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

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

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

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

INTRODUCTION

This case is one of many class actions filed against insurers in Ohio and across the country challenging the common practice of calculating "actual cash value" ("ACV") claim payments for structural damages claims by estimating the cost to repair or replace the damaged property, then applying depreciation to that full estimated replacement cost—including both material costs and any labor or other non-material costs (hereinafter "labor depreciation"). The complaint asserts a

claim for breach of contract on behalf of policyholders who made structural damage claims for property located in Ohio under policies written by State Farm. Doc. 138 (Fourth Amended Complaint).

State Farm has vigorously defended this litigation, and absent this class settlement, would continue to do so through summary judgment motion practice and trial. In 2018, this Court granted State Farm's motion to dismiss the original complaint. However, the Sixth Circuit ultimately reversed that decision, adopting a ruling involving a different insurer that labor costs may not be depreciated in calculating ACV payments under Ohio law where the policy does not expressly and unambiguously permit such depreciation. *See Cranfield v. State Farm Fire and Cas. Co.*, 798 F. App'x 929, 930 (6th Cir. 2020) (per curiam) (adopting the ruling from *Perry v. Allstate Indem. Co.*, 953 F.3d 417, 421-23 (6th Cir. 2020)).

On remand from the appeal, however, the claims of the individual plaintiffs remained vulnerable on the merits. For example, State Farm raised a contractual limitations defense (among others) barring the claims of both the original Plaintiff, Charles Cranfield,[1] and Northpointe. Docs. 66, 79, 109, 124.

These individual defenses presented significant obstacles to Plaintiffs' efforts to obtain certification of a litigation class. In fact, the Court denied Plaintiffs' motion for class certification based in part on the individualized inquiry necessary to resolve these and other defenses. As the Court observed:

> [I]t will be necessary to review and analyze the facts of each putative class claim to determine "withheld" non-material depreciation; to determine whether any policyholder was "underpaid," as Plaintiffs contend, due to labor depreciation;

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

> whether some policyholders were paid full replacement costs up-front, without depreciation; and whether others may have been paid their policy limits.

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

Despite State Farm's confidence that it would have prevailed a second time on any future motion to certify a litigation class—as well as on summary judgment, at trial, and in any subsequent appeal—it believes that a settlement as described in the Stipulation and Settlement Agreement is in the best interests of its policyholders. First, this matter has been pending for seven years, and would likely span several more years inclusive of further motion practice, discovery, trial, and appeals. Second, a trial of this matter on a class-wide basis would be unmanageable, and even reaching such a trial will likely present significant costs and risks for each side.

For these reasons, and as explained further below, State Farm has determined that the Proposed Settlement is in the best interests of its current and former Ohio policyholders. State Farm therefore seeks to resolve this case so that it can avoid further litigation expenses and uncertainty and continue providing excellent service to its policyholders. As set forth below, State Farm believes that the Proposed Settlement is fair, reasonable, and adequate, especially in view of the strength of State Farm's defenses to the asserted claims and the difficulties Plaintiffs would

face in establishing liability and proving damages. Accordingly, State Farm supports the Proposed Settlement and requests that it be preliminarily approved.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 23(e)(2), the Court must approve the class action settlement as fair, reasonable, and adequate before it becomes effective. In making this assessment, the Court considers the factors enumerated in Rule 23(e)(2), as well as factors developed by courts in this circuit in deciding whether to approve a proposed settlement agreement. *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 2016 WL 5338012, at *6 (N.D. Ohio Sept. 23, 2016); *see also* Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment. The Sixth Circuit has identified the following factors as relevant to settlement approval:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). Of these, "[t]he most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *Poplar Creek Dev. Co. v. Chesapeake Appalachia, LLC*, 636 F.3d 235, 245 (6th Cir. 2011); *see also Int'l Union*, 497 F.3d at 631 ("The fairness of each settlement turns in large part on the bona fides of the parties' legal dispute . . . [and the court] cannot judge the fairness of a proposed compromise without weighing the plaintiffs' likelihood of success on the merits against the amount and form of the relief offered in the settlement.") (internal citation omitted). This includes assessing the litigation risks faced by class members, including the strength of the defendant's defenses and the potential for an

unfavorable verdict. *See Does 1-2 v. Déjà Vu Servs., Inc.*, 925 F.3d 886, 896-97 (6th Cir. 2019); *In re Whirlpool*, 2016 WL 5338012, at *11 (approving settlement where "the merits of the Class's case are not so overwhelming that continued litigation is a vastly better option than settlement").

The following discussion briefly summarizes State Farm's defenses and demonstrates why the Proposed Settlement is fair, reasonable, and adequate in light of those defenses.

I. The Proposed Settlement is Fair, Reasonable, and Adequate in View of the Strength of State Farm's Class Certification Arguments and its Liability Defenses to the Breach of Contract Claim.

This Court has made no rulings on the merits of Plaintiffs' claims, but it has expressed skepticism that a litigation class properly could be certified in this matter as advanced by Plaintiffs—for example, because the proposed class includes policyholders insured under various structural damage policies with different provisions, and because "[d]istinctions can be drawn between putative class members who accepted ACV and those who pursued repair and replacement costs." Doc. 135 at 13. State Farm demonstrated that consideration of a potential litigation class is rife with other individualized issues, including whether a claim is timely, whether policy limits were paid, whether State Farm's payment was based on a particular estimate of ACV, whether the application of non-material depreciation to an ACV estimate resulted in injury, and whether insureds who were paid replacement costs benefits are entitled to interest. *See* Doc. 109 at 28-39. Further, although the Court permitted Plaintiffs to file a "renewed motion for class certification," there is no guarantee that the case would have survived until such a renewed motion, as State Farm had pending a summary judgment motion demonstrating that both Cranfield's and

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

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

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

Plaintiffs contend, due to labor depreciation." Doc. 135 at 10. The need for such an individualized analysis of each putative class claim would have been a significant hurdle to any class-wide adjudication in this case.

The specific factual circumstances of Northpointe's claim also illustrate the challenges that Plaintiffs would have faced here in a renewed motion for class certification. For example, Northpointe received full payment already of the costs it incurred to repair its damaged property during the claim handling process. *See* Doc. 130-1 at 9-10. Because State Farm's policy expressly caps any insured's recovery at the amount they incur "to repair or replace" their damaged property, State Farm has asserted that Northpointe is not entitled to recover any additional costs, for ACV or otherwise, through this litigation. *See id.* at 27. Many putative class members will face this same defense.[2] Additionally, discovery revealed that Northpointe was represented by counsel throughout the claim handling process and in fact negotiated a final settlement of its claim through that attorney. *See id.* at 29-30. State Farm has asserted that those facts made Northpointe's claim susceptible to the defense of accord and satisfaction. *See id.* Neither of these two defenses could be litigated on a class-wide basis. In fact, courts in other "labor depreciation" class actions have denied class certification based on these same contract-based defenses. *See, e.g.*, *Brasher v. Allstate Indem. Co.*, No. 4:18-CV-00576-ACA, 2020 WL 4673259, at *14 (N.D. Ala. Aug. 12,

[2] Further, because State Farm's policies expressly cap the amount owed for ACV at the policyholders' cost to complete repairs, State Farm submits that members of the class who received initial claim payments that exceeded their actual cost of repairs will be unable to establish breach of contract as a matter of law. Simply put, those class members were not underpaid for ACV, and thus the policy was not breached.

2020) (denying class certification motion based on insurer's asserted (and potential) defenses for accord and satisfaction, set-off and recoupment).

The Proposed Settlement avoids the intractable litigation manageability issues presented by such individualized liability proofs.

II. The Proposed Settlement is Fair, Reasonable, and Adequate in View of the Need for Individualized Proof to Establish Damages.

The Proposed Settlement is also fair, reasonable, and adequate in light of the need for individualized proof to establish damages. As discussed above, determining whether or not any class member received less than the contracted-for amount ("ACV") will require an individualized analysis of each claim that creates further litigation manageability issues. Indeed, there may be any number of policyholders for whom an individualized review would show there is no entitlement to damages, including (for example) because the policyholder: (i) did not in fact receive an ACV payment with labor depreciation applied; (ii) already received full payment of the applicable limits under their policy; (iii) sought or received RCB payments; (iv) was able to complete repairs in full for the amount of their ACV payment; or (v) received an ACV payment that was overstated by more than the amount of any labor depreciation applied in calculating the payment. State Farm has already demonstrated that numerous such examples of these claims exist within the putative class. *See* Doc. 109 at 18-30.

The Proposed Settlement eliminates the litigation manageability challenges that would otherwise be presented in a class-wide trial requiring such individualized proof on damages. The Proposed Settlement will provide agreed-upon relief to those class members who arguably experienced an economic impact as a result of an ACV payment that included labor depreciation and who submit a claim. While State Farm will have the right to review any claims submitted as part of the Proposed Settlement for purposes of determining the settlement payment amount

(pursuant to the terms agreed to in the Proposed Settlement), the Proposed Settlement will avoid individualized disputes as to damages that would prevent this case from being tried on a class-wide basis.

CONCLUSION

For all of the foregoing reasons, State Farm respectfully requests that the Court preliminarily find that the Proposed Settlement is fair, reasonable, and adequate, and preliminarily approve the Proposed Settlement in the form agreed to by the Parties, as attached to Plaintiff's motion for preliminary approval.

Dated: February 17, 2023

Respectfully submitted,

/s/ *Jacob L. Kahn*

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ACERTIFICATE OF SERVICE

I hereby certify that on February 17, 2023, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Jacob L. Kahn

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