 (Okla. 2002) (policy unambiguous because Oklahoma precedent defined "actual cash value"). And because State Farm's policy is *not* ambiguous, it was error for the district court to construe the policy adversely to State Farm.[11]

Moreover, the district court erred in finding Plaintiff's interpretation of ACV as reasonable as State Farm's. A wealth of authority amply demonstrates that Plaintiff's reading of the term is *unreasonable* and "unorthodox." *See Graves*, 686 F. App'x at 540 (calculating ACV would be "unorthodox" and is not a method that a reasonable insured would expect an insurer to adopt); *see also LaBrier*, 872 F.3d at 576-77 (calculating ACV by depreciating all components of replacement cost is generous to the insured and "eminently reasonable"); *Wilcox*, 874 N.W.2d at 785 (jury may consider "embedded-labor-cost depreciation" to determine ACV under broad evidence rule); *Henn*, 894 N.W.2d at 875 (under broad evidence rule, "materials and labor constitute relevant facts" in determining ACV); *Redcorn*, 55 P.3d at 1018 (similar).[12] The Eighth Circuit properly considered the question of ambiguity in *LaBrier* because it was the essential underpinning for the grant of class certification in that case (*see* 872 F.3d at 576-77), and this Court can undertake the same analysis here.

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[11] *See Assoc. Indust. Ins. Co. v. Brad Williams, LLC*, No. 3:17-CV-37-DPJ-FKB, 2018 WL 2308767 (S.D. Miss. May 21, 2018) (in Mississippi, only ambiguous terms are construed against an insurer (citing *U.S. Fid. Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008)).

[12] Significantly, in determining ACV, Mississippi courts also look to all the "factors affecting its value," including "how depreciation is calculated." *Estate of Minor*, 247 So. 3d at 1276.

In sum, as a matter of law, the issues raised by Plaintiff's claims cannot be resolved on a classwide basis. Plaintiff lacks a viable liability theory in the first instance, and even if that theory could have been accepted, the asserted class claims still raise a host of individualized fact issues. *See, e.g.*, *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 328 (5th Cir. 2008) ("plaintiffs must advance a *viable* theory employing generalized proof to establish liability with respect to the class involved") (emphasis added). The flawed basis underlying the district court's predominance finding warrants 23(f) review.

3. The need for mini-trials demonstrates the lack of predominance and superiority.

Many thousands of mini-trials would be required to address the individual issues discussed above, and thus common issues do not predominate and a class action is not a superior method of adjudication. *See*, *e.g.*, *Gene*, 541 F.3d at 329 (reversing class certification where "myriad mini-trials cannot be avoided"). Mini-trials would be required for virtually all class members given that the value of each insured's property is disputed and individual questions as to which class members completed repairs and at what cost. As a result, this will not really be a class action, but a never-ending series of individual cases. Moreover, because it is practically impossible for a jury to decide the individual merits of thousands of class members' claims, the class certification order effectively deprives State Farm of its right to have a jury consider the merits of each individual's claim.

B. The Class Is Not Adequately Defined and Not Clearly Ascertainable

The class definition bases class membership on whether "'non-material depreciation' is still being withheld from the policyholder (i.e. has not been paid back as replacement cost benefits)." DE164, 7-9. That definition does not satisfy ascertainability, which requires that the court be able to identify class members. *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015).

Here, it is not administratively feasible to identify policyholders from whom "labor depreciation" is "still being withheld" [redacted] The district court ignored that individualized evidence and analysis will be required to determine whether "labor depreciation" is still "withheld" from a putative class member. [redacted]. Further, identifying class members would require complete repair records, and thus necessitate discovery of such records from many class members. The class is not "adequately defined and clearly ascertainable" and should be decertified. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012).

C. The Class Was Improperly Certified Because Many Class Members Lack Standing

Rule 23's requirements "'must be interpreted in keeping with Article III

constraints,'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (citation omitted), including standing arising from "concrete and particularized" injury. *Lee v. Verizon Commc'n, Inc.*, 837 F.3d 523, 544 (5th Cir. 2016). This Court has acknowledged the circuit split as to whether in a class action standing is required for named plaintiffs only or also for absent class members, but has not decided on the issue. *See In re Deepwater Horizon*, 739 F.3d 790, 800-02 (5th Cir. 2014). The Court should take this opportunity to address the question and adopt the test set forth in *Denney v. Deutsche Bank AG*, which requires that "both the class and the representatives have suffered some injury requiring court intervention'" and that the class "be defined in such a way that anyone within it would have standing." 443 F.3d 253, 263-64 (2d Cir. 2006). Under this standard, the class as certified is fatally overbroad because many of those within it have no injury and lack standing. *See supra* at 9-10. That failing cannot be cured by amendment.

II. THE CLASS CERTIFICATION DECISION CONCERNS IMPORTANT AND RECURRING ISSUES OF LAW

The issues in this appeal are of widespread importance. Numerous "labor depreciation" class actions like this one have been filed in courts across the country, and it is likely that additional cases will be filed in this Circuit. As discussed above, the Oklahoma, Minnesota, and Nebraska supreme courts have rejected the "labor depreciation" theory on review of certified questions, the Tenth Circuit has rejected the theory under Kansas law, and the Sixth Circuit is considering the issue under Kentucky law (*see supra* at 14-15). Moreover, the Eighth Circuit has granted two Rule 23(f) petitions by State Farm challenging certification decisions on the same

issues presented here. *See LaBrier*, 872 F.3d at 571; *Stuart, supra.*

Furthermore, the district court's order conflicts with extensive authority within this Circuit recognizing that class certification cannot be granted in breach of contract cases requiring individualized proof regarding property value and/or incurred repair costs (*see supra* at 9), or in tort cases requiring a showing that a defendant acted recklessly or arbitrarily as to each individual class member (*see supra* at 12). These issues are certain to recur in the district courts of this Circuit, and guidance from this Court would be extraordinarily beneficial.

Finally, the issue of whether standing is required for absent class members is the subject of conflict among the circuits and "deep confusion," *In re Deepwater Horizon*, 753 F.3d 516, 520 (5th Cir. 2014) (Clement, J., dissenting from denial of rehearing en banc, joined by Jolly and Jones, JJ.), warranting the Court's attention.

III. REVIEW OF THE ERRONEOUS CLASS CERTIFICATION IS NEEDED NOW

"[C]lass certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents,* 482 F.3d at 379 (citation omitted). Here, the district court's certification order contemplates a trial in which State Farm will not have a fair opportunity to present its defenses and therefore may create undue pressure to settle. Consequently, this petition may present the only opportunity to review the erroneous class certification decision.

CONCLUSION

The petition for permission to appeal should be granted.

Dated: October 8, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed R. App. P. 5(c)(1) because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5133 words. This complies with the requirements of Fed. R. App. P. 32(c) because this document has been prepared in a proportionally spaced typeface using fourteen point font and Times New Roman font style.

/s/ Heidi Dalenberg
Heidi Dalenberg

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 8, 2018, Petitioner, State Farm Fire and Casualty Company, caused the foregoing PETITION OF STATE FARM FIRE AND CASUALTY COMPANY FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f) to be served on the following counsel of record for Plaintiff-Respondent by sending the same via electronic mail:

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EXHIBIT A

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

LORINE MITCHELL **PLAINTIFF**

v. **No.: 3:17cv00170-M**

STATE FARM FIRE AND CASUALTY COMPANY **DEFENDANT**

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff's *Motion to Certify Class of a Monetary Damages Class, or in the Alternative, An Issues Class* [115] and Defendant's *Motion to Strike Declaration of T. Joseph Snodgrass* [126]. The court has reviewed the parties' submissions, along with relevant case law and evidence, and is now prepared to rule.

BACKGROUND

Plaintiff and proposed class representative, Lorine Mitchell, maintains a residence in Waterford, Mississippi. Plaintiff insured the dwelling under a Homeowners Policy provided by Defendant, State Farm Fire and Casualty Company, and paid the requisite annual premiums for the coverage. The policy provides the following provisions for structural damages claims:

> **COVERAGE A – DWELLING**
>
> 1. **A1 – Replacement Cost Loss Settlement – Similar Construction.**
>
> a. We will pay the cost to repair or replace with similar construction and for the same use on the premises shown in **Declarations**, the damaged part of the property covered under **SECTION 1 – COVERAGES, COVERAGE A – DWELLING**, except for wood fences, subject to the following:
>
> (1) until actual repair or replacement is completed, we will pay out 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;
>
> (3) to receive any additional payments on a replacement cost basis, you must complete the actual repair or replacement of the damaged part of the property within two years after the date of loss, and notify us within 30 days after the work has been completed . . ..

In Spring 2017, while insured under the policy, Plaintiff's dwelling suffered storm damage. On or about May 13, 2017, Plaintiff notified Defendant of the loss and made a claim under the policy. On May 24, 2017, Defendant notified Plaintiff that the payment she was receiving was the actual cash value (ACV) as calculated by Defendant. ACV, defined in the Building Estimate Summary Guide provided to Plaintiff after a claim, is the "repair or replacement cost of the damaged part of the property less depreciation and deductible." In calculating ACV, the Defendant deducted depreciation from the replacement cost value (RCV). RCV and depreciation are also defined in the Building Estimate Summary Guide. RCV is the "[e]stimated cost to repair or replace damaged property." Depreciation is "[t]he decrease in the value of property over a period of time due to wear, tear, condition, and obsolescence."

Defendant's initial repair cost estimate listed the ACV for Plaintiff's claim as $646.19. This number was derived by taking the RCV, $3,246.42, and subtracting both the estimated depreciation of $1,600.23 and the $1,000 deductible. The estimate lists the inspected areas separately and includes a line item for the estimated RCV; the applied tax; the age, life, and condition of the property; the percentage applied for depreciation; and the ACV.

To calculate these values, Defendant relied on its Xactimate system. Xactimate allows an adjuster to insert various information for a claim. Xactimate provides the adjuster the option to select or de-select various boxes regarding depreciation—of importance to this case is the

"depreciate non-material" and the "depreciate removal" options. Once all information is inserted, the system then generates RCV, ACV, and depreciation amounts.

Plaintiff alleges that Defendant's method of calculating the ACV resulted in payment significantly lower than the amount Plaintiff should have received under the Policy—$738 lower. Plaintiff argues that Defendant, in calculating the ACV, depreciated costs associated with labor when labor is not susceptible to aging, wearing, or tearing. Specifically, certain line items, such as line item 2 (composition shingle roofing), accounted for both labor and materials and then the estimated depreciation percentage was applied to the entire line item. However, other line items that listed pure labor, such as line item 1 (remove shingle roofing), were not subjected to labor cost depreciation. Based on Defendant's practice to depreciate labor costs, Plaintiff contends that her ACV payment was less than the amount she was entitled to receive under the policy.

Proposed Class Definition

Plaintiff Mitchell seeks certification of the following class of individuals pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> All State Farm policyholders who made a structural damage claim for property located in the State of Mississippi which resulted in an actual cash value payment during the class period from which "non-material depreciation" is still being withheld from the policyholder (i.e., has not been paid back as replacement cost benefits). The class includes policyholders that did not receive an actual cash value payment solely because the withholding caused the loss to drop below the applicable deductible. The class period only includes policyholders that received their first claim payment (or would have received their first claim payment) on or after June 23, 2014 (three years before the filing of the complaint). The class excludes all claims arising under policies with State Farm endorsement Form FE3650 or any other policy form expressly permitting the "depreciation" of "labor" within the text of the policy form. The class also excludes any claims for which the applicable limits of insurance have been exhausted.

Plaintiff's Reliance on Declaration of T. Joseph Snodgrass

On July 20, 2018, along with her Motion to Certify Class [115], Plaintiff submitted a Declaration by attorney T. Joseph Snodgrass. In his Declaration, Mr. Snodgrass explained that he

"instructed staff from Plaintiff's counsel to perform . . . data sorting exercises" within the Excel spreadsheet (the Data Report) containing numerous insurance claims produced by State Farm. Mr. Snodgrass explained the method by which his staff sorted the Data Report and provided the total number of possible class members that resulted from each conducted sort, the approximate cash value payment for all claims, as well as the approximate percentage of potential class members who hold a homeowner's policy from State Farm.

CLASS CERTIFICATION STANDARD

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, class certification requires a two-part analysis. First, Rule 23(a) requires that (1) the class be so numerous that joinder of all members is impracticable; (2) questions of law or fact are common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Second, the proposed class must satisfy at least one of the provisions of Rule 23(b). Plaintiff seeks class certification pursuant to Rule 23(b)(3), or, in the alternative, certification of an issues class pursuant to Rule 24(c)(4). Plaintiff also seeks certification pursuant to Rule 23(b)(1).

Because this court finds class certification proper under Rule 23(b)(3) this court will not consider Plaintiff's alternative request for Rule 23(c)(4) certification of an issues class.

DISCUSSION

A. Standing

"[P]laintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016). In this case, Plaintiff has established her injury. Plaintiff's home suffered damages, and upon calculating her actual cash

value payment—defined in her insurance policy as the repair or replacement cost of the damaged part of the property less *depreciation* and *deductible*—State Farm depreciated non-material items (particularly labor). Plaintiff contends that such conduct—depreciating labor—is not allowed within the State of Mississippi or under the policy. Thus, Plaintiff has alleged and shown that she has personally been injured by State Farm's conduct.

Defendant argues that Plaintiff lacks standing as to the entire class with respect to the asserted tort claims—bad faith and negligence—because Plaintiff's claim was paid, *not* denied, and therefore, Plaintiff is unable to state viable claims as to either tort. However, as per this court's opinion regarding Defendant's *Motion to Dismiss for Failure to State a Claim* that will issue this same day, this court finds that Plaintiff can state viable claims for both torts. It is the court's opinion that Plaintiff does in fact have standing to represent the class in the asserted tort claims. However, whether Defendant's actions amount to bad faith or negligence are decisions to be made at a much later date.

As to Defendants' second argument, that Plaintiff's standing "fails as to insureds other than Homeowners insureds" because Plaintiff "has not shown that the loss settlement provisions in other State Farm policy forms are comparable to the Homeowners policy she purchased", this court finds that the class should be limited to include only insureds covered under a Homeowners policy. Plaintiff, having had more than enough time to submit evidence to prove to this court that other State Farm policies are truly comparable to the Homeowners policy at issue, only provided the court with a declaration from attorney McWherter stating that a review of State Farm policy documents was conducted and that only policies with Form FE-3650 allow for labor depreciation. This court notes that Plaintiff could have submitted relevant sections of the reviewed policies to the court and could have directed the court to the section of the policies pertaining to actual cash

value. Therefore, allowing this class to include insureds other than Homeowners, based entirely on an attorney's declaration, is improper. Plaintiff lacks standing to represent anyone other than an insured covered under a Homeowners policy, and the class will be limited (and the class definition altered) to include only Homeowners Policy holders.

Finally, as to Defendant's last argument on standing—that Plaintiff lacks standing "to represent insureds who *pursued* repairs and completed them at a cost equal to or less than ACV", this court finds that Plaintiff has standing to represent all individuals falling within the class definition who were subject to the labor depreciation method used by State Farm. From the Charlie Foster deposition, this court understands that State Farm has different default depreciation settings within its Xactimate system set to trigger according to the policy and region of the claim. In Mississippi, the default appears to depreciate labor in all claims. Plaintiff has standing to represent individuals whose claims were subject to this method of depreciation because, as will be mentioned below, the issue here is not whether actual cash value payments paid by State Farm were reasonable or sufficient, but rather whether State Farm was entitled to deduct labor depreciation from its insureds in the first place.

B. Admissibility of Snodgrass Declaration

In this case, the Plaintiff submitted a Declaration by attorney T. Joseph Snodgrass in which he summarized the Data Report produced by State Farm. Plaintiff argues that such summary is admissible pursuant to Rule 1006 of the Federal Rules of Evidence. Defendant does not argue that Rule 1006 does not apply, but rather bases its argument on the fact that the declaration fails to "accurately reflect the underlying records." *U.S. v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000). Particularly, Defendant contends that the summary is inaccurate as the method relied upon by Plaintiff resulted in misidentification of potential class members, misidentification of relevant

claims, and error in calculating the aver damages amount. This court agrees with Defendant that the summary must be accurate. However, since Plaintiff and Defendant both relied on Excel functions, acting far beyond the technical ability and knowledge of this court, this court has no means by which to verify whether either claims—those of the Defendant or those of the Plaintiff—are accurate; therefore, the court will disregard the Declaration of Mr. Snodgrass. Nonetheless, without relying on the Snodgrass Declaration, this court still finds that class certification under Rule 23(b)(3) should be granted.

C. Rule 23 Prerequisites

1. Ascertainability

Defendant State Farm argues that the proposed class cannot be certified because the class is not ascertainable. "The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23." *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007). "It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). "An identifiable class exists if its members can be ascertained by reference to objective criteria." Manual for Complex Litigation (Fourth) § 21.222 (2018). It is not necessary that "the class be so clearly ascertainable that every potential member can be readily identified at this stage of the litigation." *Wagner v. Cent. La. Elec. Co., Inc.*, 102 F.R.D. 196, 197 (E.D. La. 1984) (citing *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970)).

Plaintiff defined the proposed class as:

> All State Farm policyholders who made a structural damage claim for property located in the State of Mississippi which resulted in an actual cash value payment during the class period from which "non-material depreciation" is still being withheld from the policyholder (i.e., has not been

> paid back as replacement cost benefits). The class includes policyholders that did not receive an actual cash value payment solely because the withholding caused the loss to drop below the applicable deductible. The class period only includes policyholders that received their first claim payment (or would have received their first claim payment) on or after June 23, 2014 (three years before the filing of the complaint). The class excludes all claims arising under policies with State Farm endorsement Form FE-3650 or any other policy form expressly permitting the "depreciation" of "labor" within the text of the policy form. The class also excludes any claims for which the applicable limits of insurance have been exhausted.

Defendant argues that the class is not ascertainable because it encompasses unharmed individuals, identifying class members will require individualized review of each class member's claims, and some information may be in the possession of the insured. Defendant suggests that the class definition in this case is indistinguishable from the failed class definition in *Johnson v. Kan. City S. Ry. Co.*, 224 F.R.D. 382 (S.D. Miss. 2014). However, this court finds that the class definition in the present case is in fact distinguishable from the class definition in *Johnson*. The class in *Johnson* was denied class certification because each possible member maintained different title documents with differing and diverse conveyance language which would need to be reviewed individually to determine the parties' intention and the legal effects of each member's documents. The present case, however, deals with a standardized policy under which numerous State Farm clients were insured, each subject to default reduction of labor depreciation through the Xactimate settings used by State Farm (further examined below under the numerosity requirement). Defendant also argues that the class definition encompasses numerous unharmed individuals and is thus not adequately defined. Defendant contends that many individuals who received sufficient payment to cover the actual cost of complete repairs cannot be owed or have an amount still withheld by State Farm. However, as this court mentions below, whether an insured was injured by Defendant's conduct will depend not upon whether he or she received sufficient payment, but rather on whether Defendant withheld an amount it should have paid out had it not engaged in

labor depreciation in the first place. Finally, as to Defendant's argument that some information may be in the possession of the insured, Defendant did not specify what information; however, this court assumes Defendant refers to an insured's repair contracts and receipts which Defendant encourages its insureds to submit and upon which Defendant issues further payments if expenses are more than the initial ACV payment. Defendant's argument again fails because of this court's finding that Defendant's conduct of reducing labor depreciation is the crux of this matter, not whether the payments made were sufficient or reasonable.

Here, this court finds that the class is adequately defined and clearly ascertainable. Identifying class members would be based on a highly objective process; class members would be limited to insureds in the State of Mississippi, whose ACV payments were subject to labor depreciation, whose first claim was paid on or after June 23, 2014, and whose policy does not include form FE-3650 or any similar form allowing for labor depreciation. This court recognizes that identifying class members in this case may pose some clerical and administrative challenges; however, the court is persuaded that sorting and working through State Farm claim records is a feasible process by which to identify the class members.

2. Numerosity

Rule 23(a) first requires that the proposed class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). "[T]o satisfy his burden with respect to this prerequisite, a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). The focus under Rule 23(a) is "whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Id*. at 1038 (quoting *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981)). Relevant factors to consider when

deciding whether joinder is impracticable include the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim. *See Mullen v. Treasure Chest Casino, LLC.*, 186 F.3d 620, 624 (5th Cir. 1999).

Here, numerosity is satisfied. Per Defendant's argument that the Snodgrass Declaration should be stricken, the court finds it necessary to note that even without the declaration, the numerosity requirement is still met. Defendant in its own brief and in its Report of Expert O'Connor referenced that there are 14,500 potentially relevant claims in the Data Report, thereby, convincing this court that the proposed class is numerous. Additionally, the policies entered between State Farm and its insureds are standardized policies and the methods used in calculating actual cash value payments is a default—pre-entered—setting within the Xactimate system. In Mississippi, the default settings appear to depreciate labor in all claims and policies. Plaintiff is likely, in this court's opinion, not the only person covered by such a policy in the State of Mississippi, and not the only person whose actual cash value was subject to labor depreciation. The numerosity requirement is met.

3. Commonality

Rule 23(a) next requires that there be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). To satisfy this requirement the claims of every class member must "depend upon a common contention." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L. Ed. 2d 374 (2011). The common contention "must be of such a nature that it is capable of class-wide resolution—which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.

Here, it appears that the commonality requirement has been met. The proposed class members, all of whom purchased insurance coverage from State Farm, each have a claim

concerning the issue of whether State Farm breached its policy contract by depreciating labor costs in calculating actual cash value payments. The Court finds that commonality is met.

4. Typicality

Rule 23(a) next requires that the claims or defenses of the representative party are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). "[T]he test for typicality is not demanding. It 'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *Mullen*, 186 F.3d at 625 (quoting *Lightbourn v. Cty. of El Paso, Tex.*, 118 F.3d 421 (5th Cir. 1997)).

For the same reasons stated under commonality, this court also finds that the typicality requirement is met. However, as to typicality, the court also notes that State Farm engaged in similar conduct when calculating, and paying, actual cash value payments for many of its policyholders. From the Foster deposition, this court understands that State Farm has default depreciation settings set within its Xactimate system according to the policy and the region of the claim. In Mississippi, the default appears to depreciate labor in all claims and policies. Here, Plaintiff's claims are typical of the claims of each proposed class member. Thus, the court finds that typicality is met.

5. Adequacy

Rule 23(a)(4) requires that the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). A class representative must be "part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Defendant does not seem to oppose or take issue with Plaintiff's ability to fairly and adequately represent the interests of the proposed class. Here, Plaintiff is part of the class and

possesses the same interest and suffered the same injury as the proposed class members (reduction of labor depreciation in the insureds actual cash value payment). Also, Plaintiff's counsel has an extensive history in, and knowledge of, the litigation of class actions. This court finds that Plaintiff and her counsel are capable of fairly and adequately representing the interests of the class.

D. Rule 23 Requirements

After having met the prerequisites under Rule 23(a), a plaintiff seeking class certification of a proposed class must also meet the requirements of Rule 23(b). In this case, Plaintiff seeks class certification pursuant to Rule 23(b)(3), or, in the alternative, certification of an issues class pursuant to Rule 24(c)(4). Plaintiff also seeks certification pursuant to Rule 23(b)(1).

1. Rule 23(b)(3) Certification

Rule 23(b)(3) allows for class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

i. Predominance

This court finds that predominance is met. The predominance element "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. In determining predominance, the court must "careful[ly] scrutin[ize] the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 829 F.3d. 370, 376, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one whether 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id*. (quoting

2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 4:50, PP. 196–97 (5th ed. 2012)). The trial court must "weigh common issues against individual ones and determine which category is likely to be the focus of a trial." *Tyson*, 829 F.3d at 376. For the following reasons, this court finds that common issues predominate in this case.

First, contrary to Defendant's argument, this claim does not require inquiry into the reasonableness of the disputed charges or payments and will not require individualized evidence. Instead, this claim is merely dependent on the amount State Farm owed its insureds under its policies in the first place yet deducted through labor depreciation, an amount calculated through State Farm's Xactimate system. Cases cited by Defendant in its brief are unconvincing. *See Nguyen v. St. Paul Travelers Insurance Co.*, No. 06-4130, 2008 WL 4691685 (E.D. La. Oct. 22, 2008) (denying class certification because whether Defendant made a sufficient pay out would depend on "specific damage to the insured's property, the nature of the repairs and materials required to repair or replace that damages" and more individualized facts); *Shafer v. State Farm Fire & Cas. Co.*, No. 06-8262, 2009 WL 2391238 (E.D. La. Aug. 3, 2009) (denying class certification because over one million line items would require particularized inquiry into "what the proper market price of [each] line item was at a specific time, what method an adjuster used to make an estimate, whether labor was included in an estimate, and whether any class members actually were overpaid"); *Caruso v. Allstate Ins. Co.*, No. 06-2613, 2007 WL 2265100 (E.D. La. Aug. 3, 2007) (predominance not found because "plaintiffs' claims require[d] highly individualized inquiries into the cause of each plaintiff's loss and the amount of the damages sustained at each of the plaintiff's properties"); *Schular v. LVNV Funding LLC*, No. H-14-3053, 2016 WL 685177 (S.D. Tex. Fed. 18, 2016) (predominance not met because "plaintiff . . . failed to present any evidence that [defendant] used standard contracts or that defendants engaged in

standardized . . . practices capable of raising issues of fact or law common to each class member"); *Crutchfield v. Sewerage & Water Bd.*, Civil Action No. 13-4801, 2015 WL 3917657 (E.D. La. June 25, 2015) (predominance not met because each homeowner would need to establish that their damage was caused by defendants actions and "[r]elevant to the inquiry would be the age, size, structure, and distance" of each home, thereby being highly individualized); *Conrad v. Gen. Motors Acceptance Corp.*, 283 F.R.D. 326 (N.D. Tex. 2012) (predominance not met because the issue would require extensive individual inquiries into each member's account and the circumstances surrounding each "call or contact"—case determining whether or not consent to contact was granted by e-mail, website, call, in person, etc.—requiring extensive inquiry into every contact made by every member). The courts in these cases reasoned that predominance was not met because the focus in these cases would be on issues and facts specific to individual members and not to the class.

In this case, the focus would not be on issues or facts specific to individual members, but rather issues and facts specific to the class. The focus is the policy entered into between State Farm and members of the proposed class; a policy which does not specify that labor depreciation would be deducted in calculating the actual cash value. The court agrees with Plaintiff that the issue is not whether the actual cash value payments paid by State Farm were reasonable or sufficient, but rather whether State Farm was entitled to deduct labor depreciation in the first place. If the policy is held to not have allowed for labor depreciation then the inquiry will be the amount of labor depreciation withheld by State Farm—amounts calculated through Xactimate (using default settings) and easily ascertainable without particularized inquiry into each class member's claim.

Second, this court finds that the fact that damages may need to be calculated "on an individual basis [does not] necessarily preclude class certification." *Steering Committee v. Exxon*

Mobil Corp., 461 F.3d 598, 602 (5th Cir. 2006) (citing *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003). In *Bell*, the Fifth Circuit held that "class treatment . . . may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate." *Bell,* 339 F.3d at 307. Here, although the damages may not be "mechanical" in a strict sense—they are not automatically calculated and may require some administrative or clerical work—the method by which Plaintiff's expert proposes damages can be calculated is nonetheless simple and adequate. Plaintiff's expert, Toby Jerrell Johnson, reported that "determining the amount of still withheld non-material depreciation on a property damage claim through Xactimate is *simple*" and the amount of withheld non-material depreciation could be determined on a property claim within 2-3 minutes—less complex cases may take 1 minute and more complex cases may take 3-4 minutes. Johnson further reports that the process would require the "simple function of toggling the check-box" in each members' claim and comparing the difference in the amounts of withheld depreciation. However, even if it were to take the 15-20 minutes per claim, or the expected 3000 hours, as calculated by State Farm's expert O'Connor, this court finds that neither method preclude class certification. Predominance is met.

ii. Superiority

This court finds that a class action is the superior method by which to fairly and efficiently adjudicate this controversy. In determining whether a class action is the superior method to adjudicate a controversy, the Court considers the following non-exhaustive list of factors: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in

the particular forum; and (D) the likely difficulties in managing a class action." Rule 23(b)(3)(A)–(D). Overall, "[t]he superiority analysis is fact-specific and varies depending on the circumstances of each case. *Ibe*, 836 F.3d at 529.

As to the first factor, this court will focus on negative value suits. "It is well established that class actions are often the superior form of adjudication when the claims of the individual class members are small." *Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 412 (N.D. Miss. 2000) (citing *Amchem*, 521 U.S. at 616-17). The Fifth Circuit has held that "[t]he most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996). "A negative value suit is one in which the 'stakes to each member are too slight to repay the cost of the suit.'" *Walton*, 190 F.R.D. at 412 (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

In the case at hand, Defendant does not argue that the proposed class members' claims are negative value suits. Defendant, instead, again argues that the Snodgrass Declaration, upon which Plaintiff relied in her negative value argument, is inadmissible. This court finds that, even without relying on the declaration, a class members' interest in individually controlling separate actions is low. It would be incredibly difficult for class members to pursue a claim against Defendant outside of this class action. This court, having a basic understanding of the sorting functions available in Excel, conducted its own basic sorting of the spreadsheet information. Relying on the "For All Years" tab, this court sorted the data to only include Homeowners Policy claims and also excluded any policy with form FE-3650; the court then sorted the data to include only claims recorded on or after June 23, 2014 (the court acknowledges that Date Recorded is not the same as Date Paid, but relied on Date Paid information to determine values as these claims were likely paid out after the date they were recorded); the court then hid any duplicate claims and organized the data of

"Calculated Total Labor Depreciation" from highest amounts to lowest amounts. From this basic sorting, the court then relied on the Excel count function to total the number of claims below $20,000. This court found that there are approximately 13,000 (or more) relevant claims with labor depreciation value at or below $20,000. *See Favreau v. U.S.*, 48 Fed. Cl. 774, 779 (2000) (holding that claims of $20,000 were not large enough to incite separate litigation). This court, fully aware that an accurate determination of class members will need to be conducted, finds that there are many similarly situated individuals in this state insured through State Farm under comparable standardized Homeowners policies who would be unable to pursue a claim against Defendant outside of this class action—any insured with a claim below Plaintiff's $738 claim and any insured with a claim at, below, or slightly above the cost of litigation would be left without any effective redress given the costs of pursing such claims individually.

As to the second factor, this court is not aware of any currently pending litigation in this state related to, or similar to, this controversy, and involving the same proposed class members, nor did the parties provide any evidence showing that such litigation by or against the same class members concerning this controversy is currently underway elsewhere in this state.

As to the third factor, this case was transferred to this court exactly one year ago on September 12, 2017. Since its transfer, pre-trial procedures have been in full force and the parties have actively dealt within this forum. It is the court's opinion that concentrating the litigation of the claims in this forum is preferred.

As to the fourth factor, this court does not anticipate difficulties arising in managing the proposed class. "[D]ismissal of a class action for management reasons is disfavored." *In re S. Cent. States Bakery Prods Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980). However, Defendant argues that this class action is unmanageable because "it will require individual mini-trials on

liability and/or damages issues." As stated earlier in its opinion, this court finds that this case will not result in mini-trials per each class member but will require that damages be calculated on an individual basis (which does not preclude certification). This court finds that this class action is manageable as the issues among the members are the same.

"[W]here claims are small, individuals have a weaker interest in individually controlling separate actions and thus . . . a class action is more likely to be superior; the lack of filed individual litigation provides evidentiary support for [this] proposition." NEWBERG ON CLASS ACTION § 4:69. Requiring that members of this proposed class individually file their own claim, instead of granting certification, would ultimately "waste judicial resources and leave most class members without an economically feasible remedy." *Lehocky v. Tidel Technologies, Inc.*, 220 F.R.D. 491, 511 (S.D. Tex. 2004). Therefore, this court finds that a class action is the *superior* method by which to adjudicate this controversy.

Thus, having satisfied Rule 23(a) pre-requisites and Rule 23(b)(3) requirements, class certification under Rule 23(b)(3) is granted.

2. Rule 23(b)(1) Certification

Rule 23(b)(1) allows for class certification where "prosecuting separate actions by or against individual class members would create a risk of (A) inconsistent or varying adjudications," or "(B) adjudications. . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1).

Rule 23(b)(1)(A) provides that a class action can be maintained if "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards

of conduct for the party opposing the class action." Fed. R. Civ. P. 23(b)(1)(A). "If class members seek only monetary relief, there is no risk of incompatible standards of conduct in having those claims adjudicated individually." *Corley v. Entergy Corp.*, 222 F.R.D. 316, 321 (E.D. Tex. 2004) (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998)). Many courts have held that Rule 23(b)(1)(A) certification of a class primarily seeking monetary relief is inappropriate. *See Johnson v. Geico Cas. Co.*, 673 F.Supp.2d 255, 270 (D. Del. 2009) ("Certification under Rule 23(b)(1)(A) is generally inappropriate where the primary relief sought is monetary damages."); *Zinser v. Accufix Research Inst.i, Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001); *Morris v. Transouth Financial Corp*. 175 F.R.D. 694, 699 (M.D. Ala. 1997) (". . . this is primarily and principally an action to recover damages. As such, it is inappropriate for certification under Rule 23(b)(1)(A)); *Rambarran v. Dynamic AirwayS, LLC*, 2015 WL 4523222 (S.D. NY. 2015) ("Here, Plaintiffs are seeking monetary damages. . . [c]ertification under Rule 23(b)(1)(A) is thus unavailable.").

This court finds that certification of the class under Rule 23(b)(1)(A) is inappropriate. As per Plaintiff's submissions, including her complaint, it is evident that Plaintiff primarily seeks monetary relief. Thus, it would be improper to certify this class under Rule 23(b)(1)(A).

A class that fails to meet Rule 23(b)(1)(A) may still be certified under Rule 23(b)(1)(B). Rule 23(b)(1)(B) allows for certification of a class when "prosecuting separate actions by or against individual class members would create a risk of . . . (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). This is "usually applied when a 'limited fund' exists, such that non-class members seeking damages would likely deplete the fund

and deprive class members of any recovery." *Baker v. Wash. Mut. Fin. Grp., LLC.*, 193 Fed.Appx. 294, 297 (5th Cir. 2006) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2205, 144 L. Ed. 2d 715 (1999)). Here, Plaintiff does not contend that a limited fund exists. For this reason, the Court finds that certification would be improper under Rule 23(b)(1)(B).

Therefore, it would be improper to certify this class under either Rule 23(b)(1)(A) or 23(b)(1)(B).

E. Punitive Damages

Plaintiff also seeks to certify punitive damages. Plaintiff has suggested bifurcation, that the issues of liability and punitive damages be severed and tried separately. Defendant argues that bifurcation would violate the Seventh Amendment because the punitive damages jury would be required to consider factors already considered and addressed by the first jury.

Bifurcation raises Seventh Amendment problems if facts and issues addressed by the first jury are reexamined by a second jury. *Castano,* 84 F.3d at 750; *Mullen* 186 F.3d at 628. Mississippi law provides for mandatory bifurcation of punitive damages issues at trial. Specifically, "in any action in which punitive damages are sought" . . . "the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages." Miss. Code Ann. § 11-1-65(b). Furthermore, "if, and only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact." *Id.* § 11-1-65(c). As a general matter, this court concludes that the most prudent course of action is to strictly follow the procedure outlined in § 11–1–65(1)(b)-(c) if an award of compensatory damages is entered against the defendant.

F. Notice to Potential Class Members

Rule 23(c)(2)(B) states that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). *Id.*

Because the court finds that class certification is proper under Rule 23(b)(3), notice to the class members must issue in accordance with Rule 23(c)(2)(B). Additionally, this court finds that because State Farm has access to, or through reasonable efforts can acquire, the names and addresses of the potential class members through its system and records, the best notice for this class is that of mailed individual notice. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 318, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Conclusion

Accordingly, Plaintiff's *Motion to Certify Class of a Monetary Damages Class, or in the Alternative, An Issues Class* [115] is GRANTED IN PART and Defendant's *Motion to Strike Declaration of T. Joseph Snodgrass* [126] is GRANTED.

SO ORDERED, this the 24th day of September, 2018.

/s/ MICHAEL P. MILLS
UNITED STATES DISTRICT JUDGE NORTHERN DISTRICT OF MISSISSIPPI