UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

BELLE MEADE OWNERS ASSOCIATION INC.,	)	
Plaintiff,	)	**Case No.: 3:22-cv-00123**
v.	)	**District Judge J. Ronnie Greer**
	)	**Magistrate Judge Debra C. Poplin**
THE CINCINNATI INSURANCE COMPANY, et al.,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

The Settlement Agreement reached between Plaintiff Belle Meade Owners Association, Inc. ("Plaintiff"), on behalf of itself and the proposed Settlement Class, and Defendant The Cincinnati Insurance Company ("CIC"), along with The Cincinnati Casualty Company, The Cincinnati Indemnity Company, Cincinnati Global Underwriting Ltd. ("CGU"), and Cincinnati Specialty Underwriters Insurance Company ("New Defendants") (individually and collectively, "Defendants"), (the "Settlement") is attached as Exhibit 1 to Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.[1]

This multistate class action arises out of Defendants' practice of withholding certain labor and other nonmaterial costs when calculating and issuing actual cash value ("ACV") payments to Defendants' policyholders.[2] This lawsuit only concerns insurance claims for structural damage (buildings) and not contents (furniture, clothes).

Plaintiff seeks the Court's preliminary approval of this Settlement under Federal Rule of Civil Procedure ("Rule") 23(e)(1) so that notice of the Settlement can be disseminated to the Settlement Class and the Final Approval Hearing can be scheduled. At the Final Approval Hearing, the Court will have before it additional submissions in support of the Settlement, as well as any objections that may be filed, and will be asked to determine whether, in accordance with Rule 23(e)(2), the Settlement is fair, reasonable, and adequate.

---

[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Settlement, attached as Exhibit 1 to Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement (the "Motion"), filed concurrently herewith. Additional supporting materials are included in the Declarations of J. Brandon McWherter ("McWherter Decl."), T. Joseph Snodgrass ("Snodgrass Decl."), and Erik D. Peterson ("Peterson Decl."), all of which are attached to the Motion as Exhibits 2, 3, and 4, respectively.

[2] As Paragraph 15.1 of the Settlement makes clear, however, Defendants deny liability and, absent settlement, intend to contest each and every claim and cause of action, including whether any aspect of this lawsuit is appropriate for certification as a litigation class.

The proposed Settlement here is made on behalf of Arizona, California, Illinois, Kentucky, Missouri, Ohio, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin policyholders of Defendants. For Class Members who timely submit a materially complete Claim Form, the Settlement will result in the recovery of 80%-100% of the Nonmaterial Depreciation that was withheld from ACV Payments and not later paid, plus an interest award. Additionally, Class Members for whom all Nonmaterial Depreciation that was withheld from ACV Payments was subsequently recovered (*e.g.*, through receipt of replacement cost benefits), will receive a one-time payment based on the schedule set out in Paragraph 6.7 of the Settlement.

As discussed below, the proposed Settlement was reached through arms-length bargaining and will result in a significant recovery for the Settlement Class. Accordingly, for the reasons set forth herein, Plaintiff submits that the Settlement warrants the Court's preliminary approval and respectfully requests that the Court enter the proposed Preliminary Approval Order attached as Exhibit A to the Settlement Agreement.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Law Concerning Labor Depreciation

This action and proposed settlement involve allegations that Defendants breached the terms of their standard-form property insurance policies with Plaintiff and other Class Members by wrongfully depreciating labor and other nonmaterial costs when adjusting property loss claims in violation of the law. *See, e.g., Perry v. Allstate Indem. Co*., 953 F.3d 417, 423 (6th Cir. 2020) ("Because Perry's interpretation of 'depreciation' is a fair reading of an ambiguous term, her interpretation prevails against the insurer. We accordingly hold as a matter of law that it was improper for Allstate to depreciate labor costs to arrive at its net payment to Perry for the damage to her home.") (interpreting Ohio law); *Hicks v. State Farm Fire & Cas. Co.*, 751 F. App'x 703,

709–11 (6th Cir. 2018) (finding policy did not unambiguously permit the withholding of labor costs as depreciation in calculating ACV and holding "[a] reasonable construction of the insurance policies in this case is that labor is not included in depreciation") (interpreting Kentucky law); *Sims v. Allstate Fire & Cas. Ins. Co.*, 2023 WL 175006, at *4 (W.D. Tex. Jan. 11, 2023) ("[T]he term '[ACV]' in the subject Policies does not include depreciation of anticipated labor costs."); *Walker v. Auto-Owners Ins. Co.*, 517 P.3d 617, 623 (Ariz. 2022) ("[I]f a policy adopts the RCLD methodology for determining [ACV], … the insurer is precluded from depreciating labor when determining the [ACV] of the covered loss."); *Sproull v. State Farm Fire & Cas. Co.*, 184 N.E.3d 203, 221 (Ill. 2021) (concluding the policyholder's interpretation of the undefined term "ACV" was a reasonable interpretation of an ambiguous term and "depreciation may not be applied to the intangible labor component"); *Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286, 303 (Mo. Ct. App. 2022) ("In the absence of an express policy provision that allows for it, labor does not fall within that which can be depreciated when an insured is entitled to an ACV payment."); *Lammert v. Auto-Owners (Mut.) Ins. Co.*, 572 S.W.3d 170, 179 (Tenn. 2019) ("[L]abor may not be depreciated when the insurance company calculates the [ACV] of a property using the replacement cost less depreciation method.").

B. The Lawsuit

On April 8, 2022, Plaintiff commenced this Action. Dkt. 1. Plaintiff alleged that CIC improperly depreciated the estimated cost of labor and other nonmaterial costs necessary to complete repairs to insured property when it calculated and issued ACV payments to it and other class members for structural losses under their property insurance policies. *See generally* Dkt. 1. Plaintiff asserted claims for breach of contract and declaratory judgment on behalf of itself and a class of CIC policyholders who received ACV payments for damage to a dwelling, commercial

building, or other structure located in Arizona, California, Illinois, Kentucky, Missouri, Ohio, Tennessee, Texas, Vermont, Virginia, Washington, or Wisconsin, where the estimated costs of labor/nonmaterial were depreciated. *Id*.

C. Settlement Negotiations

Prior to reaching the proposed Settlement, the parties engaged in informal discovery, including the production by CIC of certain internal and third-party claim and estimating data. *See* McWherter Decl. at ¶ 21. The analysis of this data positioned the parties to engage in meaningful settlement negotiations. *Id*. The parties reached a settlement in principle for relief to the class through an August 7, 2023 mediation before former U.S. Magistrate Judge Stephen C. Williams. *Id*. at ¶¶ 16, 18, 22. The settlement in principle did not include any agreements on attorneys' fees, litigation costs, or service award. *Id*. at ¶ 22.

Following the settlement in principle on class relief, the parties began to negotiate attorneys' fees, litigation costs, and service award. *Id*. at ¶ 23. On October 5 2023, the parties reported to the Court that they had reached an agreement in principle to settle the case on a class-wide basis and jointly requested that all deadlines be suspended for 60 days while they prepare a class settlement agreement. *Id*. at ¶ 17; Dkt. 51. The Court granted the parties request by Order dated October 6, 2023. Dkt. 52. Since early October, the parties have continued to negotiate the remaining terms of a class settlement that would resolve the claims against CIC, as well as The Cincinnati Casualty Company, The Cincinnati Indemnity Company, Cincinnati Global Underwriting Ltd., and Cincinnati Specialty Underwriters Insurance Company, resulting in the Settlement Agreement that is attached as Exhibit 1 to Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. McWherter Decl. at ¶ 18. Contemporaneous

with the filing of Plaintiff's Preliminary Approval Motion, Plaintiff has also filed its Amended Complaint to add the remainder of these additional Defendants.

When the class claims were settled, Plaintiff's counsel believed that Plaintiff's claims and allegations relating to Nonmaterial Depreciation asserted in the Action had significant merit. Plaintiff's counsel also recognized and acknowledged, however, that prosecuting such claims through further fact and expert discovery, class certification motions, trial, and appeals would involve considerable uncertainty, time, and expense. Further, Plaintiff's counsel recognized the additional risk associated with the jurisdictions of Virginia and Wisconsin, whose state supreme courts had not yet finally resolved the seminal issue. Additionally, Plaintiff's counsel recognized the possibility that the Court might not certify a class that included all the states Plaintiffs sought to include here. *See Generation Changers Church v. Church Mut. Ins. Co.*, 2023 U.S. Dist. LEXIS 169243, at *58 (M.D. Tenn. Sep. 22, 2023) (certifying labor depreciation class that included only four of ten states sought for inclusion).

Plaintiff's counsel therefore concluded that it is in the best interests of the Settlement Class that the claims asserted by Plaintiff against Defendants in the Action be resolved on the terms and conditions set forth in the Settlement Agreement. After extensive consideration and analysis of the factual and legal issues presented in the Action, and extensive and multiple settlement negotiation sessions, Plaintiff's counsel reached the conclusion that the substantial benefits Class Members will receive as a result of this Settlement are a very good result in light of the risks and uncertainties of continued litigation; the time and expense that would be necessary to prosecute the Action through class certification, trial, and any appeals; and the likelihood of success at trial.[3]

[3] The McWherter Decl., filed concurrently with this Memorandum and attached as Exhibit 2 to the Motion, addresses the history of settlement negotiations for this lawsuit, and the timing and structure of the settlement negotiations. McWherter Decl. at ¶¶ 16, 18, 20-26. It also addresses the

Finally, consistent with ethical standards for class action settlements, only after there was an agreement on the relief to the Class Members, Plaintiff's counsel negotiated and agreed to attorneys' fees, litigation costs, and a service award to which Defendants would not object, and which will not reduce the recovery of the proposed Settlement Class. McWherter Decl. at ¶ 23.

III. SUMMARY OF SETTLEMENT TERMS

A. The Class

The "Settlement Class" means:

> All policyholders under any residential or commercial property insurance policy issued by Defendants who had: (a) a Structural Loss that was a Covered Loss for property located in Arizona, California, Illinois, Kentucky, Missouri, Ohio, Tennessee, Texas, Vermont, Virginia, Washington, or Wisconsin during the applicable Class Periods; and (b) that resulted in an ACV Payment from which Nonmaterial Depreciation was withheld, or that would have resulted in an ACV Payment but for the withholding of Nonmaterial Depreciation causing the loss to drop below the applicable deductible.

Settlement ¶ 2.36.

The Settlement Class excludes: (i) policyholders whose claims arose under policy forms, endorsements, or riders expressly permitting Nonmaterial Depreciation within the text of the policy form, endorsement or rider (*i.e.*, by express use of the words "depreciation" and "labor"); (ii) policyholders who only made a roof damage claim that arose under a roof surface payment endorsement or similar policy provision, which were paid based on a schedule and not by deducting Depreciation; (iii) policyholders who received one or more ACV Payments that exhausted the applicable limits of insurance; (iv) policyholders whose claims were denied or abandoned without ACV Payment; (v) Defendants and their officers and directors; (vi) members

---

considerations that led to the compromise in exchange for the proposed release. *Id*. at ¶¶ 32-38; *see also generally* Snodgrass Decl. and Peterson Decl. attached as Exhibits 3 and 4 to the Motion.

of the judiciary and their staff to whom this Action is assigned and their immediate families; and (vii) Class Counsel and their immediate families. Settlement ¶¶ 2.36.1-2.36.7.

The "Class Periods" mean the following time periods:

- For policyholders of all Defendants with Structural Loss claims in Arizona, California, Illinois, Kentucky, Ohio, Tennessee, Texas, Vermont, Virginia, or Washington, dates of loss on or after April 8, 2020 and on or before May 31, 2022;
- For policyholders of all Defendants with Structural Loss claims in Wisconsin, dates of loss on or after April 8, 2021 and on or before May 31, 2022;
- For policyholders of all Defendants except CGU with Structural Loss claims in Missouri, dates of loss on or after April 8, 2012 and on or before May 31, 2022; and
- For policyholders of CGU with Structural Loss claims in Missouri, dates of loss on or after April 8, 2020 and on or before May 31, 2022.

Settlement ¶ 2.14.

B. Class Members' Recovery Under The Settlement

The proposed Settlement provides that Defendants shall pay the following amounts to the following categories of Class Members, subject to the applicable policy limits and deductibles of the Class Members' policies:

Class Members With Still Withheld Nonmaterial Depreciation:

> Arizona, California, Illinois, Kentucky, Missouri, Ohio, Tennessee, Texas, Vermont, and Washington Class Members from whom Nonmaterial Depreciation was withheld and not subsequently recovered, and who timely submit a materially complete Claim Form, will receive a payment equal to 100% of the withheld Nonmaterial Depreciation, plus interest at the rate of 5% per annum from the date of the first ACV Payment to the scheduled date of the Final Approval Hearing. Settlement ¶¶ 6.4, 6.6.
>
> Virginia and Wisconsin Class Members from whom Nonmaterial Depreciation was withheld and not subsequently recovered, and who timely submit a materially complete Claim Form, will receive a payment equal to 80% of the withheld Nonmaterial Depreciation, plus interest at the rate of 5% per annum from the date of the first ACV Payment to the scheduled date of the Final Approval Hearing. Settlement ¶¶ 6.5-6.6.

Class Members Without Still Withheld Nonmaterial Depreciation:

> Class Members for whom all Nonmaterial Depreciation that was withheld from ACV Payments was subsequently recovered (*e.g.*, through receipt of replacement cost benefits), will receive a one-time payment in accordance with the schedule set forth below in lieu of interest accruing on the amounts of Nonmaterial Depreciation withheld through the date all Nonmaterial Depreciation was paid:

Amount of Nonmaterial Depreciation released:	**Claim Settlement Payment:**
$1 - $5,000	$25
$5,001 - $10,000	$50
$10,001 - $20,000	$100
$20,001 - $40,000	$200
$40,001 - $60,000	$300
$60,001 - $80,000	$400
Greater than $80,000	$500

Settlement ¶ 6.7. The attorneys' fees, costs, and service award as may be approved by this Court will not reduce the Class Members' individual payments. Settlement ¶¶ 13.1, 13.5.

C. The Release Of Claims

In return for these payments, Plaintiff and the Class Members will provide Defendants a release narrowly tailored to the subject matter of this dispute—*i.e.*, the systemic practice of withholding labor and other nonmaterial costs as depreciation from ACV payments. All unrelated disputes concerning an individual claim will continue to be handled by Defendants in the ordinary course. Settlement ¶¶ 2.33, 9.1-9.3.

D. Attorneys' Fees, Costs, And Service Award

Plaintiff's counsel will seek as attorneys' fees, litigation expenses and costs, and Defendants have agreed to pay if Court approved, an amount no greater than $1,200,000. The Class Members' recoveries will not be reduced or enhanced by the amounts of attorneys' fees, litigation expenses or costs paid. Settlement ¶¶ 13.1-13.4.

Additionally, Defendants have agreed to pay Plaintiff a service award not to exceed $7,500. If approved, this service award will not reduce the Class Members' recoveries. Settlement ¶ 13.5.

E. The Class Notice

Defendants will separately pay for the Class Notice and settlement administration. Settlement ¶ 4.1.4. All Class Members will be given direct-mailed notice of the terms of the proposed Settlement at least seventy-five days prior to the Final Approval Hearing. Settlement ¶¶ 5.3-5.4. Prior to mailing of the Class Notice by the Settlement Administrator through the United States Postal Service, the Administrator will run all Class Members' names and addresses through the "National Change of Address" database to obtain updated addresses. Settlement ¶ 5.3. Notice will also be published on the internet. Settlement ¶ 5.7. A reminder postcard notice will also be issued forty-five days prior to the expiration of the Claim Deadline. Settlement ¶ 5.6.

IV. THE SETTLEMENT CLASS IS CERTIFIABLE UNDER RULE 23.

The proposed Settlement comes prior to formal class certification and seeks to certify a class simultaneous with a settlement, commonly referred to as a "settlement class." As such, this Court must first ensure that the proposed class certification meets the requirements of Rule 23(a) and (b)(3), with the exception that the Court need not consider, in analyzing a proposed settlement class, whether trial would present intractable management problems. *See generally* NEWBERG ON CLASS ACTIONS § 13:12 (5th ed.) (Dec. 2021 Update) (hereafter "NEWBERG"); Wright and Miller, 7B FEDERAL PRAC. AND PROC. § 1797.2 (3d ed.) (Dec. 2021 Update) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).

While the Supreme Court reiterated that a trial court must conduct a "rigorous analysis" to confirm that the requirements of Rule 23 have been met, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), the requisite "rigorous analysis" of the record and consideration of the

merits must be focused on and limited to the question of whether Rule 23's requirements have been established and, here, in the context of a proposed settlement class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851–52 (6th Cir. 2013). Permissible inquiry into the merits at the class certification stage is limited, and district courts may not turn the class certification proceedings into a dress rehearsal for the trial on the merits. *Id*.

Here, even under a "rigorous analysis," the requirements of Rule 23 are easily met for the proposed *settlement* class. This is because courts routinely certify labor depreciation *litigation* classes: "Courts in jurisdictions where labor depreciation has been found to be unlawful have *uniformly found that common issues predominate* in cases challenging insurers' depreciation of labor costs" and have certified *litigation* classes. *Hicks v. State Farm Fire & Cas. Co*., 2019 WL 846044 (E.D. Ky. Feb. 21, 2019) (emphasis added), *aff'd*, 965 F.3d 452 (6th Cir. July 2020).[4]

Furthermore, federal courts in Tennessee have certified several *settlement* classes in the process of granting final approval of multiple labor depreciation class settlements. *See, e.g.*, *Helping Hands Home Improvement, LLC v. Selective of S.C., et al.*, No. 3:20-cv-00092 (M.D. Tenn. May 9, 2022) (*Helping Hands* Dkt. 67; hereinafter "*Helping Hands* Order"); *Holmes v. LM Ins. Corp.*, No. 19-00466 (M.D. Tenn. Feb. 5, 2020) (*Holmes* Dkt. 84; hereinafter "*Holmes* Order"); *Koester v. USAA Gen. Indem. Co.*, No. 19-02283 (W.D. Tenn. Sept. 4, 2020) (*Koester* Dkt. 69); *Oglesby v. Erie Ins. Co.*, No. 19-02361 (W.D. Tenn. Aug. 4, 2020) (*Oglesby* Dkt. 39);

[4] *E.g., Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700 (5th Cir. 2020), *reh'g and reh'g en banc denied* (5th Cir. May 13, 2020); *Stuart v. State Farm Fire & Cas. Co.,* 910 F.3d 371 (8th Cir. 2018*), reh'g and reh'g en banc denied* (8th Cir. Jan. 29, 2019); *Generation Changers*, 2023 U.S. Dist. LEXIS 169243; *Arnold v. State Farm Fire & Cas. Co.*, 2020 WL 6879271 (S.D. Ala. Nov. 23, 2020); *Green v. Am. Modern Home Ins. Co.*, No. 4:14-04074 (W.D. Ark. Aug. 24, 2016); *McCain v. Baldwin Mut. Ins. Co*., No. 2010-901266 (Montgomery Cty., Ala., Oct. 18, 2016), *rev'd due to inadequacy of representative*, 260 So.3d 801 (Ala. 2018); *Farmers Union Mut. Ins. Co. v. Robertson*, 370 S.W.3d 179 (Ark. 2010); *McLaughlin v. Fire Ins. Exch.*, No. 1316-CV11140 (Jackson Cty., Mo. July 12, 2017).

Wade v. Foremost Ins. Co., No. 18-02120 (W.D. Tenn. July 6, 2020) (*Wade* Dkt. 106; hereinafter "*Wade* Order"); *Halford v. Mid-Century Ins. Co.*, No. 19-01077 (W.D. Tenn. July 6, 2020) (*Halford* Dkt. 64; hereinafter "*Halford* Order").[5]

A. The Settlement Meets The Requirements Of Rule 23(a).

Plaintiff believes the following factors warrant certification.

1. Numerosity

Where there are likely more than 40 class members, numerosity is presumptively satisfied. NEWBERG § 3:12. When analyzing numerosity, a district court uses its common sense. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012). Only a "reasonable estimate" is required to establish numerosity. *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 480 (S.D. Ohio 2004). Based upon data review and extrapolation, counsel for both parties estimate that class notice will issue to thousands of potential Class Members. Numerosity is easily satisfied.

2. Commonality

Commonality only requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "[T]he commonality requirement is not usually a contentious one … and is easily met in most cases." NEWBERG § 13:18. To demonstrate commonality, plaintiff's "claims must depend upon a common contention…that is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each

[5] Several labor depreciation settlement classes have also been approved in other jurisdictions. *E.g., Mitchell v. Allstate Vehicle & Prop. Ins. Co., et al.*, No. 2:21-cv-347-TFM-B (S.D. Ala. Aug. 8, 2023); *Condos. At Northpointe Ass'n, et al. v. State Farm Fire & Cas. Co.*, No. 1:16-cv-01273 (N.D. Ohio July 25, 2023); *Perry v. Allstate Indem. Co., et al.*, No. 1:16-cv-01522 (N.D. Ohio July 25, 2023); *Fox v. Am. Family Ins. Co.*, No. 1:20-cv-01991 (N.D. Ohio Jan 12, 2023); *Stuart v. State Farm Fire & Cas. Co.*, No. 4:14-cv-4001 (W.D. Ark. June 2, 2020) (granting final approval; hereinafter "*Stuart* Order"). To Plaintiff's counsel's knowledge, no labor depreciation *settlement* class has ever failed to be certified.

one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "[E]ven a single common question will do." *Id.* at 359.

Here, Plaintiff contends that the seminal disputed issue is the same one recently addressed by the Sixth Circuit—a property insurer may not withhold a portion of labor depreciation when calculating ACV under a policy that does not specifically allow for labor depreciation. *Perry*, 953 F.3d at 423. This same issue has repeatedly been identified by federal courts as "a common question well suited to class wide resolution." *Stuart*, 910 F.3d at 375; *see also Hicks*, 965 F.3d at 459 ("Plaintiffs' claims share a common legal question central to the validity of each of the putative class member's claims: whether State Farm breached Plaintiffs' standard-form contracts by deducting labor depreciation from their ACV payments."). Indeed, "[t]his common question, posed in the context of [Defendants'] uniform claim handling practices, 'will yield a common answer for the entire class that goes to the heart of whether [Defendants] will be found liable under the relevant laws.'" *Hicks*, 2019 WL 846044, at *4, *aff'd*, 965 F.3d at 458–59 (6th Cir. 2020). In addition to the depreciation of labor and other nonmaterial costs, class members' entitlement to statutory prejudgment interest also presents a common issue. Commonality is easily satisfied.

3. Typicality

"Like the test for commonality, the test for typicality is not demanding." *Kerns v. Caterpillar, Inc.*, 2007 WL 2044092, at *5 (M.D. Tenn. July 12, 2007); NEWBERG § 3:29. A representative's claim is typical if it arises from the same conduct that gives rise to the claims of other class members and if its claims are based on the same legal theory. *Beattie v. Century Tel., Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). "[F]or the district court to conclude that the typicality requirement is satisfied, "a representative's claims need not always involve the same facts or law,

provided there is a common element of fact or law." *Gaynor v. Miller*, 2018 WL 375606, at *9 (E.D. Tenn. Aug. 6, 2018); *Kerns*, 2007 WL 2044092, at *5-6.

Here, all claims are premised upon the same legal theories. Plaintiff's breach of contract claims arising from the underpayment of its ACV claim in violation of the standard-form policies are identical to the claims of the putative class. *Hicks*, 2019 WL 846044, at *4; *Mitchell*, 327 F.R.D. at 561–62. The additional claims for prejudgment interest are likewise identical for both the putative class and class representative. Through these claims, Plaintiff seeks monetary relief for itself and all putative class members. Accordingly, "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

4. Adequacy

Adequacy under Rule 23(a)(4) is satisfied where a proposed class representative does not have conflicts with other members of the class and has retained qualified counsel. *Young*, 693 F.3d at 543. Here, Plaintiff's interests are perfectly aligned with the proposed class, as it seeks to maximize everyone's recovery of compensatory damages and prejudgment interest. Plaintiff also retained counsel experienced in class actions and insurance law. McWherter Decl. at ¶¶ 2-11.

B. The Settlement Meets The Requirements Of Rule 23(b).

To qualify for certification under Rule 23(b)(3), a settlement class must meet two requirements beyond the Rule 23(a) prerequisites: (1) common questions must predominate over any questions affecting only individual members, and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. *Amchem*, 521 U.S. at 615. Again, however, in a settlement class situation, the Court does not inquire whether the "case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id.* at 620.

1. Predominance

The determinative legal issue, whether labor and other nonmaterial costs may be depreciated under Defendants' policies, remains the predominating issue for purposes of this Court's preliminary certification analysis. *Hicks*, 965 F.3d at 457–59 (affirming certification of labor depreciation class action after earlier Sixth Circuit panel resolved predominating common liability question in plaintiffs' favor). On this issue, a survey of the twelve states—Arizona, California, Illinois, Kentucky, Missouri, Ohio, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin—demonstrates the laws in these jurisdictions are similar if not identical. Indeed, the laws of these states are "in harmony on the issue at the crux of this case—that is, the interpretation of ambiguous property insurance language regarding '[ACV]' and whether labor costs may be withheld as depreciation in the calculation thereof." Order at 1-2, *Cedarview Mart, LLC v. State Auto Prop. & Cas. Co.*, No. 3:20-cv-00107 (N.D. Miss. Mar. 30, 2021) (*Cedarview* Dkt. 40) (concluding the laws of Mississippi, Kentucky, Ohio, and Tennessee "are in harmony" on the issue of labor depreciation); *see also Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 76 (E.D.N.Y. 2004) (certifying class action involving ACV interpretation and application of substantive laws of 46 states where "principles of contract law do not drastically differ from state to state and … the variances in the state laws can be categorized and easily managed").

Conceded or otherwise resolved legal issues still satisfy Rule 23(b)(3)'s predominance inquiry such that a class action remains the superior means of adjudicating the case. *Hicks*, 965 F.3d at 457–58 (rejecting insurer's argument that commonality cannot be satisfied where the common liability question concerning labor depreciation was already answered in plaintiffs' favor); NEWBERG § 4:51 ("[T]he fact that an issue is conceded or otherwise resolved does not mean that it ceases to be an 'issue' for the purposes of predominance analysis."). Simply put,

"resolved issues bear on the key question that the analysis seeks to answer: whether the class is a legally coherent unit of representation by which absent class members may fairly be bound." *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006).

Accordingly, courts repeatedly find that common issues predominate in cases challenging insurers' withholding of labor and other nonmaterial costs as depreciation under the terms of standard-form insurance policies. *Hicks*, 2019 WL 846044, at *5–6 ("Courts in jurisdictions where labor depreciation has been found to be unlawful have uniformly found that common issues predominate in cases challenging insurers' depreciation of labor costs."); *Arnold*, 2020 WL 6879271, at *8 (same).

2. Superiority

Rule 23(b)(3) also requires that a class action be superior to other available methods of fairly adjudicating the controversy. The superiority of class certification over other available methods is measured by consideration of certain factors, including: the class members' interests in controlling the prosecution of individual actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability of concentrating the litigation of various claims in the particular forum; and the likely difficulties in managing a class action. *Hosp. Auth. Of Metro. Gov't of Nashville & Davidson Cnty. v. Momenta Pharm., Inc.*, 333 F.R.D. 390, 414 (M.D. Tenn. 2019).

The "'most compelling rationale for finding superiority in a class action' is the existence of a 'negative value suit.' A negative value suit is one in which the costs of enforcement in an individual action would exceed the expected individual recovery." *Pfaff v. Whole Foods Mkt. Grp. Inc.*, 2010 WL 3834240, at *7 (N.D. Ohio Sept. 29, 2010) (citation omitted).

All three superiority factors favor preliminary certification as this Court does not consider manageability. First, this case presents classic small, negative value claims, and class members have no interest in individually litigating this issue. As such, "the negative value nature of the claims in this case establishes superiority of the class action." *Mitchell*, 327 F.R.D. at 564; *Hicks*, 2019 WL 846044, at *6 (finding superiority where spreadsheet data of supplemental labor depreciation payments made by State Farm as part of its Kentucky labor depreciation refund program demonstrated majority of policyholders were paid less than $1,000, with a significant portion paid less than the filing fee for commencing an action in state court). Further, the parties have uncovered no evidence that any class member has brought a separate claim against the Defendants for withheld labor depreciation at issue. Finally, it would be desirable to concentrate these claims in this Court, as it will streamline the resolution of the claims pursuant to the settlement and conserve judicial and litigation resources.

Accordingly, all the requirements of Rule 23 are satisfied. The next step is for the Court to analyze whether the proposed settlement warrants preliminary approval.

V. THE SETTLEMENT MERITS PRELIMINARY APPROVAL.

The Settlement is fair, reasonable, and adequate, resulting from extensive, arm's length negotiations by experienced counsel.

A. The Court Should Grant Preliminary Approval Because The Proposed Settlement Satisfies The Requirements Of Rule 23 And Sixth Circuit Precedent.

Rule 23(e) was recently amended to codify the factors that affect whether a court should approve a class action settlement, including for a class that has not yet been certified. In the context of preliminary approval, the amendments direct putative class counsel to provide the court with information sufficient to enable the court to determine that the settlement is fair, reasonable, and adequate; that certification for purposes of settlement is warranted; and that notice is justified

because the court will likely grant final approval of the settlement. These amendments largely mirror current practice under applicable law. As discussed below, courts in the Sixth Circuit have applied similar principles as part of the analysis of preliminary approval motions for many years. All such factors weigh in favor of preliminary approval here.

According to the amendments to Rule 23, before notice can issue, the putative class representative must demonstrate "that the Court will likely be able to" approve the settlement under Rule 23(e)(2); and "certify the class for purposes of judgment" arising from the settlement. Fed. R. Civ. P. 23(e)(1)(B). Under Rule 23(e)(2), a Court may only approve a settlement based on a finding that the proposed settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e). These factors overlap with the factors that courts in the Sixth Circuit have considered on preliminary and final approval, which include:

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

In re Packaged Ice Antitrust Litig., 2011 U.S. Dist. LEXIS 17255, at *46–47 (E.D. Mich. Feb. 22, 2011) ("*Packaged Ice*") (quotation marks and citations omitted). "The Court may choose to

consider only those factors that are relevant to the settlement at hand and may weigh particular factors according to the demands of the case." *Id*. at *44.

At the preliminary approval stage, the Court is not required to determine whether it will ultimately approve the settlement, but only whether "the proposed settlement will likely earn final approval." *See* Adv. Comm. Note at 27. As detailed below, consideration of the Rule 23(e) and Sixth Circuit factors support preliminary approval here.

B. The Sixth Circuit Factors: The Settlement Achieves An Excellent Result For The Proposed Settlement Class, Particularly Given The Expense, Duration, And Uncertainty Of Continued Litigation.

1. Likelihood Of Success On The Merits

This factor analyzes whether there were risks that the class would not be certified or if certified, potentially decertified. It also analyzes whether the class, if certified, would be able to establish liability or damages, and whether the defendant has vigorously defended the lawsuit and whether there were risks. *Blasi v. United Debt Servs., LLC*, 2019 WL 6050963, at *7 (S.D. Ohio Nov. 15, 2019). The Court then weighs these risks against the amount and form of relief in the settlement. *Packaged Ice*, 2011 U.S. Dist. LEXIS 17255, at *46–47. Importantly, "[i]n evaluating this factor, the Court's 'task is not to decide whether one side is right or even whether one side has the better of [the] arguments…. The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement.' That is the case here." *Gokare v. Fed. Express Corp.*, 2013 WL 12094870, at *3 (W.D. Tenn. Nov. 22, 2013) (internal citation omitted).

On July 10, 2020, the Sixth Circuit affirmed the grant of class certification in a similar labor depreciation class action in the Eastern District of Kentucky. *See generally Hicks*, 965 F.3d at 467. While labor depreciation litigation classes have been initially certified for contractual

claims (as referenced above in Section IV), no labor depreciation class action has ever gone to trial or faced the issue of decertification.

Assuming *arguendo* that class certification could have been obtained and sustained over any Rule 23(f) appeals or decertification motions, the next hurdle would be to establish class-wide liability and class-wide damages. Labor depreciation class actions pending throughout the United States have resulted in mixed results concerning liability, with the majority resulting in no recovery. *See Hicks v. State Farm Fire & Cas. Co.*, 751 F. App'x 703, 710 (6th Cir. 2018) (noting "substantial weight of authority" is against successfully establishing liability in labor depreciation class actions).

Nevertheless, after the Tennessee Supreme Court decision in *Lammert*, the Sixth Circuit decisions in *Hicks* (Kentucky) and *Perry* (Ohio), and the Fifth Circuit's decision in *Mitchell*, Plaintiff's counsel had a high level of confidence in establishing contractual liability for the claims. That said, liability was still speculative in other states within the proposed settlement class because at the time of execution of the memorandum of understanding in October 2023, the issue of whether labor depreciation is lawful had not yet been finally resolved by appellate courts applicable to those states. It was because of this risk that Plaintiff negotiated class relief for Virginia and Wisconsin putative class members at 80% net recovery (as opposed to 100% net recovery for putative class members in Arizona, California, Illinois, Kentucky, Missouri, Ohio, Tennessee, Texas, Vermont, and Washington).

"The certainty of recovery and prospective relief makes the Settlement Agreement a better course of action for the Settlement Class than proceeding with the uncertainty of whether the Settlement Class would overcome the potential difficulties in its case." *Gokare*, 2013 WL 12094870, at *5. "Given the time value of money, a future recovery, even one greater than the

proposed Settlement, may be less valuable to the Class than receiving the benefits of the proposed Settlement now. To delay this matter further would not substantially benefit the Class." *Id.* at *6. Moreover, the Class Members stand to receive 100% (or 80% for Virginia and Wisconsin Class Members) of their still-withheld Nonmaterial Depreciation, plus 5% interest for the period of withholding. The Class Members for whom their withheld Nonmaterial Depreciation was already recovered will receive a one-time payment to compensate for the lost time value of that money for the period of withholding. These terms are very favorable.

2. Complexity, Expense, And Likely Duration Of The Litigation

"Most class actions are inherently complex." *Moore v. Aeroteck, Inc.*, 2017 WL 2838148, at *8 (S.D. Ohio June 30, 2017). Labor depreciation class actions are particularly complex and slow moving due to the increased likelihood of interlocutory appeals via state supreme court "question certification" laws, 28 U.S.C. § 1292(b) and/or Rule 23(f). For example, the labor depreciation lawsuit *Stuart, supra* Section IV, was filed on January 2, 2014 and remained pending in the Western District of Arkansas for over six years (and after an Eighth Circuit appellate decision). Similarly, the *Hicks* litigation, *supra* Section IV, was filed on February 28, 2014 and remained pending in the Eastern District of Kentucky for over eight years.

The instant lawsuit could have continued for several additional years in trial and appellate courts absent settlement. Experts in the areas of claims handling and data manipulation would have been retained. Both sides retained sophisticated counsel with nationwide class action practices. Given the foregoing, the complexity, expense, and likely duration of the litigation supports preliminary approval of the proposed settlement here. *Gokare*, 2013 WL 12094870, at *4 ("'[T]he difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses,

and a possible delay in recovery due to the appellate process' and to the proceedings yet to occur in this Court 'provide justifications for this Court's approval of the proposed settlement.'").

3. The Opinions Of Class Counsel And Class Representative

Plaintiff's counsel, who are putative or certified class counsel in most of the pending labor depreciation class actions throughout the United States and have decades of experience in insurance, class actions, and complex litigation, strongly recommend the Settlement. Courts give weight to the recommendation of experienced counsel for the parties in evaluating the adequacy of a settlement. *Does 1-2 v. Déjà Vu Servs., Inc*., 925 F.3d 886, 899 (6th Cir. 2019); *Blasi*, 2019 WL 6050963, at *7; *Gokare*, 2013 WL 12094870, at *6. Plaintiff, knowing that the proposed Settlement will result in recovery of 80%-100% of the still-withheld labor depreciation plus interest, is similarly pleased with the proposed Settlement.

4. The Amount Of Discovery

The parties engaged in informal discovery. Prior to settlement, Plaintiff obtained extensive and detailed data that included thousands of line items of claim and payment information for the states in question, plus complex damages modeling concerning the aggregate values to be made available to putative class members. Plaintiff's counsel was well-positioned to intelligently assess the merits of the lawsuit.

5. The Reaction Of Class Members

The reaction of absent class members cannot be determined prior to the dissemination of notice.

6. The Risk Of Fraud Or Collusion

"Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered. Here, there is no such

evidence." *Gokare*, 2013 WL 12094870, at *3 (internal quotation marks and citations omitted); *Johnson v. W2007 Grace Acquisition I, Inc.*, 2015 WL 12001269, at *5 (W.D. Tenn. Dec. 4, 2015). The class settlement negotiations were structured to follow the highest ethical standards. *See* McWherter Decl. at ¶¶ 20-26.

7. The Public Interest

"There is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *Dick v. Sprint Commc'ns Co., LLC*, 297 F.R.D. 283, 297 (W.D. Ky. 2014); *Griffin v. Flagstar Bancorp, Inc.*, 2013 WL 6511860, at *5 (E.D. Mich. Dec. 12, 2013). "In the instant case, the proposed settlement end[s] potentially long and protracted litigation among these parties and frees the Court's valuable judicial resources." *In re Se. Milk Antitrust Litig.*, 2012 WL 2236692, at *4 (E.D. Tenn. June 15, 2012). This weighs in favor of approving the proposed settlement because the public interest is served by resolution of this case. *Id.*

C. Plaintiff's Forthcoming Motion Requesting Attorneys' Fees, Costs, And Service Award Fall Within The Range Of Reasonableness Sufficient To Allow Preliminary Approval And Notice To The Class.

The Settlement provides that Plaintiff's counsel will seek, and Defendants have agreed to pay if Court approved, an amount no greater than $1,200,000 for attorneys' fees, litigation expenses, and costs. Plaintiff will also seek a service award in the amount of $7,500. If approved, the requested attorneys' fees, litigation expenses, costs, and service award will not reduce the Class Members' recoveries.

Under the Settlement, and pursuant to Rule 23(e) and (h), the Class Members will receive notice that attorneys' fees, litigation expenses, costs, and a service award will be sought, and will be provided information about how they can object, assuming the Court preliminarily approves

the Settlement. Plaintiff's counsel will then file a motion pursuant to both the Settlement and Rules 23(h)(1) and 54(d)(2). In turn, this Court will award the fees, costs, expenses, and service award, if any, that it determines appropriate assuming the Settlement is finally approved.

Given Plaintiff's Counsel's considerable efforts and success in achieving this recovery for Class Members, there is no reason to doubt the reasonableness of an anticipated request for attorneys' fees and expenses, or the fairness of the Settlement. Although fees are analyzed at the final approval stage, proposed class counsel seek amounts made available on a claims made basis pursuant to the percentage-of-the-fund methodology described in *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 516 (6th Cir. 1993). In the Sixth Circuit, using the percentage-of-the-fund method is the "trend" for awarding fees in a common benefit class action. *New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 243 (E.D. Mich. 2016).

As will be explained when Plaintiff's counsel formally move for fees, in the Sixth Circuit, "[f]ee awards in common fund cases generally are calculated as a percentage of the fund created, with the percentages awarded typically ranging from 20 to 50 percent of the common fund created." *Moore*, 2017 WL 28338148, at *6. Plaintiff's counsel will demonstrate that the fees and litigation expenses they seek fall well within the typical percentage range of the total amounts to be made available and paid by Defendants. *Id.*; *Johnson v. Midwest Logistics Sys.*, 2013 WL 2295880, at *6 (S.D. Ohio May 24, 2013) (finding one-third fee award "consistent with the general fee awards in class action cases"). At this stage of the proceedings, there is no basis to preclude preliminary certification on a fee request to be made in the future.

Further, because the attorneys' fees will not reduce any Class Member's recovery and the attorneys' fees are to be paid "*over and above* the settlement costs and benefits with no reduction of class benefits," then agreements between plaintiff's and defense counsel as to the amount to

fees "are *encouraged*, particularly where the attorneys' fees are negotiated separately and only after all the terms have been agreed to between the parties." *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, *28–30 (M.D. Tenn. Aug. 11, 1999) (emphasis added); *Bailey v. AK Steel Corp.*, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008) ("[C]ourts are especially amenable to awarding negotiated attorneys fees and expenses in a reasonable amount where that amount is in *addition to and separate from* the defendant's settlement with the class." (emphasis added)).

District courts have therefore held that these "over and above" fee requests are entitled to a "presumption of reasonableness." *Id.*; *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322–33 (W.D. Tex. 2007). The reasoning of these courts is twofold. First, any hypothetical judicial reduction of an "over and above" fee request upon final approval would only benefit the insurance companies that breached their contracts—not any class members. *E.g.*, *DeHoyos*, 240 F.R.D. at 322 ("Were the Court to reduce the award of class counsel's fees, this would not confer a greater benefit upon the class, but rather would only benefit Allstate."); *accord Lane v. Page*, 862 F. Supp. 2d 1182, 1258 (D.N.M. 2012) ("Even if the Court were to reject the attorney's fees arrangement, the funds would not go to the class and would not increase the class fund in any way."); *Mirakay v. Dakota Growers Pasta Co.*, 2014 WL 5358987, at *11 (D.N.J. Oct. 20, 2014) ("[W]here the money paid to attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no potential conflict of interest between attorneys and class members.").

Finally, in the Sixth Circuit, service awards are typically provided to class representatives for their involvement with a lawsuit and are "efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *E.g.*, *Hogan v. Cleveland Ave. Rest., Inc.*, 2019 WL 6715976, at *6 (S.D. Ohio Dec. 10, 2019)

(approving service awards up to $15,000); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 2016 WL 5122565, at *7 (S.D. Ohio Sept. 21, 2016) (approving service awards up to $25,000). The $7,500 service award sought here is consistent with those approved in other labor depreciation class actions. *See Helping Hands* Order at ¶ 14 (approving $10,000 service award); *Holmes* Order at ¶ 15 (approving $7,500 service awards to each class representative in multistate labor depreciation class action); *Wade* Order at ¶ 22 (approving $15,000 service award); *Halford* Order at ¶ 23 (approving $7,500 service award); *see also Stuart* Order at 14, ¶ 13 (awarding $9,500 service award).

The proposed representative here obtained a settlement for the class valued at several millions of dollars, exclusive of interest payments, attorneys' fees, and costs. Its willingness to serve as a class representative was critical to the litigation. Since this Court will fully analyze the appropriateness and amounts of a service award at the final approval hearing, the proposed service award in the Settlement does not provide grounds for delaying the grant of preliminary approval. The award will have no impact on putative class member recoveries.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court preliminarily approve the Settlement. In order to comply with the notice requirements under CAFA, as well as to allow sufficient time after notice for Class Members to decide whether to opt out of the Settlement Class or to object to the Settlement, Plaintiff further requests that the Court schedule a final fairness hearing no sooner than 105 days from the date of preliminary approval.

Dated: December 5, 2023

Respectfully submitted,

By: *s/ J. Brandon McWherter*
J. Brandon McWherter - #21600
McWherter Scott Bobbitt PLC
341 Cool Springs Blvd., Suite 230
Franklin, TN 37067
Tel: 615-354-1144
Fax: 731-664-1540
brandon@msb.law

T Joseph Snodgrass, *pro hac vice*
Snodgrass Law LLC
100 South Fifth Street, Suite 800
Minneapolis, MN 55402
612-448-2600
jsnodgrass@snodgrass-law.com

Erik D. Peterson (*pro hac vice*)
Erik Peterson Law Offices, PSC
110 West Vine Street, Suite 300
Lexington, KY 40507
800-614-1957
erik@eplo.law

Attorneys for Plaintiff and Putative Class Representative

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of this Memorandum has been mailed electronically via the Court's electronic filing system on this the 5th day of December 2023 to all counsel of record:

Mark A. Johnson (*pro hac vice*)
Mathew G. Drocton (*pro hac vice*)
Baker Hostetler LLP
200 Civic Center Drive, Suite 1200
Columbus, Ohio 43215-4138
mjohnson@bakerlaw.com
mdrocton@bakerlaw.com

George T. Lewis
Ryan A. Strain
Baker Donelson
165 Madison Avenue
Memphis, TN 38103
blewis@bakerdonelson.com
rstrain@bakerdonelson.com

s/ J. Brandon McWherter