UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

AMANDA LABRIER, et al., **Plaintiffs,** **v.** **STATE FARM FIRE AND CASUALTY COMPANY,** **Defendant.**	))))))))))	**Case No. 15-04093-NKL**

STATE FARM'S SUGGESTIONS IN SUPPORT OF ITS OBJECTION TO AND MOTION TO VACATE OR MODIFY THE SPECIAL MASTER'S DISCOVERY ORDER NO. 4 (AS AMENDED)

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Defendant State Farm Fire and Casualty Company ("State Farm") hereby objects to, and moves to vacate or modify, the Special Master's Order No. 4, issued on Wednesday, April 6, 2016 (Dkt. 117), as amended by Special Master Order No. 5, issued on Monday, April 11, 2016 (Dkt. 125).

Plaintiff complains here that State Farm used an improper method to calculate "actual cash value" payments to its insureds from March 2005 forward. *See* First Am. Pet. for Declaratory and Class Action Relief (the "First Amended Complaint" or "F.A. Compl."), Dkt. 1-1, ¶¶ 26-35. There are approximately 150,000 individuals who may fall within Plaintiff's proposed class definition. This filing addresses the Special Master's recent Order requiring State Farm to answer interrogatories that cannot *be* answered without analysis of the putative class members' files.

The Second Interrogatories demand that State Farm identify which of its insureds received actual cash value payments where labor depreciation was applied.[1] In addition, they demand a painstaking, file-by-file analysis in which State Farm must (i) identify all repair tasks on each insured's estimates as to which depreciation was applied; (ii) determine the depreciation attributable to labor for that repair; (iii) verify whether the repair was performed and, if so, the cost for that work; and (iv) identify the date and amount of any replacement cost benefit payment for the repair.[2] Plaintiff concedes these inquiries are relevant and necessary for adjudication of the asserted class claims *and* State Farm's defenses.[3] But rather than shouldering her burden as proposed class representative to demonstrate the existence of common proofs for the parties'

[1] *See* State Farm's Motion for Protective Order as to Plaintiff's Second Set of Interrogatories ("S.F. Mot."), attached hereto as Ex. 1, at Exhibit K thereto.

[2] *Id.*

[3] *See generally* Pl. A. LaBrier's Sugg. in Support of the Special Master's Mar. 21, 2016 Ruling ("Pl. Sugg."), attached hereto as Ex. 2; *see also* Tr. of Apr. 1, 2016 Tel. Conf., attached hereto as Ex. 3, at 45:7-46:8; Tr. of Apr. 8, 2016 Tel. Conf., attached hereto as Ex. 4, at 21:18-22:7.

claims and defenses, she seeks to solve her evidentiary problem by forcing State Farm to *perform* all of the individualized inquiries her asserted class action requires. Plaintiff believes that if she can shift that obligation to State Farm, she will not need to develop common proofs at all, with or without the assistance of experts. *See*, *e.g.*, Ex. 3 at 45:7-46:8. Plaintiff is wrong in substance, as open questions raised by State Farm's affirmative defenses would remain,[4] but her tactic in any event is a clear abuse of the discovery process and would rob State Farm of due process if allowed.

State Farm presented uncontroverted evidence that answering the Second Interrogatories will require individualized analysis of putative class members' claims. *See* S.F. Mot. at 8-15, 19-24. While the depth of that review will vary from claim to claim, the overall burden attendant to reviewing 150,000 claims is staggering – the claim files likely consist of roughly 20,400,000 pages of information. *See id*. at 3. Even assuming (conservatively) just one hour on average to review each claim, it would take 72 "work years" for experienced reviewers working 40 hours per week, 52 weeks per year to complete the review. And assuming a moderate pay rate of $50 per hour for that work, the cost for the review would amount to millions of dollars. *See id.* at 16-17. Nevertheless, the Special Master erroneously ordered State Farm to conduct and complete that review in just 30 days, by May 6, 2016, ruling that the foregoing burden imposed on State Farm is "proportional" to the needs of this case. *See* Dkt. 117, 3-4.

The Special Master plainly erred when ordering State Farm' to answer the Second Interrogatories. As set forth more fully below, proper application of the discovery rules, Rule 23, and due process requirements preclude an order requiring a defendant in an asserted class case to

[4] State Farm's affirmative defenses include the proposition that this Court already has acknowledged – that "*[f]or purposes of an actual cash value payment, LaBrier is only entitled to receive the actual cash value of her loss, or the actual cost to repair or replace the damaged property, whichever is less*." *See LaBrier v. State Farm Fire and Cas. Co.*, No. 2:15-cv-04093-NKL, 2015 WL 7738362, at *5 n.6 (Nov. 30, 2015).

engage in the very individualized review and fact-finding for class members that renders the action improper for class treatment. The whole point of class litigation is that a representative can prove putative class members' claims through presentation of the evidence for her *own* claim, and thus can adequately protect absent class members' interests.[5] If such common proofs are not available both for the asserted class claims and the affirmative defenses State Farm has a constitutional right to present, Plaintiff's action here may only proceed as to her own, individual claims.[6] State Farm respectfully requests that this Court vacate the Order.

<u>Background</u>

I. What the Interrogatories Require.

The demands imposed by the Second Interrogatories are best summarized by considering the Interrogatories together. Interrogatory No. 1 requires that State Farm identify a set of claims with a particular set of characteristics or "Criteria." S.F. Mot. at Ex. K. Interrogatories Nos. 1, 2, and 3 then demand specific dates and calculations for every claim meeting the Criteria. *Id.* Then, Interrogatory No. 4 demands that State Farm identify every affirmative defense and all supporting evidence as to every putative class member on a person-by-person basis. *Id.* Thus, to answer the

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[5] Rule 23 requires a plaintiff to supply "*evidentiary proof*" to demonstrate affirmatively that all prerequisites of Rule 23(a) and at least one sub-part of Rule 23(b) are satisfied before class certification may be granted. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (emphasis supplied); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551-52 (2011). In addition, Eighth Circuit authority requires proof that a proposed class be "ascertainable," such that its members can be reliably identified by objective criteria in an administratively feasible manner. *See, e.g., Dumas v. Albert Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 WL 2172030, at *5 (W.D. Mo. Sept. 7, 2005); *Littleton v. State Farm Mut. Auto. Ins. Co.*, No. 5:14-CV-05007, 2015 WL 128577, at *6-7 (W.D. Ark. Jan. 8, 2015).

[6] *Dukes*, 131 S.Ct. at 2561 ("[B]ecause Rule 23 cannot be interpreted to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims.") (internal citations omitted).

Interrogatories, State Farm will have to make at least the following determinations as to each putative class member:

- Did the insured receive an actual cash value payment (rather than receiving replacement cost benefits up front)?
- For each actual cash value payment, to which line items in the insured's State Farm estimate was depreciation applied, and what portion of depreciation is attributable to estimated costs for labor?
- What repairs did the insured perform and at what cost?
- What replacement cost benefit payments did the insured receive for any repair tasks where labor depreciation was applied, and when were those benefits paid?
- Did replacement cost benefits equal the original labor depreciation originally applied?
- Was the insured ultimately paid the full limits of his or her policy and/or the full amount of the cost State Farm estimated for repair of the insured's property?
- Was the structural damage portion of the claim resolved by litigation or arbitration?

See Pl. Mot. at 7-9; *see also* Ex. 4 at 14:10-24:15.

The minute detail this inquiry would involve is illustrated by Plaintiff's structural damage claim estimate for the claim on her residence. Plaintiff's loss was for minor hail damage. Nevertheless, her estimate shows 20 different line items for repairs, with potentially varying depreciation factors applied to 14 of those line items. SFLABRIER00000264-70PROD, attached as Ex. 5.[7] And for every insured who pursued repairs, State Farm would need to trace through the repair contract documentation and invoices in the insured's file (or in the insured's personal possession) to determine which repairs were performed, what the repair costs were (if that can even be determined based on the contractor's invoice or other receipts), and the amount of any "remaining" labor depreciation beyond the replacement cost benefits paid to the insured.

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[7] The depreciation for each line item will vary, depending on the age of that portion of the damaged property – *e.g.,* the roof on a home may be 5 years old, while the siding may be 15 years old.

II. The Uncontroverted Record Shows Individualized Review is Necessary to Answer the Second Interrogatories.

State Farm has presented uncontroverted evidence showing that electronic data queries *cannot be run* to answer the questions posed by the Second Interrogatories. *See* S.F. Mot. at 8-17, 19-24. Certainly many potentially relevant data points can be identified by such data queries, and State Farm already has run such queries and produced the results to Plaintiff. *See id*. at 18-19. But the Second Interrogatories do not simply ask State Farm to run specific electronic data queries from which Plaintiff, through expert evidence or otherwise, will attempt to present statistical or other common proofs. Plaintiff instead posed *specific* Interrogatories that require *specific* answers as to each putative class member. *See id.* at Ex. K. And while she argues that State Farm should easily be able to answer each inquiry, the record shows otherwise.

First, one cannot reliably determine whether an actual cash value payment was issued to an insured solely by relying on a field drawn from estimate data maintained by Xactware that is entitled "Net ACV Payment." *See* Pl. Mot. at 6, 7. That is because estimate data is *not* payment data. Xactware does *not* have information regarding whether a claim payment then was issued based on the estimate. S.F. Mot. at Ex. A thereto, at 25:3-10, 126:1-13, 129:12-17.

Moreover, while State Farm certainly records each payment it has made for a claim, it does not code those payments to indicate whether it is an actual cash value payment, a replacement cost payment, or a combination of the two. *See* S.F. Mot. at Ex. B thereto, at 43:4-5 ("Our pay codes don't signify ACV payments or RCV payments").[8] Plaintiff's assumption that State Farm can "easily" calculate "labor depreciation" amounts supposedly due and owing to putative class

[8] Thus, a claim with a single payment may have involved an ACV payment or a full payment of replacement cost benefits up front. An initial claim payment may be a combined payment of replacement cost benefits and ACV. *Id*. at 2:11-47:7. A claim with two payments may involve two ACV payments, an ACV payment and a replacement cost payment, and so forth. *Id.*

members who received only one claim payment thus is wholly unfounded.

Further, one cannot determine what repairs an insured has made, what those repairs cost, or how the insured's actual cost compares to State Farm's prior estimate without reviewing *at least* the insured's estimate, images of contracts and other documentation of the insured's repair costs, and the claim representative's activity notes. And in many instances, only the insured will be in possession of records necessary to establish that information, as insureds do not submit such records unless they are claiming replacement cost benefits.

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[10] *See* S.F. Mot. at Ex. D thereto, ¶ 8.

[11] Plaintiff's assumption that State Farm can easily answer the Second Interrogatories as to insureds who received *no* claim payment is equally unfounded. She assumes that if the calculated actual cash value for a loss plus identified labor depreciation for the insured's estimate exceeds the insured's deductible, the insured must be entitled to a recovery, but that is the sort of assumption that an expert must support after conducting an appropriate analysis, and no such analysis has been undertaken by Plaintiff. Payment may not have been issued for any number of reasons, including the insured's choice not to pursue the claim because property damage was minimal. To know the *actual* reason an insured did not receive payment, one instead must review the insured's claim file.

III. The Evidence Establishing the Burden Attendant to Individual Review of All Putative Class Members' Claims.

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Extrapolating those findings to the approximately 150,000 claims at issue here, and even using a more conservative assumption that review and analysis of each claim for the *LaBrier* putative class would take just one hour, it likely would take an experienced team of 72 reviewers approximately a full year to perform the necessary review even working 40-hour weeks for 52 weeks per year. And assuming a pay rate of $50.00 per hour for the review, the labor cost for the review would be millions of dollars. Immense resources thus would be needed to complete the review that the Special Master's Order would require even by the August 3, 2016 cut-off for all discovery in this case, much less by the May 6, 2016 deadline imposed by the Special Master.

IV. The Claim File Sampling State Farm Is Producing Here Has Been Accepted in Other, Similar Actions as an Alternative to the Individualized Discovery Plaintiff Demands.

State Farm is producing a claim file sampling of 400 randomly selected files for putative class members. Insurers' production of claim samples of this type has been accepted by, if not affirmatively *demanded* by, the plaintiffs in numerous asserted class actions alleging breach of contract based only on an insurer's claim payment practices – both in this District and elsewhere – for purposes of determining whether the cases could be certified for class treatment.[12] Indeed, in another action challenging an insurer's labor depreciation practices that is currently pending in this District, Plaintiff's counsel David Butsch and Chris Roberts (1) sought to *compel* a claim file sampling, (2) admitted that a production (and presumably, review) of all claim files is "unrealistic," (3) acknowledged that even producing a sample of 250 claim files "is a burden on the defendant," and (4) argued that a claim file sampling is "necessary to go forward with [the plaintiff's] motion for class certification." Tr. of Apr. 28, 2015 Hearing in *Riggins v. Am. Family Mut. Auto. Ins. Co.*, attached as Ex. 6, at 3:23-5:2.

The defendants in those other actions, including *Riggins*, will *never* be put to the expense of reviewing every putative class member's claim for merits issues as State Farm has been ordered

[12] *Shady Grove Orthopedic Assoc., PA v. Allstate Ins. Co.*, 293 F.R.D. 287, 295 (E.D.N.Y. 2013) (parties agreed to sampling of 300 claim files in case potentially involving "more than 344,000" claims); *Seabron v. Am. Fam. Mut. Ins. Co.*, No. 11–cv–01096–WJM–KMT, 2013 WL 3713652, at *5 (D. Colo. Jul. 16, 2013) (magistrate judge previously had ruled plaintiffs were entitled only to a sampling of files for putative class to prevent significant "overburdening" of the defendant); *Cummins, Inc. v. ACE Am. Ins. Co.*, No. 1:09–cv–00738–JMS–DML, 2011 WL 130158, at *9-10 (S.D. Ind. Jan. 14, 2011) (noting that insurers often are required to produce a sampling of claims files to be used as sufficient basis to show the insurers' actual claims interpretation and claims handling practices."); *Zurich Am. Ins. Co. v. ACE Am. Reinsurance Co.*, No. 05 Civ. 9170 RMB JCF, 2006 WL 3771090, at *2 (S.D.N.Y. Dec. 22, 2006) (ordering a sampling protocol where "the volume of data accumulated by [insurer] makes a search of its entire database infeasible); *Lafollette v. Liberty Mut. Fire Ins. Co.*, No. 2:14-cv-04147-NKL (W.D. Mo.) (Laughrey, J.), Dkt. 86 (minute entry noting the Court's prior suggestion that "the parties narrow discovery to 500 random claim files," with the potential for further discovery if needed).

to do here. If the file samplings shows that common proofs are not available, class certification will be denied. If common proofs *are* available, those proofs (rather than individualized determinations for every class member) will be presented. Thus, the Second Interrogatories impose demands that are neither necessary nor proportional to the needs of this action; they instead demand discovery *that is not and will not be required* in actions indistinguishable from this one.

Argument

I. Legal Standard.

All aspects of the Special Master's Order are subject to this Court's *de novo* review. *See* Fed. R. Civ. P. 53(f); *see also Equal Employment Opportunity. Comm'n v. New Prime, Inc.*, No. 6:11-cv-03367-MDH, 2015 WL 8757318, at *2 (W.D. Mo. Dec. 14, 2015). In deciding this Appeal, the Court accordingly should consider anew whether Plaintiff made the requisite showing that the discovery she demanded falls within the scope of Rule 26. As explained below, Plaintiff did not meet her burden to compel State Farm's responses to the Second Interrogatories. In contrast, State Farm has established "good cause" for entry of a protective order by its evidentiary showing that production of the requested materials would impose undue burden and expense upon State Farm. *See* Fed. R. Civ. P. 26(c)(1); *Leisman v. Archway Med., Inc.,* No. 4:14CV1222 RLW, 2015 WL 4994084, at *2 (E.D. Mo. Aug. 19, 2015) (entering protective order and denying motion to compel where the defendant established good cause under Rule 26(c)).

II. The Second Interrogatories Impose a Burden Disproportionate to the Needs of the Case.

The Special Master did not make an affirmative finding regarding the burden State Farm would face in responding to the Second Interrogatories, nor did he find that individualized inquiry would be unnecessary as to any set of putative class members. Dkt. 117 at 2-3. Had he made such a finding, it would have been error for the reasons set forth above. *See supra* at 10-11. But in any

event, the gist of his ruling was that *despite* State Farm's showing of extreme burden, proportionality *still* was satisfied. That ruling constitutes legal error.

Rule 26 requires an assessment of both fairness and efficiency to ensure that information is not discoverable unless it is *both* relevant to the claims and defenses *and* proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Recent amendments to the rule clarify that proportionality in discovery must be evaluated under the following factors: "the importance of the issues at stake in the action; the amount in controversy; the parties' relative access to relevant information; the parties' resources; the importance of the discovery in resolving the issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* This renewed emphasis on proportionality requires a change in mindset:

> Proportionality in discovery under the Federal Rules is nothing new. …New Rule 26(b)(1), implemented by the December 1, 2015 amendments, simply takes the factors explicit or implicit in the[] old requirements to fix the scope of all discovery demands in the first instance. What will change—hopefully—is mindset. … [A] **party seeking discovery of relevant, non-privileged information must show, before anything else that the discovery sought is proportional to the needs of the case**.

Gilead Sciences, Inc. v. Merck, No. 5:13-cv-04057, 2016 WL 146574, at 5 *1 (N.D. Cal. Jan. 13, 2016) (emphasis supplied). Similarly, Chief Justice John Roberts has commented that under the changes to Rule 26, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but **eliminate unnecessary or wasteful discovery**. The key here is careful and realistic assessment of **actual need**."[13]

The concept of proportionality applies in asserted class actions as well as individual suits. That is important because, as this case demonstrates, a class plaintiff faces no financial risk in

[13] Chief Justice John G. Roberts, 2015 Year-End Report on the Federal Judiciary (Dec. 31, 2015), available at http://www.supremecourt.gov/publicinfo/yearend/2015year-endreport.pdf (last accessed March 12, 2016), at 6-7 (emphasis supplied).

demanding individualized discovery as to all class members in a case where certification may never be granted, while a defendant ordered to conduct that discovery cannot recoup the substantial cost such discovery imposes even if class certification is denied. Class "[d]iscovery is not to be used as a weapon, nor must discovery on the merits be completed precedent to class certification. Unnecessarily broad discovery will not benefit either party." *Nat'l Org. for Women v. Sperry Rand Corp.*, 88 F.R.D. 272, 277 (D.Conn.1980); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 172 (D.D.C. 2009) (in class actions "district courts must 'balance the need to promote effective case management, the need to prevent potential abuse, and the need to protect the rights of all parties'") (citation omitted). Thus, discovery in a class suit "'should be sufficiently broad that the plaintiffs have a fair and realistic opportunity to obtain evidence which will meet the requirements of Rule 23, yet not so broad that the discovery efforts present an undue burden to the defendant.'" *Seabron v. Am. Family Mut. Ins. Co.*, 862 F. Supp. 2d 1149, 1152 (D. Colo. 2012), order clarified on reconsideration (June 26, 2012).

Further, the disproportionality of extensive and costly discovery of facts underlying individual putative class members' claims, whether pre-or-post certification, must be judged in terms of Rule 23's requirement that class treatment is unavailable unless "a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (ellipses in original) (citation omitted). In addition, courts must consider Rule 1's admonishment that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and **inexpensive** determination of every action and proceeding." Fed. R. Civ. P. 1 (emphasis supplied); *see also* Fed. R. Civ. P. 1, advisory committee's notes to 2015Amendment

("[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and **proportional** use of procedure") (emphasis supplied).

For example, the putative class plaintiffs in *Seabron* sought (in pre-certification discovery) production of all of the claims files of the uncertified putative class members, totaling fewer than 1,600 claim files. *Seabron*, 862 F. Supp. 2d at 1152. The district court sustained the defendant insurers' objection to that broad demand and ordered that production of a file sampling would "satisfy both Plaintiffs' needs . . . and Defendants' legitimate concern over massive document production of third-party information at a stage of the case where class certification is far from inevitable.' *Id*. at 1153-1154. Similarly, in *Aldapa v. Fowler Packing Co. Inc.*, 310 F.R.D. 583 (E.D. Cal. 2015), a sampling approach was used to allow the "Plaintiffs the opportunity to substantiate their claims while saving Defendants from bearing the costs" of class-wide responses to discovery. *Id*. at 589.

Notably, in this case State Farm is producing a claim file sampling of the type that the *Seabron* and *Aldapa* courts deemed to be an appropriate substitute for individualized discovery as to all putative class members claims. And as discussed above, that same solution has been employed in numerous other asserted class suits presently pending against insurers in this Court and elsewhere.

The Special Master's Order does not cite a single case in which the amount in controversy for an asserted class case was held to justify a requirement that the defendant conduct individualized inquiries – despite a multi-million dollar cost to the producing party and an estimate that the discovery essentially would require performance of 72 "work years" – in order to resolve *merits* issues in the action. And Plaintiff's briefing on the issue likewise identified no such

authority.[14] Extensive precedent instead holds that class certification cannot be ordered where, as here, individualized inquiries will be needed to adjudicate the claims and affirmative defenses presented in an asserted class action.[15] Thus, the proportionality of discovery demanded in a class suit cannot be determined simply by looking at the amount in controversy a plaintiff has estimated the action will involve. The denial of class certification in *Dukes* amply demonstrates this principle – the amount in controversy there was far greater, yet class certification was denied *because* the defendant's affirmative defenses required presentation of individualized proofs.

III. State Farm Should Not Be Penalized for its Record Keeping.

An additional basis for the Special Master's conclusion on the issue of proportionality was his determination that State Farm should have maintained its records in a manner that would have allowed it to easily derive the information Plaintiff demands. That, too, was error.

The Court's decision that Missouri would prohibit application of labor depreciation for

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[14] Plaintiff cites several cases where it was recognized that some individualized inquiry to determine damages for members of a certified class is permissible. *See* Pl. Sugg. at 14-15 (citing *Martins v. 3PD Inc.*, No. 11-11313, 2014 WL 1271761, at *13 (D. Mass. Mar. 27, 2014); *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 894 (8th Cir. 1999); *Barfield v. Sho-Me Power Elec. Co-op*, No. 11-CV-04321, 2013 WL 3872181, at *15 (W.D. Mo. July 25, 2013) (Laughrey, J.) Those cases are inapposite. Plaintiff also cites a number of cases for the proposition that a defendant must *always* produce all requested evidence addressing its affirmative defenses, regardless of claims of burden. *See* Pl. Sugg. at 20-21. None of those actions was a class suit, and none is remotely comparable to this action. *See Am. Oil Co. v. Penn. Petrol. Prods. Co.,* 23 F.R.D. 680, 683 (D.R.I. 1959); *Asberry v. Cate*, No. 2:11-CV-2462, 2014 WL 1286191, at *3 (E.D. Cal. Mar. 31, 2014); *Flour Mills of Am., Inc. v. Pace*, 75 F.R.D. 676, 680-81 (E.D. Okla. 1977).

[15] *Dukes*, 131 S.Ct. at 2561 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims.") (internal citations omitted); *Schafer v. State Farm Fire & Cas. Co.,* Civil Action No. 06-8262, 2009 WL 2391238, at *6 (E.D. La. Aug. 3, 2009) (denying class certification because "assessing [the defendant's] affirmative defense would require individualized inquiry and would predominate over any issues common to the class"); *In re Monumental Life Ins. Co.,* 365 F.3d 408, 420 (5th Cir. 2004) ("The predominance of individual issues necessary to decide an affirmative defense may preclude class certification."); *Kennedy v. United Am. Ins. Co.*, No. 2:11CV00131 SWW, 2013 WL 1367131, at *3-6 (E.D. Ark. Apr. 3, 2013) (finding predominance lacking in part because affirmative defenses as to class could not be resolved without individualized proofs).

non-fire claims like Plaintiff's addressed a novel question of law. And Plaintiff errs in arguing that State Farm otherwise should have known for decades that labor depreciation should be "tracked" on a task-by-task basis. To the contrary, to the extent issues regarding treatment of depreciation for actual cash value calculations were raised in litigation, longstanding authority including the Oklahoma Supreme Court's decision in *Redcorn v. State Farm Fire and Casualty Company* in 2002 supported the position that depreciation of *all* components of estimated replacement cost is *proper*.[16] That trend of decisions only became more mixed in late 2013, with the Arkansas Supreme Court's decision in *Adams v. Cameron Mutual*.

Moreover, the issue presented here is not that State Farm *lacks* records to show what it paid or what its payments addressed. The claim records for each putative class member contain the relevant information for State Farm's claim handling. This case accordingly is entirely unlike the authorities Plaintiff cited to the Special Master where a defendant's "disorganized" record-keeping was cited as a reason for requiring it to analyze its records for the plaintiff's benefit.[17]

IV. The Special Master's Order Should Be Modified Or At Least Deferred.

Plaintiff previously has argued that individualized discovery on all merits issues is appropriate in this case because the Scheduling Order for this action contemplates that the question of class certification will not be decided until after the close of discovery. Now, however, she has

[16] *See Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1021 (Okla. 2002) (holding that State Farm may properly depreciate labor costs when calculating actual cash value); *Davis v. Mid-Century Ins. Co.*, 311 F.3d 1250, 1252 (10th Cir. 2002) (insurer properly depreciated labor costs when calculating actual cash value); *Tolar v. Allstate Tex. Lloyd's Co.*, 772 F. Supp. 2d 825, 831-32 (N.D. Tex. 2011) (insurer properly applied depreciation to all elements of estimated replacement cost when calculating actual cash value); *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684, 690 (Fla. Dist. Ct. App. 2008) (same).

[17] *See* Pl. Sugg. at 18, citing *Zahorik v. Cornell Univ.*, 98 F.R.D. 27, 35 (N.D.N.Y. 1983) (court determined that United States Supreme Court decision had put defendant on notice that it might be required to produce the information sought, yet nevertheless ordered the defendant to answer the interrogatories in a more "narrow and tailored" fashion).

chosen to file her motion for class certification early. *See* Dkt. 123. Thus, her case now is on the same procedural footing as other actions where the class determination is presented for decision before merits discovery will close. Courts repeatedly have recognized that pre-certification class-wide discovery is particularly suspect when the burden of discovery is high for the defendant. *See, e.g.*, *Allen v. Mill-Tel, Inc.*, 283 F.R.D. 631, 636 (D. Kan. 2012). State Farm therefore respectfully submits that if the Special Master's Order is not vacated in its entirety, the ruling should be modified either to provide that answers need only to be provided in respect to the claim file sample State Farm is producing (with an extension of time beyond May 6, 2016 to accomplish that task); to provide that the only information State Farm need consider in answering is the data available from the results of reasonable electronic data queries, or that State Farm's obligation to respond at the least be deferred until after the Court rules on Plaintiff's newly filed class certification motion.

Conclusion

State Farm's prior productions of estimate and claims data, and its forthcoming production of a sampling of claim files again should be deemed sufficient response, without more, to this Interrogatory. The file sampling will provide a sufficient basis for the parties and the Court to ascertain whether representative evidence may be used to prove the putative class members' claims and resolve State Farm's affirmative defenses without enlarging or diminishing either party's substantive rights. *See Dukes*, 564 U.S. at 131 S.Ct. at 2561. If it can, then the individualized discovery Plaintiff demands will be unnecessary. If it cannot, then individualized discovery *still* will be unnecessary, as Plaintiff will not be entitled to pursue claims of other putative class members. For all of the foregoing reasons, State Farm requests that the Court vacate the Special Master's Order in its entirety or, alternatively, order that State Farm's obligation to respond to the Second Interrogatories be suspended until further order of the Court in light of Plaintiff's recent filing of her class certification motion.

Dated: April 13, 2016

Respectfully submitted,

By: /s/ *Heidi Dalenberg*

Riley Safer Holmes & Cancila LLP
Joseph A. Cancila, Jr. (IL 6193252)
Heidi Dalenberg (IL 6021041)
Three First National Plaza
70 W. Madison, Ste. 2900
Chicago, IL 60602
Tel. (312) 471-8700
Fax. (312) 471-8701
Admitted pro hac vice

Daniel E. Wilke (24464)
Wilke & Wilke PC
2708 Olive Street
St. Louis MO 63103
Tel. 314-371-0800
Fax 314-371-0900
dwilke@wilkewilke.net

Attorneys for Defendant State Farm Fire and Casualty Company

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 13, 2016, a copy of the foregoing document was filed and served through the Court's electronic filing system to the following attorneys of record for Plaintiff:

David T. Butsch
Christopher E. Roberts
231 S. Bemiston Ave., Suite 260
Clayton, MO 63105
Tel. 314-863-5700
Fax 314-863-5711
Butsch@ButschRoberts.com
Roberts@ButschRoberts.com

and

Joe D. Jacobson
168 N. Meramec Ave., Suite 150
Clayton, MO 63105
Tel. 314-899-9790
Jacobson@ArchCityLawyers.com

and

T. Joseph Snodgrass
Larson King, LLP
30 East Seventh Street
Suite 2800
St. Paul, MN 55101
Tel: (651) 312-6500
Fax: (651) 312-6618
jsnodgrass@larsonking.com

Attorneys for Plaintiffs

By: /s/ Jacob L. Kahn