HONORABLE MARSHA J. PECHMAN
NOTED FOR APRIL 23, 2021

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FAYSAL A. JAMA, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,

Defendant.

Civil Action No. 2:20-cv-00652-MJP

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Noting Date: April 23, 2021.

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I. INTRODUCTION.

Defendant's opposition brief is a blizzard of irrelevant, misleading, and unsubstantiated arguments designed to obscure the fact that this is a relatively simple case with clear liability and easily discernable damages. Defendant's attempted obfuscation primarily relies on: (1) a methodologically flawed survey of no probative value; (2) the "expert" testimony and improper legal conclusions of a statistician most famous for testifying that cigarettes **do not** cause cancer, and (3) a tortured interpretation of Washington State's regulatory framework for total loss claims. State Farm also offers self-serving studies as to the Autosource method's alleged accuracy, not offered under penalty of perjury and "authenticated" by witnesses lacking any personal knowledge. See Declaration of Mark A. Trivett, Ex. 12. Finally, State Farm argues that even if its typical negotiation adjustment ("TNA") and condition deductions were unlawful, certification should be denied because it is entitled to a "do over."

This Court has already determined deducting TNA is unlawful. Dkt. #29, pg. 10 ("the insurer must use a comparable motor vehicle's actual cash value reduced only by the deductions listed in [WAC 284-30-391(4)(b)]."). Similarly, State Farm's condition deductions are unlawful because they are not verifiable, nor derived from local data within ninety days of the date of loss. State Farm admits that its claim practices – which include taking both illegal adjustments – have been the same throughout the Class Period. Thus, the common question of liability is affirmatively answered, and certification is warranted.

As for damages, putative Class Members are contractually and statutorily entitled – under the adjustment method State Farm selected – to the value of their vehicle, absent State Farm's unlawful deductions. Thus, the foundational value of Class Members' damages is easily identifiable from the TNA and condition deductions within Autosource reports.

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II. DISCUSSION.

A. State Farm's "Agreement" Defenses are Factually and Legally Wrong.

In its brief, State Farm argues that Section 391's prescribed methodology is irrelevant to the common questions of liability and damages because it reached "agreed values" with Class Members. Dkt. #53, pg. 23. This argument is a red herring; a logical fallacy contradicted by the section's legislative intent.

State Farm misinterprets §391 to contend that insurers are only required to note whether an "agreed value" was reached with claimants. The contention's falsity is plain from the statute's own text: "[i]f an agreed value or methodology is reached between the claimant and the insurer **using an evaluation that varies from the methods described in subsections (1) and (3) of this section**, the agreement must be documented in the claim file." WAC 284-30-391 (emphasis added). In this case, State Farm produced a sample of one-hundred and fifty (150) claim files (the "Sample"), none of which document methods alternative to those prescribed in §391. *See* Supplemental Report of Dr. Paul Torelli. This argument also contradicts State Farm's own CR 30(b)(6) deposition testimony. Dkt. #38-4, 32:9-15 ("in general, Autosource would be our starting point [for typical passenger vehicle valuations]"). This argument is also contradicted by State Farm's total loss offers to Class Members, which paraphrase §391: "To achieve comparability any deductions or additions for options mileage or condition can only be made if they are itemized and appropriate in dollar amount." Declaration of Mark Trivett, Ex. 9. State Farm has failed to present any evidence that its insureds knowingly and voluntarily waived their rights under §391 or agreed to alternative adjustment methods. Rather, the evidence overwhelmingly demonstrates that State Farm relies on non-compliant methodology, while overtly representing to customers that it is in fact complying with §391.

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State Farm also ignores §391's directive that "[insurers] must take reasonable steps to ensure that the agreed value is accurate and representative of the actual cash value of a comparable motor vehicle in the principally garaged area." WAC 284-30-391. Assuming, for purposes of argument, that an insured consented to an alternative methodology and an agreed value, State Farm was still obligated to ensure that value was "accurate." By taking improper deductions, State Farm did not "take reasonable steps" to ensure the accuracy of its agreed value, thereby violating Washington State law.

This argument is also inconsistent with State Farm's internal claim policies, as described by Fed. R. Civ. P. 30(b)(6) designee Mr. Douglas Graff. *See* Dkt. #38-4, *Ngethpharat* Dkt. #72. Mr. Graff testified that State Farm's payment of ACV "does not bind [insureds] from pursuing or receiving…additional benefits that they be deemed owed…There is nothing we require of a customer who agrees to accept an advance payment…and we will work with them to resolve any remaining issues. If there is an error or issue identified in a claim and that information is brought to our knowledge, we will assess it and made any additional payments that are appropriate and necessary." *Id*., Graff Dep., 179:1-181. Contrary to State Farm's opposition brief, the insurer does not obtain releases or settlement agreements before issuing total loss payments. Rather, Plaintiff's factual evidence and State Farm's own testimony shows that for every passenger vehicle claim, except rare or heavily modified vehicles, State Farm's adjusters obtain an Autosource Report and present the valuation to the insured, and that in nearly every circumstance, that valuation is used to calculate paid-ACV. *See* Torelli Supplement Rpt., ¶6-7. There is no evidence that Class Members agreed to non-Section 391 methodologies, and, thus, there is no need for the individualized inquiry.

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B. Plaintiff Has Presented Classwide Proof That State Farm's Condition Deductions Are Unlawful.

To satisfy the requirements of commonality, predominance, and superiority, Plaintiff need only show he can prove a single theory of liability on a classwide basis. *Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036, 1045-46 (2016); *Wolin v. Jaguar Land Rover N. Am., LLC,* 617 F.3d 1168, 1172(9th Cir. 2010). Plaintiff has accomplished this by demonstrating that State Farm's condition deduction is neither verifiable, nor based on current and local data. Dkt. #39-3. Therefore, this deduction is invalid, and cannot be used to calculate the §391 ACV of any total loss vehicle. State Farm's statutory violation establishes the liability necessary for the Plaintiff and putative Class to prevail on their claim for breach of contract.

To prevail on a breach-of-contract claim, a party must establish that a contractual duty was breached, with damages proximately caused by the breach. *NW Indep. Forest Mfrs. v. Dep't of Labor and Ind.*, 78 Wash. App. 707, 712, 899 P.2d 6 (1995). In the context of an insurance regulation, a plaintiff needs only to show that a standard set by a regulation applied and was not met. *Wash. Cedar & Supply Co. v. Dep't of Labor and Ind.*, 137 Wash. App. 592, 603, 154 P.3d 287 (2007). When applicable regulations provide a specific procedure for adjusting claims, that standard becomes "a part of and should be read into the insurance policy." *Touchette v. NW Mut. Ins. Co.*, 80 Wash. 2d 327, 332, 494 P.2d 479 (1972); *see also Williams v. GEICO Gen. Ins. Co.*, 2020 WL 628720 at *2.

Here, Plaintiff challenges State Farm's failure to follow statutory standards for setting the value of condition deductions. That standard requires that condition deductions be (1) itemized, (2) explained, (3) **verifiable**, (4) appropriate in dollar amount, and (5) **based on the value of comparable vehicles available within 90 days of the date of loss and within 150 miles of the**

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location of the loss vehicle. WAC 284-30-391(4)(b) (emphasis added). The regulations' plain-language requires all five-criteria be met. Plaintiff has presented evidence that State Farm's condition deductions rely on old data, and an arbitrary weighting of vehicle components.[1] *See* Dkt. #44, pg. 8. Because State Farm's method for determining condition deductions was improper, it is liable for the value of those deductions. *See Johnson v. Hartford Cas. Ins. Co.*, No. 15-cv-04138-WHO, 2017 U.S. Dist. LEXIS 77482, at *42 (N.D. Cal. May 22, 2017) (an appropriate measure of damages was the difference between insurer's underpayment, and the amount it should have paid but for improper depreciation deduction). The central question of this case is State Farm's adoption and application of condition deductions, and whether that policy violates §391. *Id*. There is no need to examine State Farm's conduct on an individual basis.

Thus, the Plaintiff is not so much alleging that State Farm failed to pay the actual cash value of total loss vehicles, but rather, that distinct components of State Farm's valuation procedure breached its statutory and contractual duties, thereby harming the Plaintiff and putative Class. *See e.g. Williams*, at *2.)("Williams argues that Geico breached the contract through violating WAC 284-30-320, -330, and -391, which are incorporated into the Policy, through an allegedly unlawful valuation. The basis of Williams's action is the unlawful valuation: Williams does not allege that Geico breached the contract through the appraisal process, which was invoked after Williams filed suit, but rather argues that Geico breached the contract by failing to conduct a valuation that met the WAC's specific requirements."); *Stanikzy v. Progressive Direct Ins. Co.*, 2020 WL 2800711, at *2 (W.D. Wash. May 29, 2020)("This is not a dispute over whether

[1] Although State Farm had six weeks to prepare its opposition and supporting evidence, it has failed to offer any insight or support for Audatex's vehicle component formulation, the basis for all its condition deductions.

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the calculated average of the comp vehicles' PSAs should be some amount other than $1008.70; as Plaintiff notes, neither party claims that anything about this sum is incorrect. Instead, the gravamen of this lawsuit is whether Progressive may legally make the adjustments at all.")

Based on State Farm's standardized use of the Autosource method, and Autosource's ubiquitous use of arbitrary and unverifiable condition deductions, Plaintiff has presented sufficient evidence to establish common questions of liability for all Class Members.

State Farm incorrectly relies on Judge Bryan's denial of certification in *Lundquist v. First National Insurance Co. of America*, 2020 WL 6158984 (W.D. Wash. Oct. 21, 2020). In *Lundquist*, the plaintiffs challenged an insurer's practice of "using a flat, unitemized and arbitrary 'condition adjustment" that reduces the values of all comparable vehicles located on dealer lots – an ultimately the valuation of each insured's claim." Trivett Dec., Ex. 14. In short, the *Lundquist* plaintiffs bore the burden of establishing **inappropriateness** of condition deductions, a benchmark different for each vehicle. Here, the Plaintiff alleges that State Farm's condition deductions are **unverifiable**, and violate the §391's data age and proximity requirements. Unlike *Lundquist*, State Farm's liability can be established with evidence of common adjustment procedures and underlying data. Therefore, no individual inquiry is needed.

State Farms' condition deductions have no relation to the "comparable vehicles" identified by Autosource. Rather, State Farm's methodology gauges the loss vehicle's "typicality" against vehicles of its age and type. Dkt#38-6 (Dep. of Lowell at pg. 148-49). That "typicality" is derived from national data, and a decades-old arbitrary formulation of vehicle component values, and are thus, facially invalid per §391.

C. Plaintiff Has Presented Classwide Proof That State Farm's Typical Negotiation

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Adjustment is Unlawful.

On November 9, 2020, the Court ruled that §391(2) does not permit adjustments for TNA, and that State Farm's arguments to the contrary were based on "a flawed reading of §391 that violates the canons of statutory construction." Dkt. #29. The Court also ruled that §391(4)(b) does not permit a TNA, and that "State Farm's reading of §391(4)(b) would essentially allow insurers to come up with any deductions they see fit—so long as they were 'itemized and verifiable.'" *Id*.

State Farm responded by claiming that its typical negotiation discount constitutes "weighting" as described in WAC 284-30-392. This argument is fatuous. First, unlike §391 which sets forth the methods and standards of practice for settling total loss claims, §392 is concerned only with precise contents of total loss reports. Second, a cursory investigation into the regulations' historical background reveals that the term "weighting" refers to the previous requirement that comparable vehicles be weighted by their distance from the principally garaged area of the loss vehicle. The Insurance Commissioner's summary of the changes makes clear that one of the principal changes to the regulation was to eliminate this *requirement* for weighting:

> In addition, this proposed revision also eliminates the previous requirement for weighting the data for comparable values by the distance from the principally garaged area.

Supp. Dec. of Harber at ¶10.

In addition to being inconsistent with the historical meaning of the term "weighting," Marais' definition has no connection to reality.

> When Autosource/Audatex takes a TNA, the comps are not "averaged." They are instead individually *reduced* by the same percentage (unless they fall into different price bands). Weighting takes several vehicles, applies different weights, and then averages them. The TNA simply reduces the value of each individual comp by an arbitrary percentage, and does not in any way calculate an average value of the comps.

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Id. at ¶12.

It is important to note, both State Farm and Audatex participated in the Office of Insurance Commissioner's drafting of WAC 284-30-391, and neither proposed inclusion of "typical negotiation" as a lawful deduction. *See* Trivett Dec, Ex. 1 & 2.

Further, State Farm acknowledged in its correspondence with OIC that §391(5) prohibits an insurer from taking any deductions not specifically enumerated in the regulation, and asked that the proposed definition of "comparable vehicle" in §320 permit adjustments for options, mileage and condition.

> While the objective of subsection (5) is to permit specific adjustments, we are concerned an unintended Catch-22 exists whereby adjustments for different options, mileage or condition will not be allowed as "comparable motor vehicles" are identified, which is a necessary process to achieve a total loss settlement.

Trivet Dec, Ex. 2.

As to State Farm's TNA, Plaintiff can again prove a theory of liability on a classwide basis, satisfying the requirements of commonality, predominance, and superiority. *Tyson Foods*, 136 S. Ct. at 1045-46 (2016). Absent a request for appraisal, throughout the relevant six-year Class period, State Farm exclusively used the Autosource system to value total loss claims. *Dep. of Graff*, 29:7 – 30:4. This system applied a TNA, thereby reducing insureds' recovery.

Lundquist, supra, a decision heavily relied upon by Defendants concerned a "conditioning adjustment," and it not relevant to Plaintiff's TNA claim. As described above, the *Lundquist* plaintiffs bore the burden of showing that the subject condition adjustment was "inappropriate" which could be an individualized inquiry. Here, the Court has already determined typical negotiation is not a lawful deduction, so appropriateness is irrelevant.

D. Defendant's Damages Arguments Indicate the Insurer Incorrectly Believes it is Entitled to a "Do Over."

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In opposing certification, State Farm asserts that it is entitled to a "do over" and that there must be an individualized determination of a vehicle's true value. This argument is meritless and exaggerates the inquiry necessary to calculate Class Members' damages. With this argument, State Farm offers the testimony of Dr. Laurentius Marais, a professional witness for-hire, whose primary focus is the proper measure of damages. The proper measure of damages is a legal question, solely for the Court to determine, and Dr. Marais's "X-X prime theory" is a farcical attempt to overcomplicate this dispute and shift the burden to the Plaintiff. *See* Motion to Exclude Dr. Marais, filed in conjunction with this brief. Here, the Plaintiff contends that two distinct components of the Autosource valuation method are improper, and that Class Members were entitled to the calculated ACV of their vehicle, minus the unlawful deductions.

Plaintiff's method of calculating damages is *Comcast*-compliant because it isolates specific harm and limits the remedy to correct that harm. *Comcast Corp. v. Behrend,* 569 U.S. 27, 38 (2013). State Farm chose to use the Autosource methodology for its Washington State total loss claims, and to include unlawful deductions. State Farm, not its lay insured, bears sole responsibility for ensuring that its valuations comply with Washington State laws. WAC 284-30-380(7).

There is no need for an individualized determination of the actual cash value of each class member's vehicle. State Farm's preoccupation with these individual determinations arises from its desire to avoid certification. As in *Williams* and *Stanikzy, supra,* Jama is alleging that State Farm breached its contract and its duty of good faith by engaging in an **improper valuation process**.

Plaintiffs propose simply using the Audatex values State Farm used without the improper deductions for condition and TNA. This method is not only an (a) an authorized valuation (it is an

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"Advertised data comparison" under §391(2)(b)(iii)) but is (b) what State Farm does in California where a typical negotiation is not taken. The same valuation reports are used, just with no typical negotiation adjustment. *See* Graff Depo. at 96:10-24; 137:23-138:5; 265-18-266:4.

E. Defendant's Contention that Plaintiff Jama is not Typical is Both Incorrect and Inconsistent.

As explained fully above, State Farm's "agreement" arguments are fatally flawed. Mr. Jama did nothing more than receive an advance payment which per the insurers 30(b)(6) designee, "does not bind [insureds] from pursuing or receiving…additional benefits that they be deemed owed…[W]e surely don't deny them the right to complete and conclude a claim like we're talking about here just because we chose to pay advance benefits." *See* Dep. of Graff, pp.179-81. State Farm has already admitted there was no binding agreement by moving the Court to compel appraisal. Dkt. #13. State Farm took this step after writing the Plaintiff to request resolution of "**the disagreement by appraisal.**" Trivett Dec., Ex. 15. If State Farm had a binding agreement with Mr. Jama, as it contends, this action would have been swiftly dismissed.

F. Defendant's "Survey" is Irrelevant and Misleading.

To support the spurious contention that Class Members "agreed" with State Farm's valuation, as the term is used in WAC 284-30-391, the insurer commissioned a survey from John Lynch, Jr. This survey is a fundamentally flawed smoke screen, designed to obscure the lawsuit's relevant issues. Mr. Lynch failed to calculate a margin of error, nor distinguished between current and former State Farm customers, and failed to provide an "I don't know" option to the survey's central question. State Farm and Mr. Lynch designed the survey to obtain a self-serving answer to an entirely irrelevant question. The survey made no mention of this lawsuit, nor of Respondents' rights under WAC 283-30-391 and the statutory definition of

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"agreed."

The degree to which State Farm insureds may be satisfied with total loss payments is irrelevant to the common question of State Farm's compliance with WAC 283-30-391. A restaurant customer may be satisfied with their steak dinner until they discover they were entitled to a steak twice the size. Legally, Class Members' alleged satisfaction is irrelevant, as indicated above, because there are no binding agreements between State Farm and Class Members. Similarly, whether respondents' researched their vehicle's value is irrelevant to resolution of State Farm's systematic violation of §391. The survey is a distraction, albeit, a very expensive one.

G. Defendant's Criticism of Plaintiff's Proposed Class Definition can be Easily Cured by Clarifying the Definition.

State Farm contends that purported issues of predominance are compounded by Plaintiff's proposed class definition. To the extent that is true, it can be easily cured because the Court may redefine/modify the class definition at a certification hearing. *Armstrong v. Davis*, 275 F.3d 849, 872 at fn 28 (9th Cir. 2001). Courts are "not bound by the class definition proposed in the complaint." *Bueche v. Fid. Nat. Mgmt. Servs., LLC,* 2014 WL 2468601, *2 (E.D. Cal. June 2, 2014) citing *Robidoux v. Celani,* 987 F.2d 931 (2d Cir. 1993). "Rather, the Court may 'modify the definition of a proposed class' at a later stage, namely the Rule 23 class certification hearing." *Id.* citing *Jackson v. Nat'l Action Fin. Servs., Inc.,* 227 F.R.D. 284, 286 (N.D. Ill. 2005).

A proposed class can be redefined without amending the complaint. In *Beuche*, the Court held it was not bound by the definition in the class complaint, and also held that amending the complaint was futile since the Court would rule on class definitions at the certification hearing.

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Id. at *2-3. Similarly, in *Abdeljalil v. Gen. Elec. Capitol Corp.*, the Court granted class certification without an amended complaint since the new class definition more narrowly defined that complaint. *Abdeljalil*, 306 F.R.D. 303, 306 & 312 (S.D. Cal. 2015). With that authority in mind, Plaintiff proposes modifying the proposed Class definitions to more accurately describe the injured populations. *See* Appendix One, attached hereto.

III. CONCLUSION

To oppose certification, State Farm throws everything at the proverbial wall, including specious arguments and five-figure expert fees, in hopes that something will stick. In doing so, State Farm overlooks this action's straightforward legal issues: (1) are typical negotiation deductions permitted under §391, and (2) are State Farm's condition deductions verifiable, and based on data collected from the local area within ninety days of the date of loss? As demonstrated in Plaintiff's Motion to Certify (Dkt. #44), the answer to both questions is an unequivocal "**no**." As such, the Plaintiff and putative Class Members are entitled to the value of their car, but for these unlawful deductions. Fortunately, those figures are easily identifiable from the Autosource reports within State Farm's own records. *See* Trivett Dec., Ex. 3-5 & 8.

The Plaintiff respectfully requests the Court grant certification of the classes described in Appendix One.

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Dated this 23rd day of April, 2021

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 23rd day of April, 2021, he caused a true and correct copy of the above-titled document to be delivered via the method indicated below to the following party(ies):

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