The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANYSA NGETHPHARAT and JAMES KELLEY; Plaintiffs, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; Defendant.	NO. 2:20-cv-00454 MJP PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. MOTION/RELIEF REQUESTED

ANYSA NGETHPHARAT and JAMES KELLEY ("Plaintiffs") move pursuant to FRCP 23(a) and (b)(3) for class certification against their insurer STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ("State Farm") for the proposed class[1]:

> All STATE FARM [Mutual] insureds with Washington first party personal line policies issued in Washington State, who received compensation for the total loss of their own vehicles under their First Party (Comprehensive, Collision, and UMPD) coverages, and who received a total loss valuation from Audatex based upon the value of comparable vehicles which took a deduction/adjustment for "typical negotiation."

Excluded from the Class would be (a) the assigned Judge, the Judge's staff and family, and State

[1] The wording in exclusion (c) has been changed slightly and non-substantively for clarity from that listed in Dkt#5.

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Farm employees; (b) claims for accidents with dates of loss occurring before March 25, 2014; (c) claims where the total loss was on a "non-owned" (borrowed or rented) vehicles; and (d) claims where the insured submitted written evidence supporting a different valuation, and the amount of that different valuation submitted by the insured was paid by State Farm to settle the total loss. Plaintiffs seek to be appointed as Class Representatives with the undersigned counsel appointed as Class Counsel.

II. EVIDENCE RELIED UPON

1. Declaration of STEPHEN M. HANSEN with attachments (*Dkt#72*)

III. INTRODUCTION/SUMMARY

This case challenges State Farm's *uniform* claims practice of underpaying its insured's total loss claims using computer generated reports ("Autosource Reports") which it licenses from a vender, Audatex/Solara, which on reports using comparable vehicles ("multi-comp" reports, see e.g. Dkt#72-6) take a *hidden in the fine print,* (and un-disclosed by State Farm), "typical negotiation adjustment" ("TNA") from the verifiable and available listed price for each comparable vehicles, unless the vehicle is listed for sale by CarMax or a "no-haggle" dealer. Autosource reports were used on 99+% of total loss claims, and as State Farm admits, its total loss claims handling system, and the reports themselves, has been materially identical in the class period. *See* Torelli Decl. at ¶12-13 (*Dkt#72-1*) (outlining practice and testimony).

Plaintiffs allege (*Dkt#5*) that WAC 284-30-391 does not authorize a deduction for "typical negotiations," that the deduction fails to meet the specific requirements of Section 391 as to what data can be used in calculating the deduction, and that State Farm's use of the reports which contain the deduction violate its obligations under WAC 284-30-380(7) to insure that the deduction being taken accurately reflects the claimed ask-to-sold adjustment which each insured

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would actually be able to obtain in the real world. Plaintiffs further allege that the additional "two dealer quote" reports (e.g. *Dkt#72-3*), which are provided as "the next step" in escalating the claim, also violate and fail to comply with WAC 284-30-391. State Farm was required to pay a §391 compliant valuation, which would have been the multi-comp valuation State Farm obtained from Autosource, *with the TNA, and the applicable sales taxes, added back in*. Having not paid this WAC-compliant valuation (or put another way, having underpaid the claim due to the advent of the TNA deduction) damages are the difference between what State Farm actually paid for the total loss and the value shown by the multi-comp valuation + TNA + tax (and if awarded pre-judgement interest and/or treble damages on that difference). This can be calculated for both the members of the proposed Class and individual class members using available data. *See* Torelli Decl. at ¶12, 15-25.

Typically, Plaintiffs would discuss the evidence they would hope to gather on the merits, and how the claims could be tried with that evidence. This case is far easier; absent the issue presented by one-way intervention, *see Schwarzschild v. Tse,* 69 F.3d 293, 295-6 (9th Cir. 1995), given the evidence that has already been gathered and the clear requirements in §391 Plaintiffs already would have moved for summary judgment on their claims. The common evidence – specifically the testimony of Audatex's FRCP 30(b)(6) designee Neal Lowell (*Dkt#72-13*) - shows that not only is the TNA deduction not based upon data that complies with §391, but that even Audatex has realized the invalidity and unverifiable nature of the Washington data upon which the deduction as in large part based, and as a result is no longer using data from this State to calculate the purported TNA deduction. See Torelli Decl. at ¶21 & n.28-29, 15-25; Harber Decl, at ¶18, 25-35 (*Dkt#72-2*). The evidence further shows the common lack of disclosure by State Farm and that State Farm as its FRCP 30(b)(6) designee admitted, had absolutely no

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support for the unsupportable deduction when it has been taken. Torelli Decl. at ¶12(f) & n.12, 26; Harber Decl at ¶ 22-24; Graff Depo. at 20:1-22:4, 131:23-132:17 (*Dkt#72-11*). Moreover, even State Farm does not dispute that there is no way for an insured to verify the claimed deduction, a key requirement of §391. *Id*. at 55:25-56:20; 57:17 to 58:14. Audatex's 30(b)(6) Mr. Lowell agreed, noting that the only way for an insured to try to verify the deduction would be that an insured "could do their own study of humanistic behaviors between asking price and selling price of vehicles." Lowell Depo. at 96:17-20 (*Dkt#72-13*).

Added to these undisputable facts – *all of which can be presented with evidence which applies equally to every member of the proposed Class* - this Court has already considered the issues presented by §391 in denying State Farm's motion to dismiss [Dkt.#49], ruling as follows:

1. WAC 284-30-391 does not permit adjustments for a "typical negotiation discount": rejecting State Farm's argument that a negotiation deduction can be applied to reflect the "realities of haggling", this Court held that this argument would require "the Court to ignore the specific, detailed methodologies in Section 391(2) that must be followed to determine a comparable car's "actual cash value." See WAC 284-30-391(2)(b)." Dkt.#49 at 10. Moreover, in so holding, the Court found that in order to "give full effect to the language of Section 391(2), . . . the "actual cash value" determination must comply with the methodologies set forth in Section 391(2). This determines the "fair market value" of a comparable vehicle, which is consistent with the general definition of "actual cash value" in Section 320." *Id*. The Court concluded in observing that "nowhere does this subsection [WAC 391(2)(b)(ii)] state that negotiation deductions on top of the advertised prices are permissible." *Id*. at 11.

2. WAC 284-30-391(4)(b) does not permit a negotiation discount. Rejecting State Farm's argument that WAC 284-30-391(4)(b) provides a *non-exclusive* list of deductions for

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options, mileage or condition when determining comparability" and does not exclude additional deductions, beginning at p. 12, this Court observed:

> State Farm's reading of Section 391(4)(b) would essentially allow insurers to come up with any deductions they see fit—so long as they were "itemized and verifiable." This would contravene the intent of the regulations and their authorizing statute requiring insurers to act in "good faith, abstain from deception, and practice honesty and equity in all insurance matters." RCW § 48.01.030. Reading Section 391(4)(b)'s deductions as exclusive gives full effect to the insurance statute and regulations. See *Silverstreak*, 159 Wn.2d at 884. The Court thus rejects State Farm's argument. See *Zuern v. IDS Property Cas. Ins. Co.*, C19-6235MLP, 2020 WL 2114502, at *5 (May 4, 2020) ("A plain reading of the regulation suggests that the list is exhaustive to the extent it provides the basis for deducting or adding to the value of a comparable vehicle.")

Reading WAC 284-30-391(2) and §391(4)(b), together, this Court concluded that to determine actual cash value, "the insurer must use a comparable motor vehicle's actual cash value reduced only by the deductions listed in Section 391(4)(b)." *Id*. at 12.

3. *Plaintiffs have viable breach of contract and Consumer Protection Act causes of action.* This Court, in first observing at p. 9 that the failure by an insurer to follow WAC requirements in settling an insurance claim "is a per se breach of contract" (citing *Van Noy v. State Farm Mut. Auto. Ins. Co*., 98 Wn. App. 487, 495-96 (1999) *aff'd*, 142 Wn.2d 784 (2001)), concluded at p. 14 that Plaintiffs' FAC has sufficiently alleged a cause of action for breach of contract upon the allegations that the typical negotiation discount is neither "itemized" or "verifiable" as required by Section 391(4)(b), and (at p. 16) that Plaintiffs have adequately plead a cause of action for violation of the Washington Consumer Protection Act.

Within the context of these rulings, given the evidence that can be presented either under Rule 56 or at trial, this matter can be resolved on a class-wide basis and doing so will be superior to potentially thousands of individual claims (or more realistically, that insureds would be left

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with no effective remedy) while providing common, easy to calculate and distributable relief to those tens of thousands of class members who may be unaware of their entitlement to a remedy.

IV. STATEMENT OF FACTS

A. ***State Farm's Common Claims Practice***.

State Farm has, from 2014 (when the proposed Class period starts) to today, exclusively settled first party (Collision, Comprehensive, and UMPD) total loss claims with its insureds using Autosource Reports purchased from its third-party vender, Audatex (i.e. State Farm did not use Mitchell which takes a similar "ask-to-sold" deduction, CCC which does not take such a deduction, or any other valuation method, see Harber Decl. at ¶ 9, 16, 19-22). All claims at issue in the proposed Class, exactly like Plaintiffs here, involved a valuation being presented based upon an Autosource Report which took a TNA deduction. With respect to the use of the Autosource Reports, taking a TNA deduction, Mr. Graff confirmed that "we've been pretty much following the same process Washington. There's been no substantive or significant change that I can recall that's relevant to this matter." Graff Depo. at 147:6-9.

State Farm's common claims practice for total losses can be summarized as follows:

(1) The damaged vehicle is first inspected by State Farm or its designated repair shop, that information is then sent to Audatex, which generates an Autosource valuation report, which is then transmitted back to State Farm, where it auto populates a field called the "Total Loss Settlement Tool" (TLST) in State Farm's system; see e.g. *Dkt#72-4*.[2] These Autosource valuations are final, unless the vehicle's options or mileage are determined to be wrong when the

[2] Graff Depo. at 33:25 to 34:20; 36:22 to 39:6; 185:17 to 187:9; Gray Depo at 27:7-13; 32:14-33:4 (*Dkt#72-14*)

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value is presented to the insured, in which case the corrected information results in a new valuation being generated.[3]

(2) The Autosource valuations themselves are retained in the claims file, and as part of the TLST.[4] Any updated versions of the Autosource valuation (e.g. a "version 2") as a result of mileage or options being updated after confirming with the insured, are populated into the TLST, and are also retained in the file and can be accessed electronically and or printed.[5]

(3) Outside of extremely unusual situations (a very rare specialized or collectable vehicle), an Autosource valuations is used, as Mr. Graff testified, they are used to value 99+% of first party total loss claims.[6] Further, absent the very unusual situation where comparable vehicles are not found (and a "two dealer quote" report is initially obtained), the Autosource report will be a "multi-comp" report, with a TNA deduction being taken.[7]

(4) The TNA amount is calculable from the actual Autosource reports themselves[8] and can be calculated using State Farm's data on the paid ACV and the applicable TNA % for that

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[3] Graff Depo. at 41:18 to 43:8.
[4] Graff Depo. at 186:15 to 187:9.
[5] Graff Depo. at 187:14 to 190:19
[6] Graff Depo. at 31:25 to 32:23; 29:7 to 29:20; 29:21 to 30:4. Mr. Graff as an example of this very rare occurrence provided a "one in a million example" of a claim involving a "unique vehicle" a 1935 Buick, which presented a situation where *non-Autosource* information and valuations would be accepted by State Farm to value the loss and determine what State Farm would pay. *Id.* at 233:8 to 234:11.
[7] Graff Depo. at 44:23 to 46:3.
[8] The math is quite simple, but likely not readily apparent to someone receiving a copy of the report. One must pull the fine print "advertised" prices listed for each vehicle (starting on parge 5 of the report, see *Dkt#72-6*) and from it subtract the bolded "adjusted" price that Autosource then lists as the vehicle's price. The difference in the TNA discount amount on that comparable. Since the comparables are then averaged together to reach the "base" price of the vehicle, the average of the TNA amounts on the individual comps will be the net amount taken as a deduction on the final vehicle. Mr. Graff agrees this is the appropriate way to determine the net TNA deduction taken on the claim. See Graff Depo. at 78:22 to 79:8.

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price band.[9] Further, Audatex itself has a data field showing how much of a deduction was taken for TNA on each claim, which is accessible to State Farm from Audatex.[10]

(5) Where the insured contests the Autosource valuation figure (which is presented on a phone call, without providing the underlying report)[11], State Farm's practice is to confirm the mileage and options are correct, and if the insured still contests the valuation, to "escalate" the claim by having Autosource run a "two dealer quote" report, with that valuation then being presented to the insured by a Claims Specialist to whom the claim has been escalated.[12] If the two-dealer quote report is higher than the original multi-comp report (with a TNA deduction taken) then the TLST is updated, the higher amount is offered on the claim, and the claims file will be noted to show the two-dealer quote report and discussions with the insured.[13]

(6) State Farm will not agree to back out the TNA deduction when challenged by an insured, as Mr. Graff testified, using the dealer quote report is the "appropriate next step."[14]

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[9] There are rare situations where a multi-comp report will have either some or all of the comparable vehicles be either sold prices (marked with an "s" on the report) or from CarMax or another "no haggle" dealership. (See Lowell Depo. at 67:20 to 68:24). This can result in either no deduction for typical negotiation (when no comparable vehicle had an advertised price which was reduced by the TNA deduction) or a reduced deduction (when one or several of the vehicles took no TNA deduction). As an e.g. if an Autosource report has three comps at $10,000 advertised price, and two take a TNA of $1000, and the third is a CarMax Comp with no TNA deduction, the total TNA taken on the claim would be $666.66, not $1000 as it would be if the CarMax vehicle had the same price band deduction taken. As in prior matters, a sample of claims (Plaintiffs have requested a sample of 250 claims) can be used to determine the prevalence of either a reduced or absent TNA deduction, and the impact upon class wide damages (and class size), by reviewing the Autosource reports within the sample.

[10] Lowell Depo. at 27:23 to 35:2.

[11] *See* Gray Depo. at 33:5 to 34:4. State Farm does not disclose the deduction on this call, and the only way that an insured would be able to know it existed is if they expressly requested the valuation report and then noted the deduction in the report's fine print on page 5 forward. See Graff Depo. at 83:9 to 84:17; 161:25 to 163:10; Gray Depo. at 41:7-42:1. State Farm will expressly note any discussion of the TNA (if raised by the insured) in the claims file, as well as record if a copy of the Autosource report is sent to the insured, along with keeping in the file a copy of the transmittal letter or e-mail. Graff Depo. at 163:24 to 164:8.; Gray Depo. at 45:15-46:24; 47:14-50:2; 54:22-55:22. As Ms. Gray noted the outgoing vehicle evaluation reports (if sent) are coded by the system as such, making it easier to search for them. *Id*. at 52:9-53:1; 53:20-54:5. Or one can review the file history notes. *Id*. at 54:7-11.

[12] Gray Depo. at 65:6 to 65:19.

[13] Graff Depo. at 92:19 to 93:21; 95:17 to 96:8; 166:20 to 167:1; 193:21 to 194:14.

[14] Graff Depo. at 168:9 to 168:22; 169:8 to 169:20.

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Further, using anything other than an Autosource report valuation to resolve the claim requires express management approval and is then fully documented in the claims file.[15] And in the rare (if not non-existent) situation where such approval was given on a claim that would otherwise fall within the proposed Class (because a multi-comp valuation with a TNA deduction was first given to the insured) the TLST is updated showing that the claim was not settled using an Autosource valuation.[16]

(7) Nor in the usual case does State Farm even consider "comparables" or valuations presented by its insureds, and actively discourages paying claims at other than the Autosource valuations. It does not do so absent a "unique vehicle" (i.e., a "one-in-a-million example" such as a 1935 Buick).[17] Further, in such an unusual case where State Farm might consider information its insureds submit, it requires that the information be "objective, verifiable, and legitimate" and will then "do our own due diligence to kind of look and see and maybe call the dealer and make sure it's, you know, it's legitimate" and make that State Farm can "verify" the information presented before considering it.[18] State Farm's requirement that the valuation information must be able to be verified by State Farm, is of course reasonable, but it is also the direct opposite of the unverifiable "black box" (and undisclosed) TNA deduction that State Farm took on Class members claims, which as State Farm itself admits cannot be verified.

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[15] Graff Depo. at 171:3 to 172:20. As Mr. Graff stated it is the job of the State Farm representative to try to settle the claim at the Autosource number. Graff Depo. at 202:1 to 202:13.

[16] Graff Depo. at 235:7 to 235:14. The searchable codes for valuation type are "Autosource", "book", "appraisal", and "other", and as discussed below, can be used to identify those likely in the proposed class (with an "Autosource" valuation); those outside of the proposed class (those whose claims were resolved via appraisal), and those who may or may not be in the Class and where the claims file would need to be reviewed (those who may or may not have received an Autosource valuation taking a TNA deduction). See Graff Depo. at 245:3 to 247:4.

[17] Graff Depo. at 233:8 to 234:11; 231:12 to 232:13; 229:24 to 231:7.

[18] Graff Depo. at 226:13-228:8.

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(8) If the claim is not then paid based upon an Autosource value, State Farm suggests the use of the Appraisal process because as Mr. Graff testified "we have nothing else to offer but appraisal"[19]

(9) State Farm does not obtain releases or suggest to its insureds in any way that accepting the State Farm valuation prevents further claims under the policy.[20] State Farm records any determination on comparative fault in the file, which can be applied as to any Underinsured Motorist Property Damage claims where it is found to be a partial defense.[21] As such, there are no limitation defenses that present issues.

(10) Finally, State Farm's disclosure as to the TNA deduction, and its training for the exceedingly rare situation the TNA is raised by an insured, is common. There appears to be only a single unrevealing document available to State Farm adjusters (Dkt#72-7), and no training or available materials on how the typical negotiation deduction is calculated. As such, discussions with State Farm about the TNA would provide no information which would inform an insured regarding the deduction, let alone allow the insured to validate or verify the amounts of the deduction. Ms. Gray, a claims specialist trained to handle "escalated" claims, testified regarding the level of knowledge she could provide based upon her training:

> Q Okay. To the extent that an insured gets the report and raises the issue of typical negotiation with you and asked you how the typical negotiation is calculated, what information can you provide them on that?
>
> A So I don't know exactly how it's calculated in the Autosource system. As far as I'm concerned, that's proprietary information from Autosource. So usually just give them a very basic description that it's taking into account the typical negotiation that you would find when purchasing the vehicle at a dealership.

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[19] Graff Depo. at 172:21 to 175:6; 236:13 to 237:8; see also Gray Depo at 66:12 to 69:20.
[20] Graff Depo. at 177:16 to 178:1; 181:5 to 181:25; 183:1 to 183:16; Gray Depo. at 57:1 to 58:9.
[21] See Graff Depo. at 248:8 to 248:16.

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Q If they ask you what data that's based upon, what would you tell them?

A I would tell them I don't know what data it's based on.[22]

Given that State Farm's total loss adjusters, who handle claims bullpen style (called a "demand pool" by State Farm) randomly addressing files from a seven-state region, are not even trained or familiar with §391 (see e.g. Gray Depo at 22:19 to 24:14) there is little or no ability for even a sophisticated consumer to navigate a total claim with State Farm and receive a valuation that complies with §391 outside of pushing the claim through to an expensive and often negative value appraisal process. State Farm's claims handling fails to meet its duty of good faith and fair dealing towards its insureds.

B. Common Proof Exists as to All Members of the Proposed Class.

The FAC alleges, (*and this Court has confirmed*, (Dkt. #49 at p. 12)), that §391(4)(b) does not permit a negotiation discount. Discovery has confirmed that the deduction cannot be "verified" and is not based upon "available" vehicles (as is required by §391(4)(b) and relies upon data which falls outside the current date (within 90 days) and mileage (150 miles) requirements in how the TNA is determined (§391(2)(iv)(B), (4)(b)). *See* Torelli Decl. at ¶21 & n.28-29, 15-25; Harber Decl, at ¶18, 25-35.

This can be further shown through the deposition testimony of the Audatex representative, Mr. Neal Lowell, who confirmed that the use (prior to sometime this year) of data from the Washington Department of Licensing (and likely other DMV departments) to represent the purported sale prices in Washington of vehicles was unreasonable, resulting in materially overstating the actual difference between actual sale and asking prices, as only the cash portion of sales (i.e. the price minus any trade in value) was reported, and further because of the likelihood of underreporting of sale prices to avoid tax. (See Lowell Depo 36:17-39:13, 40:10-18, 42:5-43:25, 46:4-47:1). Mr. Lowell's admission confirms the above: "Washington was not

[22] Gray Depo 118:15-119:23 (objections omitted).

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one of those states that could be absolutely verified." (Lowell Depo. at 137:15-16). Yet, this is the data that was primarily used to determine the TNA deduction amounts.

The way in which the TNA deduction is calculated was further confirmed by Mr. Lowell to violate the §391 requirements that data and comparables which are used by insurers to value total losses be both in the local market (within 150 miles of the total loss) and current (from within 90 days of the date of loss) and be based upon available comparable vehicles. See §391(2)(b)(i). These requirements ensure that the valuations be based upon current conditions and the local market, (i.e., that the valuation reflects what the loss vehicle is worth at the time and location of loss, not its value at a much different time or a different market). The Autosource TNA deduction used by State Farm violates each of these requirements. Graff Depo. 113:15-23; 114:18 – 115:6; 116:12-22. Because a year's worth of historical prices is being used, with a data set that is updated twice a year, the TNA deduction from the price will always be based partially or completely upon purported sales that are more than 90 days old.

Violating the 150-mile and 90-day requirements of the WAC is not only a regulatory violation, but it also results in deductions that are inaccurate and inapplicable to total losses. The market for vehicles changes with the season, availability, model year change, model change, and demand, and is specific to vehicle make/model, body type, and of the vehicle year. These factors are not static nor uniform across markets; nor is the ability to negotiate, which will vary based upon a number of factors, as well as the type of deal (financed, trade-in, etc.), the time of the month, as well as a person's ability to negotiate. Harber Decl, at ¶34-35

The result of the above is that the total loss payments made to the Plaintiffs (and all others in the proposed Class) was reduced by the *average of* the unauthorized deductions taken for the purported "Typical Negotiation Discount" on each of the comparable vehicles, plus the

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sales tax on that amount. This is the exact, precise, and undisputable amount that State Farm failed to pay. Plaintiffs allege that this figure – easily calculable for every single member of the Class – is what was required to be paid under several sections of the WAC, and was not paid, constituting a breach of their insuring agreements and a violation of the Washington Consumer Protection Act, RCW 19.86 *et seq*.

C. ***Predominating Common Issues Arising from State Farm Mutual's Common Practice***.

While the amounts of recoverable damages are easily determined using State Farm's records, Audatex data, and/or statistical sampling, they are not the only predominating common issues before this Court on the merits. There are also legal and factual determinations; to-wit: is the TNA deduction allowed by the WAC; and if so, was the deduction method used by State Farm Mutual accurate under §391(4)(b) in that (a) it requires "verifiable dollar amounts for vehicles that…were available within ninety days of the date of loss" (emphasis added); and (b) actually represents the "Actual Cash Value" of the vehicle as of the time of loss under a §391 compliant valuation? Further, is State Farm's use of Autosource Reports which deduct a TNA amount unfair or deceptive? Is State Farm's routine practice of failing to disclose the advent of a deduction for "typical negotiation" its insureds unfair or deceptive? Do the contested practices have the capacity to deceive? Do violations of WAC 284-30-391 constitute *per se* violations of RCW 19.86 *et seq*.?

This common evidence shows that State Farm has violated its duty of good faith and fair dealing as well as WAC §391. These types of common evidence will allow a single proceeding to decide the common issues presented by State Farm's current and ongoing claims practice.

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V. THE FRCP 23 STANDARDS

A. Rule 23 Requirements

The Court must conduct a "rigorous analysis" to determine whether Plaintiffs' claims are suitable for class certification. *Roshandel v. Chertoff*, 554 F.Supp.2d 1194, 1203 (W.D. Wash. 2008). In doing so, "the court is not at liberty to consider whether the moving party has stated a cause of action or is likely to prevail on the merits." *Grays Harbor Adventist Christian Sch. v. Carrier Corp.*, 242 F.R.D. 568, 571 (W.D. Wash. 2007) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992)).[23] Given that the ruling can be revised at a later time, this Court is afforded "noticeably more deference" in certifying a class than in denying class certification. *Just Film, Inc. v. Buono*, 847 F. 3d 1108, 1115 (9th Cir. 2017) (quoting *Abdullah v. US Security Associates, Inc.*, 731 F. 3d 952, 956 (9th Cir. 2013). "This is because there are pro-class action policy arguments that we should not ignore. In particular, class actions are an important way of resolving so-called "negative value claims"; that is, claims that are legitimate, but cost too much to litigate individually." *Baker v. Microsoft Corp.*, 797 F.3d 607, 621 (9th Cir. 2015). This case meets all requirements of Rule 23(a) and 23(b)(3). Certification is therefore appropriate.

B. The Proposed Class Definition

Deposition testimony confirms that State Farm Mutual has the information necessary to identify Class Members from its computerized estimates and records of policyholders and generate a list of claims falling within the proposed Class. See Decl. of Dr. Torelli at ¶¶ 5, 13 –

[23] *See also Yapuna v. Global Horizons Manpower Inc.*, 254 F.R.D. 407, 414 (E.D. Wash. 2008) ("the narrow question" is whether a class action is a proper vehicle for litigating the claims brought by Plaintiffs on behalf of the absent class members.").

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24. From this, a class list can be created for notice. The proposed Class definition is "sufficiently definite" as the members of the Class can be identified by examining State Farm Mutual's records. *Sandoval v. Rizzuti Farms, Ltd.*, No. CV-07-3076-EFS, 2008 WL 4530525, at *3 (E.D.Wa. Oct. 6, 2008).[24]

C. The Requirements of Rule 23(a) Are Readily Met

Rule 23(a) sets forth four prerequisites for certification – numerosity, commonality, typicality and adequacy of representation. *Roshandel*, 554 F.Supp.2d at 1203. Each is satisfied.

1. Numerosity is Satisfied

Numerosity exists if the class is so numerous that joinder of all members is "impracticable," meaning difficult or inconvenient, it need not be impossible. Rule 23(a)(1); *Rodriguez v. Carlson*, 166 F.R.D. 465, 471 (E.D. Wash. 1996). Courts are entitled to rely on "common sense assumption[s]" and "reasonable estimate[s]" to support a finding of numerosity. *See In re Badger Mountain Irrigation Dist. Sec. Litig.*, 143 F.R.D. 693, 696 (W.D. Wash. 1992). "As a general rule, classes exceeding forty-one (41) individuals satisfy the numerosity requirement." *Sandoval*, 2008 WL 4530525, at *3. Here, while State Farm Mutual has yet to identify the number of insureds who fall within the Class definition, (such information being part of Plaintiffs' pending motion to compel [*Dkt. #53, 66*]), there can be no serious argument concerning numerosity where its claims practice has remained consistent over the course of now nearly seven year, and as Plaintiffs has plead over 34,000 claims are at issue. Dkt#5 at ¶2.1, n.6

[24] It is error to refuse to certify on ascertainably grounds. *Brisenco v. ConAgra Foods*, Inc., 855 F.3d 1121 (9th Cir 2017)("ascertainability" is not a proper ground to deny class certification, particularly where it only impacts a "tiny subset" of the class);*Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir 2015)(same).

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2. Commonality is Satisfied

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." *See* Rule 23(a)(2); *see also Pierce v. Novastar Mortg., Inc.*, No. C05-5835RJB, 2006 WL 2571984, at *6 (W.D. Wash. Sept. 5, 2006). But all questions of fact and law need not be common; "a single common issue is sufficient to meet he commonality requirement." *See Kirkpatrick v. Ironwood Commc'ns, Inc.*, No. C05-1428JLR, 2006 WL 2381797, at *3 (W.D. Wash. Aug. 16, 2006); *see also Roshandel*, 554 F.Supp.2d at 1203 (citations omitted); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir.1996).

The commonality test "is qualitative rather than quantitative…." *In re Am. Med. Sys.*, 75 F.3d at 1080 (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.10, at 3–50 (3d ed.1992)); *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 174 (E.D.Pa.1997) ("[A] common question need only *exist*, not predominate, for the [commonality] requirement to be satisfied.").

As confirmed through the testimony State Farm Mutual's CR30(b)(6) witnesses, State Farm Mutual's claims handling practice and procedure, in valuing total losses using Autosource Reports with the TNA that Plaintiffs challenge, followed by what is alleged to be an invalid "two-deal quotes" valuation on escalated claims, was uniformly implemented throughout the Class Period as it related to members of the proposed Class. This generates a set of common questions including, but not limited to: (a) whether the TNA deduction was allowed under §391; (b) even if allowed, whether the data and method used to calculate it complied with §391; (c) if the data used and resulting TNA amounts claimed are reliable, verifiable, and accurate; (d) whether State Farm had sufficient information to support the deduction under §380(7) when taken; (e) was the deduction adequately disclosed to insureds consistent with State Farm's duties

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under the WAC and the duty of good faith and fair dealing; (f) whether the "escalation" "two dealer quote" reports complied with §391, and if so their use cuts off the recovery of damages; (g) the measure and amounts of damages that are recoverable; and (h) whether pre-judgment interest and/or treble damages should be awarded.

These questions not only exist (and predominate) but they are also capable of common resolution (demonstrating manageability). Finally, at issue is whether State Farm's claims handling violated the Washington CPA. Each of these are predominating common questions which will drive the resolution of this litigation.

3. Typicality is Satisfied

Rule 23(a)(3) requires that a Plaintiff's claims be typical of the claims or defenses of the Class. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Further stated: "To satisfy typicality, Plaintiffs must show 'each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2009)). "Typicality focuses on the class representative's claim — but not the specific facts from which the claim arose … The requirement is permissive … [claims] need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F. 3d 1108, 1116 (9th Cir. 2017). As put in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F. 3d 1168, 1175 (9th Cir. 2010), "different factual circumstances" do not defeat typicality, provided they "possess the same interest and suffered the same injury as the class members." (quoting *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)).

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Here, Plaintiffs and all other members of the proposed class share the same insuring agreement. The same standards for adjustment of total losses (i.e., those mandated under §391) apply to each total loss claim, and Plaintiffs and all other members of the proposed class were subjected to the same course of conduct described above designed to pay less on total losses using the TNA hidden in the Autosource Reports. Review of their claims files shows that Plaintiffs claims were adjusted according to State Farm's common policy and practice. Harber Decl. ¶36. In fact, State Farm witnesses admitted that Ms. Ngethpharat's claim – which was escalated through the entire process – stating that "this claim followed at least our standard procedure." (Gray Depo. at 108:14-15; see also Graff Depo 166:20-167:1)

Further, the relief Plaintiffs seeks for themselves is the same as that which they seek for the Class. The only variation *among the class members* relates to the amount deducted for the "Typical Negotiation Adjustment" due to them, which is not sufficient to defeat class certification. *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 513 (9th Cir. 2013) ("In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device."); *Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161, 1168 (9th Cir 2014) ("So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed did not defeat class certification.").

Trial of Plaintiffs' claims will be the same as trial of those other members of the proposed Class, raising the same questions, with the same evidence, and the method used to calculate the amount of the Typical Negotiation Discount + tax at issue, as well as any pre-judgment interest or trebling under the Washington CPA. However, a class-wide trial can be done in a way that

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does not require a $200,000 trial on claims worth (in Plaintiffs' case) +/- $1,000.00.

4. *Adequacy is Satisfied*

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Adequacy involves a two-prong test: (1) the named plaintiff must appear to be able to prosecute vigorously the action through qualified counsel; and (2) there must be no conflicting interests between the class representative and the other members of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)); *Weinberger v. Jackson*, 102 F.R.D. 839, 845 (N.D. Cal. 1984). It is presumed that the interests of the representative plaintiffs do not conflict with those of the Class Members, and that counsel is adequate to represent those interests. H. Newberg & A. Conte, *Newberg on Class Actions*, §3.05 at 3-25 (3d ed. 1992). Here, there is no evidence of any conflict, nor is there any as Plaintiffs seek the same relief for themselves that is sought for all Class Members.

Plaintiffs' counsel have extensive experience in successfully prosecuting class actions, including insurance coverage and total loss cases and have successfully prosecuted and resolved three other total loss Class Actions challenging the TNA deduction, including *Stier v. PEMCO (Dkt#26-1)* which preceded through Class Certification. See Dkt#72-15 (CV's of proposed Class Counsel).

The adequacy requirement is satisfied because Plaintiff and Class Members have a common interest in establishing State Farm's liability and were similarly harmed by State Farm's underpayment of their total losses. Plaintiffs have retained experienced class action counsel and demonstrating their commitment to vigorously prosecute this case.

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D. Certification is Appropriate Pursuant to Rule 23(b)(3)

Under Rule 23(b)(3), the Court may certify a Class if it finds that: (1) common questions of law or fact predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See* Fed. R. Civ. P. 23(b)(3); *Grays Harbor*, 242 F.R.D. at 572-73. Here, Plaintiffs seek certification of a Washington-only FRCP 23(b)(3) damages Class.

1. Common Questions of Law and Fact Predominate

"The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). The existence of common questions is judged by whether "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Torres*, 835 F.3d at 1134 (quoting *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1045, 194 L.Ed.2d 124 (2016)). "There is no single qualitative or quantitative test for predominance; rather, the Court pursues a pragmatic inquiry as to whether common questions represent a significant aspect of the case." *Kelley v. Microsoft Corp.*, No. C07-0475MJP, 2009 WL 973368, at *4 (W.D. Wash. April 10, 2009) *rev'd on other grounds* 395 Fed.Appx. 431 (9th Cir. 2010) (citations and quotations omitted). As the *Torres* Court observed,

> Predominance is not, however, a matter of nose-counting. *Jimenez* [*v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014)]. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.

Torres, 835 F.3d at 1134.

"[I]ndividual damage questions do not preclude a Rule 23(b)(3) class action when the

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issue of liability is common to the class." *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915, at *9 (W.D. Wash. May 3, 2006) (citations and internal quotations omitted); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) ("In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device."); *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) ("The potential existence of individualized damage assessments ... does not detract from the action's suitability for class certification.").

Common issues as to the amount of underpaid loss, if any, due to the use of the "Typical Negotiation Discount," unquestionably predominate here. Here, with respect to liability, the overriding common question is whether State Farm Mutual owes Class members payments for the amount withheld due to the (what Plaintiffs now show with substantial admissions from State Farm and Audatex, is an undisclosed, unauthorized, unsupported, inapplicable, and therefore unfair) TNA deduction and as such underplayed those losses, losses it was obligated to pay under the standardized language of State Farm's form insurance policies and Washington Law. "Since this case involves the use of form contracts, it is particularly appropriate to use the class action procedure." *Mortimore v. F.D.I.C.*, 197 F.R.D. 432, 438 (W.D. Wash. 2000).

Although Plaintiffs' and Class Member's individual damages may vary, the *amount* of their individual *and* aggregate damages can be calculated using available, objective information contained in State Farm and/or Audatex's own electronic records and the Autosource reports themselves, or a sample of claims files, exactly can be done for Plaintiffs. See, e.g., Torelli Decl. ¶15-25.

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While Plaintiffs can easily calculate each Class member's damages individually, with Mr. Graff testifying that it would take "a few minutes per claim" to organize and print the required records (Torelli Decl, ¶16-18; Graff Depo. at 255:2-257:3), as Dr. Torelli shows, Plaintiffs can determine class size and class-wide damages both directly from Audatex and State Farm data, and via sampling. Torelli Decl. ¶17-25. Statistical proof of damages and liability is well accepted in Washington and Federal law. *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332 P.3d 461, 466 (2014) (""it is not unusual, and probably more likely in many types of cases, that aggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss"),[25] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016); (see also *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wn.2d 507, 519, 415 P.3d 224 (2018) ("it is not necessary to prove each plaintiff's damages on an *individual* basis; it is possible to assess damages on a class-wide basis using representative testimony") (italics in original). Certification is therefore appropriate.

2. Class Treatment is Superior and Manageable

Rule 23(b)(3) sets forth factors for determining whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." *See* Rule

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[25] As *Moores* noted, in a holding directly relevant to this case, Class Certification was appropriate as:

> Class members with small claims would be unlikely to pursue their claims, and of course, absent class members would automatically be deemed to have no damages. These results defeat the purpose of a class action, which is to provide relief for large groups of people with the same claim, particularly when each individual claim may be too small to pursue. *See Scott v. Cingular Wireless*, 160 Wash.2d 843, 851, 161 P.3d 1000 (2007) (class actions demonstrate "a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice"). Adopting [defendant's] method in this case would not only create an unreasonable burden on class members, it would hinder our state policy underlying class action lawsuits. The trial court was correct to reject it.

Id.

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23(b)(3); *Grays Harbor,* 242 F.R.D. at 573.[26] The focus is on "the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser,* 253 F.3d at 1190 (citations omitted) when also "involves a comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998).

Here, the superiority considerations weigh heavily in favor of class certification. Class Members would presumably have little interest and/or resources to pursue individual actions. Plaintiffs are not aware of pending individual actions by Class Members against State Farm Mutual for underpayment of total loss claims. In fact, most Class Members likely do not even *know* their claim was underpaid. Indeed, it would be neither economically feasible nor efficient for Class Members to pursue their claims on an individual basis. The monetary recovery for the majority of Class Members would be relatively small. This, coupled with the cost of litigation, makes vindication of Class Members' rights extremely difficult, if not impossible.

Allowing insureds to proceed as a Class affords them the only reasonable chance of recovery, let alone of addressing uniform underpayment of total loss claims, and is therefore clearly superior.

Finally, this case is manageable as a class action. Coverage is admitted, any comparative fault as to Underinsured motorist claims has been determined (Graff Depo. at 248:8- 248:16, 249:8- 249:17) and State Farm has already ruled out any policy defenses to liability before paying the underlying claim. Liability will be established through common evidence of State

[26] The four superiority factors include: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." *Id*.

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Farm's uniform state-wide claims practice as described above, and the common evidence as to how the TNA deduction does/does not comply with §391. There is simply no variation in the evidence to be presented on these issues between members of the Class. Further, damages can be easily calculated as described above directly, through use of statistical sampling, or via a review of claims files to determine Class Members' entitlement to relief and the amount of the relief. As the Supreme Court observed (quoting *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 344 (1997)) in *AmChem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997),

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

VI. CONCLUSION

Based on the above, Plaintiffs respectfully requests that the Court GRANT their motion to CERTIFY this matter as a class action. They ask to be appointed to serve as class representatives and that the undersigned counsel be appointed Class Counsel.

RESPECTFULLY SUBMITTED this 29th day of January 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 29th day of January, 2021, I [X] e-mailed [ ] mailed via regular U.S. mail [ ] faxed [ ] delivered by legal messenger a true and correct copy of this document to counsel of record.

DATED this this 29th day of January 2021, at Tacoma, Washington.

Sara B. Walker

SARA WALKER

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