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

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiffs present an overly simplistic and legally incorrect argument in support of class certification. According to Plaintiffs, the Court has already ruled against State Farm on the merits, so the only issue that remains is the calculation of class-wide aggregate damages using a sampling methodology presented by their proffered expert. Unlike the Plaintiffs, however, this Court does not have the luxury of ignoring the facts or the rigorous Rule 23 analysis required before certifying a class. And unlike the Plaintiffs, this Court cannot run roughshod over the law, endorsing an incorrect interpretation of the Washington Administrative Code ("WAC") and a damage theory precluded by United States Supreme Court precedent.

Plaintiffs' motion repeatedly argues the merits, contending that the Court's denial of State Farm's motion to dismiss has resolved the issue of liability for Autosource's use of a "typical negotiation adjustment" when valuing total losses. But the Court doesn't decide the merits on a motion to dismiss. State Farm recognizes the Court's conclusion that WAC § 284-30-391 ("WAC 391") authorizes deductions ***only*** for "options, mileage or condition when determining comparability." The typical negotiation adjustment is not a deduction to determine comparability, however, but a permissible method of estimating the fair market value of advertised prices *before* determining comparability. WAC § 284-30-392 ("WAC 392"). Perhaps that's the reason, despite tens of thousands of total-loss valuations from Audatex, CCC, and Mitchell, the Office of the Insurance Commissioner ("OIC") has never initiated a market conduct examination or otherwise sought to preclude insurance companies from making adjustments to advertised prices when settling total-loss claims.

But even if Plaintiffs' merits-based arguments weren't incorrect, the individualized issues presented by their claims preclude certification under Rule 23. Most importantly, the provisions of WAC 391 that State Farm purportedly violated *do not apply* "when an agreed value is reached." Whether an agreed value was reached cannot be resolved on a class-wide basis. In addition to this threshold individualized issue, two others stand as insurmountable obstacles to certification. First, State Farm's obligation is to pay actual cash value or fair market value for

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total-loss vehicles. Whether it did cannot be resolved with common evidence because the question requires proof of the fair market value of each and every vehicle in the proposed class. Second, damages are not susceptible of common proof; those proposed class members who received fair market value for their total-loss vehicles did not suffer the fact of damage and cannot be included in the proposed class, while those who can prove the fact of damage can do so ***only*** by demonstrating the difference between what they were paid and the fair market value of their vehicle at the time of the loss.

Lundquist v. First National Insurance Co. of America, 2020 WL 6158984 (W.D. Wash. Oct. 21, 2020), a case making similar allegations based on CCC's total-loss valuation methodology, denied certification for these very reasons. Judge Bryan ruled there that plaintiffs could not satisfy Rule 23(a)'s commonality requirement, that individual issues predominated under Rule 23(b)(3), that plaintiffs' damages model did not fit their theory of liability under *Comcast*, and that a class action was not superior. The same result is required here.

BACKGROUND

I. AUTOSOURCE IS A STATISTICALLY VALID METHOD OF DETERMINING ACTUAL CASH VALUES FOR TOTAL LOSSES.

In Washington and throughout the United States, State Farm uses Autosource to provide market valuation analysis ("Autosource Reports") for most of its total-loss claims. (Graff Decl. ¶ 6.) In general, the valuation process begins with State Farm providing Autosource with information about the total-loss vehicle, which prompts Autosource to access its database of more than 73 million vehicles to identify comparables (i.e., vehicles that are the same year, make, model, and style as the total-loss vehicle) in a localized market that are or were available within 90 days after the date of loss. (Lowell Decl. ¶¶ 8, 15, 17.) From this database, Autosource will generate an Autosource Report providing an actual cash value based on comparable vehicles. (*Id.* ¶ 15.) If not enough comparables exist, however, Autosource valuation experts will obtain dealer quotes, which consist of a dealer's opinion regarding a particular vehicle's likely selling price. (*Id.*) In some circumstances, usually involving customized, specialized, or

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otherwise rare vehicles, no Autosource Report will be generated at all. (Graff Decl. ¶ 14.)

By analyzing millions of transactions over time, Autosource has seen that used vehicles are typically sold for less than the advertised price. (Lowell Decl. ¶ 19.) And since the sold price is the fair market value of that vehicle, *DePhelps v. Safeco Ins. Co. of Am.*, 65 P.3d 1234, 1240 (Wash Ct. App. 2003), to the extent the advertised price is higher than the sold price, it also is higher than the fair market value of the vehicle. *See id.*; (Lowell Decl. ¶ 19; Herzog Decl., Ex. 1, Marais Rep. ¶¶ 25-31.) Most of the vehicles in Autosource's database have advertised prices and not sales prices, so the values associated with those vehicles are, on average, higher than their sales prices (and therefore their fair market values). (Lowell Decl. ¶ 19.) To account for this disparity, Autosource adjusts the value of the advertised price of a comparable vehicle to account for the difference between the advertised price and the ultimate selling price. (*Id.* ¶ 20.) This is the "typical negotiation adjustment" (or "selling price adjustment") applied to certain comparables *before* making "appropriate deductions or additions for options, mileage or condition." (*Id.* ¶¶ 20, 22.) If Autosource based its valuation on advertised prices, then most comparable vehicles would be systematically *over*valued. (*Id.* ¶ 20; Ex. 1, ¶¶ 25-31.) Not every comparable vehicle includes an adjustment for typical negotiation, however. (Lowell Decl. ¶ 21.) Autosource Reports also contain "sold" data and data from "no-haggle" dealerships, such as Carmax, to which no typical negotiation adjustment is made. (*Id.*; Herzog Decl., Exs. 20-24.)

Insurers have used Autosource Reports (and other third-party valuation services) in the State of Washington for more than 35 years. (Lowell Decl. ¶ 6.) In all that time, covering tens of thousands of total-loss claims, the OIC has never initiated a market conduct action or otherwise contended that an insurer's use of Autosource or a typical negotiation adjustment violates Washington law. (*Id.* ¶¶ 6, 39-40 & Ex. B.) Indeed, Autosource is used throughout the United States, and every state that requires formal approval of Autosource's methodology has given that approval, including Connecticut, Indiana, New Hampshire, New Jersey, New York, Pennsylvania, and West Virginia. (*Id.* ¶ 39.)

Analyses of the Autosource methodology also show that, on average, Autosource

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determines actual cash values higher than actual sold values and higher than other third-party valuation services. In one Yale University study, which analyzed Autosource valuations and actual sold prices for 4,057 randomly selected vehicles sold in the State of Washington, Autosource values for those vehicles were, on average, ***8.8% higher*** than the ***actual*** sold prices of those vehicles. (*Id.* ¶ 38 & Ex. A.) And in two internal State Farm studies, one conducted in 2017 with 500 vehicles and one conducted in 2019 with 1,500 vehicles, Autosource valuations were higher than CCC by 9.3% and 4.1%, respectively. (Graff. Decl. ¶¶ 32-33 & Ex. C, at 1 (17197) & Ex. D, at 4 (17184).)

II. STATE FARM ADJUSTS TOTAL-LOSS CLAIMS INDIVIDUALLY AND MOST CLASS MEMBERS AGREED WITH STATE FARM'S VALUATION.

State Farm claim handlers use Autosource Reports to help arrive at an actual cash value for most customers' total-loss vehicles. (Graff Decl. ¶ 6.) But claim handlers retain discretion in the settlement process, as each individual claim is handled "on its merits" and is necessarily "fact- and case-specific." (Herzog Decl., Ex. 3, Graff Dep. 95:1-16; *see also id.* at 168:13-19, 246:22-247:4.) For example, claim handlers may (i) obtain additional Autosource Reports with corrected options, mileage, or condition; (ii) obtain additional Autosource Reports with new or more recent comparable vehicles; (iii) obtain Autosource Reports using the "dealer quote" methodology; (iv) obtain an "exception" Autosource Report; (v) adjust the valuation based on information provided by the insured; (vi) use a different valuation methodology altogether; or (vii) offer appraisal. (Graff Decl. ¶ 26.) Claim handlers receive appropriate training on the total-loss settlement process (including training on all applicable insurance regulations) (*id.* ¶ 7; Herzog Decl., Ex. 4, Gray Dep. 16:12-18:24; Herzog Decl., Ex. 7, Kline Dep. 8:1-10), so they may handle different types of claims and fact scenarios independently and in light of their unique circumstances. (Graff Decl. ¶ 7.)

In general, once an Autosource Report is received, a claim handler is expected to verify all information in it, including the mileage, options, and condition. (*Id.* ¶ 16.) If there is an error, the claim handler will request an updated valuation. (*Id.*) Once a verified Autosource Report is in

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hand, the claim handler will speak to the customer by phone to discuss the valuation. (*Id.* ¶ 17.) The content of this conversation varies from claim to claim and from claim handler to claim handler. (*Id.*) No "word track" is used. (Ex. 4, at 37:11-25.)

For example, Ms. Gray, who worked on Ms. Ngethpharat's claim, "will always let the customer know where we're getting [the valuation] information from" (*id.* at 39:4-5), will "always go over the mileage, options, and conditions" (*id.* at 40:17-25), and will "usually disclose [the typical negotiation adjustment] to the customer." (*Id.* at 63:10-16.) Mr. Kline, who worked on Mr. Jama's claim, will "review options and mileage, condition, and the typical negotiation" with each customer. (Ex. 7, at 24:10-25; *see also* Ex. 3, at 161:25-163:23 (claim handlers "respond to each individual claim on its merit," so whether "typical negotiation" is discussed will depend on the claim).) As required by WAC 391, claim handlers provide the Autosource Report "if requested" by the insured. But "[l]ots of times [they] offer to send it to them so they can review it with us in real time" (Ex. 4, at 59:16-23), "if the customer is having trouble following along," or "if any other circumstance" arises where doing so may be helpful. (Ex. 7, at 29:3-9.) Plaintiffs here each received a copy of the Autosource Report. (Herzog Decl., Ex. 8, Ngethpharat Dep. 83:20-86:5; Herzog Decl., Ex. 6, Kelley Dep. 44:14-46:6, 47:25-48:10.) Finally, State Farm claim adjusters are "totally authorized" to consider information from the customer (Ex. 3, at 230:9-15), and they routinely do exactly that. (Graff Decl. ¶ 21.) Accordingly, and contrary to Plaintiffs' many mischaracterizations, claim handlers often *do* disclose the typical negotiation adjustment (Ex. 4, at 63:10-16; Ex. 7, at 24:10-25), often *do* provide the Autosource Report without a request (Ex. 4, at 59:16-23; Ex. 7, at 29:3-9), and *always* consider information provided by the customer. (Ex. 3, at 230:9-15.)

If an agreed value is reached during the conversation, the agreement is documented in the claim file. (Graff Decl. ¶ 23.) If the customer disagrees with the value, the claim handler may take several different steps in an effort to reach agreement as required by the policy. (*Id.* ¶¶ 25-26 & Ex. A, at 31 ("The owner of the ***covered vehicle*** and ***we*** must agree upon the actual cash value of the ***covered vehicle***.").) But if all options are exhausted and disagreement remains, then

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the claim handler may offer appraisal (Graff Decl. ¶ 28), or the customer (like Ms. Ngethpharat) may demand it herself. (*See infra* Background § III.) Consistent with Washington law, each insurance policy contains an appraisal provision allowing either State Farm or the customer to invoke it. (Graff Decl. ¶ 5 & Ex. A, at 31); WAC 391(3).

The record evidence establishes that most members of the putative class did not disagree with State Farm's total-loss valuation. In a survey of 421 putative class members, 87.6% of them were satisfied with the speed of the final settlement received from State Farm, 59.7% of them conducted their own research to determine the fair market value of their vehicle, and 81.7% were "satisfied" with the final settlement amount. (Herzog Decl., Ex. 2, Lynch Rep. ¶ 24.) Further, 79.4% of putative class members did not tell State Farm they disagreed with the valuation. (*Id.*) And even for the 20.6% who expressed disagreement, 46.7% of that subset reported being "satisfied" with the final settlement amount. (*Id.* ¶ 27.) Unlike Plaintiffs' histrionic speculation, State Farm's survey evidence shows that most putative class members were informed through independent research, most were satisfied with both the speed and the amount of the settlement, and most agreed with the actual cash value determined by State Farm. (*Id.* ¶¶ 24-30.)

III. PLAINTIFFS THEMSELVES ILLUSTRATE THE INDIVIDUALIZED ISSUES THAT RENDER THIS CASE UNSUITABLE FOR CLASS TREATMENT.

On December 19, 2019, Ms. Ngethpharat's 2014 Subaru Forester was in an accident. (Ex. 8, at 73:2-12.) Through counsel, she affirmatively requested that State Farm declare her vehicle a total loss, claiming it "was worth approximately $14,000." (Herzog Decl., Ex. 10, at 2 (422).) As requested, State Farm declared the vehicle a total loss and offered $13,378 as its actual cash value, based on an Autosource Report using comparable vehicles adjusted for typical negotiation. (Herzog Decl., Exs. 11 & 12.) Ms. Ngethpharat, through counsel, objected to the valuation. (Herzog Decl., Ex. 13.) State Farm then provided a second Autosource Report based on dealer quotes with no adjustment for typical negotiation. (Herzog Decl., Ex. 14.) That valuation was somewhat higher, at $13,948 (or $52 less than Ms. Ngethpharat's attorney had valued the vehicle). (*Id.* at 2 (365).) When Ms. Ngethpharat continued to object to the valuation,

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State Farm paid Ms. Ngethpharat $13,948, representing the amount it did not dispute it owed her. (Ex. 8, at 118:4-119:24.) Ms. Ngethpharat then invoked the appraisal provision of her insurance policy, naming Mr. Harber (Plaintiffs' proffered expert) as her appraiser, but refused to complete the appraisal process. (Herzog Decl., Ex. 5, Harber Dep. 113:2-114:6.)

On January 16, 2020, Plaintiff Kelley's 2020 Ford Explorer was in an accident. (Ex. 6, at 31:1-8.) After determining the vehicle was a total loss, State Farm offered $54,056 based on an Autosource Report that used a single comparable vehicle methodology adjusted for typical negotiation. (Herzog Decl., Ex. 15.) After receiving a copy of the Autosource Report, Mr. Kelley (i) communicated with Mr. Harber regarding the valuation; (ii) determined the amount of the typical negotiation adjustment; (iii) verified details about the comparable vehicle; and (iv) calculated various "underpayment" scenarios. (Ex. 6, at 48:4-49:1, 52:11-53:5, 82:15-84:14.) Mr. Kelley admitted that the Autosource Report disclosed the typical negotiation adjustment to him, as well as the reason for its application. (*Id.* at 55:10-15.) Despite this, Mr. Kelley never provided State Farm with additional information regarding the actual cash value calculation; never told State Farm that he disagreed with the valuation; never objected to the way it was calculated; and never requested that State Farm reopen his claim. (*Id.* at 80:6-82:1.) Instead, Mr. Kelley accepted the total-loss settlement and bought a replacement vehicle with the settlement proceeds. (*Id.* at 77:25-80:5.) Mr. Harber then referred Mr. Kelley to his current counsel, because Mr. Hansen was looking for another plaintiff to sue State Farm. (*Id.* at 83:10-87:2; Ex. 5, at 197:10-198:5.)

LEGAL STANDARD

The class action is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). And to determine whether class certification is appropriate, courts must undertake a "rigorous analysis" of all the Rule 23 factors. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). This is so because "Rule 23 does not set forth a mere pleading standard." *Id.* at 350. Rather, Plaintiffs "must affirmatively demonstrate [their] compliance" with each Rule 23 factor,

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Dukes, 564 U.S. at 350, proving that there are "common questions of law or fact, typicality of claims or defenses, and adequacy of representation," and that they meet the "even more demanding" requirements of Rule 23(b)(3). *Comcast*, 569 U.S. at 33. Rule 23(b)(3) requires proof that common questions predominate over individual ones, and that a class action is the superior method of adjudication. *Id.* at 34. Certification is not proper unless "the trial court is satisfied, after a rigorous analysis," that each of these requirements is met. *Dukes*, 564 U.S. at 350-51.

ARGUMENT

I. PLAINTIFFS DO NOT SATISFY RULE 23(a)(2) COMMONALITY.

Plaintiffs argue commonality is satisfied because whether State Farm violated WAC 391 and whether Plaintiffs are entitled to damages are purportedly common questions. (Dkt. No. 71, at 16-17.) But merely "reciting [such] questions is not sufficient." *Dukes*, 564 U.S. at 349-50. Instead, Plaintiffs must prove that their claims "depend upon a common contention … that is capable of classwide resolution," meaning its determination "will resolve an issue that is central to the validity of each of one of the claims ***in one stroke***." *Id.* at 350 (emphasis added).

A. Plaintiffs Cannot Prove Liability with Common Evidence.

1. Whether an "agreed value" was reached under WAC 391 cannot be proved with common evidence.

Plaintiffs bring claims for (1) breach of contract; (2) violation of the Washington Consumer Protection Act ("CPA"); and (3) declaratory and injunctive relief. (Dkt. No. 5 ¶¶ 6.3, 7.2, 8.1-8.3.) Because a violation of WAC 391 is a necessary predicate for all of Plaintiffs' claims (*see id.*), Plaintiffs argue that the question of whether State Farm violated WAC 391 satisfies the commonality requirement. (Dkt. No. 71, at 16.)

But the requirements of WAC 391 that State Farm allegedly violated do not apply where an agreed value is reached. "***Unless an agreed value is reached***, the insurer must adjust and settle vehicle total losses using the methods set forth in subsections (1) through (3) of this section." WAC 391 (emphasis added). The WAC thus expressly allows an insurer and insured to reach an "agreed value" based on any methodology, so the Court must first determine whether

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that threshold question—**was an agreed value reached?**—can be answered with common proof.

The answer plainly is no. Under Washington law, whether agreement is reached is a question of fact that is ascertained from the parties' objective manifestations, statements, and conduct. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005); *Sea–Van Inv. Assocs. v. Hamilton*, 881 P.2d 1035, 1038-39 (Wash. 1994). This inquiry necessarily depends on "the particular facts of each case." *Sea–Van Inv. Assocs.*, 881 P.2d at 1039. Thus, the existence of an agreement will turn on the specific terms exchanged between the parties, *id.*, and whether the parties' later conduct was consistent with those terms. *Ma v. Dep't of Educ.*, 2019 WL 5212970, at *2 (W.D. Wash. Oct. 16, 2019) (repeated affirmation of agreement shows "meeting of the minds").

Here, the issue of whether an "agreed value was reached" will necessarily depend on the "particular facts of each case," including the nature of the exchange between the State Farm claim handler and the insured, and whether the parties' "objective conduct" manifested agreement. An insured's "objective conduct" could include whether the insured cashed the settlement check without objection; whether the insured bought a replacement vehicle with the settlement proceeds; and whether the insured ever acted inconsistently with the agreement. *See Wilcox v. Clasen Fruit & Cold Storage Co.*, 2011 WL 383926, at *7 (Wash. App. 2011) (one party's "objective conduct in continually accepting, packing, and selling" goods without objection showed no "essential disagreement").

Plaintiffs predictably will counter with argument, not evidence, that putative class members were fraudulently induced into reaching an "agreed value" with State Farm. (*See* Dkt. No. 5 ¶¶ 7.1, 7.4.) But that simply raises more individualized issues, including whether a State Farm claim handler misrepresented an existing fact, whether the insured read and understood the application of the typical negotiation adjustment (like Mr. Kelley), and/or whether the insured relied on any alleged misrepresentation. *See Leifer v. Safeco Ins. Co. of Ill.*, 2010 WL 11579014, at *9 (E.D. Wash. Aug. 10, 2010) (denying class certification because whether a putative class member "relied on the [valuation] report requires an individualized assessment").

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The impact of this threshold question whether an agreed value was reached is not theoretical. State Farm's survey of 421 putative class members shows that 59.7% of them conducted their own research to determine the fair market value of their vehicle, and 81.7% were "satisfied" with the final settlement amount. (Ex. 2, ¶ 24.) The survey also showed that 79.4% of putative class members never told State Farm they "disagreed" with the dollar value of their totaled vehicle (*id.*), suggesting an agreed value was reached a significant percentage of the time. *See Wilcox*, 2011 WL 383926, at *7 (lack of objection shows no "essential disagreement"). However, 20.6% of putative class members did tell State Farm they "disagreed" with the dollar value, which further illustrates the individualized nature of this inquiry, as does the fact that some who told State Farm they "disagreed" were nevertheless "satisfied" with the final settlement amount. (Ex. 2, ¶¶ 24-25, 27.) This suggests that some putative class members initially disagreed but then became "satisfied," perhaps after doing research or receiving a subsequent valuation. (*Id.* ¶ 27; *see also* Graff Decl. ¶¶ 25-26.) Still other putative class members may have disagreed but nevertheless were satisfied with the final settlement amount, perhaps after deciding that disputing the valuation did not make economic sense. (*See* Ex. 5, at 104:2-105:5.) Regardless, this survey evidence shows that whether an "agreed value" was reached is an individualized and fact-intensive inquiry.

2. Plaintiffs have not offered common evidence to prove that putative class members did not receive "actual cash value."

The record contains no common evidence to answer the fundamental liability question whether each putative class member received less than "actual cash value." If an agreed value is not reached, WAC 391 requires an insurer to replace the total-loss vehicle or pay its "actual cash value." Washington law defines "actual cash value" as "the fair market value of the loss vehicle immediately prior to the loss." WAC § 284-30-320(1). Fair market value "is that which an informed buyer would willingly pay and an informed seller would accept." *DePhelps*, 65 P.3d at 1240. Determining whether State Farm's claims handling practices violated WAC 391 does not answer the fundamental question whether each class member was *actually underpaid*—and

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thus suffered injury—as a result of the Autosource Report. To answer that question, a valuation analysis for each total-loss vehicle at issue is necessarily required.

Curtis v. Progressive Northern Insurance Co., 2020 WL 2461482 (W.D. Okla. May 12, 2020), found commonality lacking for precisely this reason. There, the plaintiff alleged that her insurer paid less than actual cash value based on a valuation report provided by Mitchell. *Id.* at *1. The court concluded the parties would have to conduct a valuation analysis of each putative class member's vehicle to determine whether s/he was actually underpaid. *Id.* at *2-3. Accordingly, "the answer to the question of whether Progressive's use of [Mitchell valuations] violated law or contract will not result in a common answer for the purported class, and will require an in-depth look at specific claims." *Id.* at *3. The same is true here. The answer to the question whether each class member was paid less than actual cash value for his or her vehicle requires an individualized inquiry. As in *Curtis*, to prove that State Farm paid each class member less than the actual cash value of his or her vehicle, Plaintiff would be required to introduce evidence relating to the "purchase price, replacement cost, appreciation or depreciation, age of the vehicle, condition in which [the] vehicle has been maintained, [and] market value." *Id.* at 2.

Judge Bryan's recent decision in *Lundquist* is in accord. Plaintiffs there alleged that an insurer's use of valuation reports from CCC violated WAC 391. 2020 WL 6158984, at *1. *Lundquist* found commonality lacking because the insurer would have the right to present evidence "that each individual class member received an appropriate determination of actual cash value," which the court likened to a "no harm, no foul" situation. *Id.* at *2. As in *Lundquist*, Plaintiffs cannot demonstrate commonality because the fundamental liability question whether each putative class member "received an appropriate determination of actual cash value" will turn on individualized issues not capable of class-wide resolution. This is so *even if* State Farm's use of Autosource Reports violated WAC 391, because State Farm can defend any individual action on the basis that the class member received "actual cash value" and thus suffered no compensable injury. *Nw. Indep. Forest Mfrs. v. Dep't of Lab. & Indus.*, 899 P.2d 6, 9 (Wash. Ct. App. 1995) (damages are an "essential element" of a breach of contract claim); *see Marts v. U.S.*

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Bank Nat'l Ass'n, 166 F. Supp. 3d 1204, 1208 (W.D. Wash. 2016). As the *Lundquist* Court made clear, with "no harm" there can be "no foul." 2020 WL 6158984, at *2.

3. Whether State Farm violated WAC 391, and whether any such violation caused a class member injury or damages, are not susceptible of common proof.

Even assuming that State Farm's liability turns on a violation of WAC 391, Plaintiffs cannot prove such a violation with common evidence. As explained above, if an agreed value is not reached, WAC 391 requires an insurer to replace the total-loss vehicle or pay its "actual cash value" using any one of several approved methods. One such method permits an insurer to use a "computerized source to establish a statistically valid actual cash value." When an insurer makes use of that permitted method, WAC 391(4) requires the insurer, *if requested*, to "[p]rovide a true and accurate copy of any 'valuation report,'" as described in WAC 392, which is titled "Information that must be included in the insurer's total loss vehicle valuation report." WAC 392(4) lists the information that a computerized source valuation report *must* include and expressly allows the "weighting of identified vehicles to arrive at an average," provided any "weighting" is "documented and explained." Here, Autosource Reports that use a comparable vehicle methodology apply a "weighting" to identified comparable vehicles, depending on whether the price is an advertised price at a traditional dealership, an advertised price from a "no haggle" dealership, or a sold price. (Ex. 1, ¶¶ 15-20; Exs. 20-24.) Because most advertised prices for most used vehicles are negotiated, advertised prices are weighted differently than sold prices or prices advertised by dealers that do not negotiate. (Ex. 1, ¶¶ 15-20; Exs. 20-24.) The "weighting" of prices is documented and explained. (Lowell Decl. ¶ 27.) For example, Mr. Kelley's valuation report documents the typical negotiation adjustment (Ex. 15, at 6 (noting that "[t]he advertised price of $58,580 was adjusted to account for typical negotiation")), and explains it as follows: "The following information provides the details for the vehicles used to calculate the Autosource Value. The selling price may be substantially less than the asking price. Where indicated, the asking price has been adjusted to account for typical negotiation according to each comparables price." (*Id.*) Mr. Kelley admitted that he reviewed these provisions and that

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the valuation report disclosed the fact and basis of the typical negotiation adjustment. (Ex. 6, at 53:13-55:14.)

Even if Plaintiffs had not ignored WAC 392, whether application of the typical negotiation adjustment to most but not all advertised prices of comparable vehicles caused any putative class member injury or damages is highly individualized. Plaintiffs propose to end run this individualized issue with purported expert testimony that an advertised price *equals* the fair market value of a used vehicle. (Ex. 5, at 163:19-21.) As explained by Dr. Marais, however, that proposition is contrary to settled authority. (Ex. 1, ¶¶ 27-31.) Each class member will be required to prove that applying the typical negotiation adjustment caused *each* adjusted comparable vehicle's valuation to be less than fair market value which, in turn, caused the valuation of the insured's total-loss vehicle to be less than fair market value. (*Id.* ¶¶ 25-31.) These necessary individualized inquiries destroy commonality. *See Lundquist*, 2020 WL 6158984, at *2; *Curtis*, 2020 WL 2461482, at *2-3. The importance of this individualized inquiry cannot be overstated in light of State Farm's evidence that (1) the fair market value of comparables used by Autosource was *overstated* (Lowell Decl. ¶ 38 & Ex. A), and (2) *most* putative class members did their own research to determine the fair market value of their total-loss vehicle, and *most* agreed with State Farm's valuation. (Ex. 2, ¶¶ 24-30.)

B. Plaintiffs Cannot Prove Damages with Common Evidence.

The same problems plaguing Plaintiffs' purportedly common liability questions doom damages as well. On that issue, Plaintiffs say only this: "State Farm Mutual's claims handling practice and procedure … generates a set of common questions including … the measure and amounts of damages." (Dkt. No. 71, at 16-17.) But just as the fundamental liability question whether each class member was *actually underpaid* would require an in-depth analysis of his or her total-loss vehicle, so too would any damages calculation to determine that delta.

Such a calculation will require an analysis of each class member's total-loss vehicle to determine its "true" actual cash value and the difference (if any) between what State Farm paid and what Plaintiffs allege State Farm should have paid. *See Capitol Pros, Inc. v. Vadata Inc.*,

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2018 WL 3390457, at *2 (W.D. Wash. July 12, 2018) (the proper measure of damages for a breach of contract claim is the "benefit of the bargain," i.e., the sum of money that will put an injured party in as good a position had the contract been performed); Wash. Rev. Code § 19.86.090 ("actual damages" recoverable); *Brotherson v. Pro. Basketball Club, L.L.C.*, 604 F. Supp. 2d 1276, 1292 (W.D. Wash. 2009) (under the CPA, "the defendant 'may set off the monetary value of his part performance against the aggrieved party's claim'" (quoting *Golob v. George S. May Int'l Co.*, 468 P.2d 707, 712 (Wash. Ct. App. 1970))); (*see also* Ex. 6, at 120:12-121:9 (Mr. Kelley is seeking as damages "what I got paid versus what I think I should have gotten paid")).

Plaintiffs offer no evidence or explanation regarding how they intend to calculate those damages class-wide. Instead, Plaintiffs propose refunding the amount of the typical negotiation adjustment to every putative class member who "received" an Autosource Report, regardless of whether the typical negotiation adjustment was even taken. (Dkt. No. 72-1, ¶¶ 4, 15; *see also* Exs. 20-24.) But that "refund" methodology does not calculate Plaintiffs' damages consistent with Plaintiffs' theory of liability (*see infra* Argument § III.A), Washington law, *see Brotherson*, 604 F. Supp. 2d at 1292 (rejecting "refund" damages methodology because it failed to account for the benefits received under the contract), or the insurance policy that State Farm allegedly breached (*see* Graff Decl. ¶ 4 & Ex. A, at 30-31 (requiring State Farm to pay the "actual cash value" of a total-loss vehicle)). Instead, Plaintiffs' "refund" methodology will necessarily result in a windfall to any class member who received "actual cash value," even if a typical negotiation adjustment was taken. (Ex. 1, ¶ 25.) Plaintiffs' methodology, furthermore, applies to any putative class member who "received" an Autosource Report, even if State Farm paid "actual cash value" based on a different methodology that did not take a typical negotiation adjustment, such as a two-dealer quote or an appraisal. That also destroys commonality. *See Lundquist*, 2020 WL 6158984, at *2 (commonality cannot be satisfied when the putative class includes members who were paid based on an appraisal, which is an "entirely different theory of damages").

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II. INDIVIDUAL ISSUES OF LIABILITY AND DAMAGES PREDOMINATE.

Rule 23(b)(3) predominance is even "more demanding" than commonality. *Comcast*, 569 U.S. at 34. Predominance tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036 (2016). It "'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id*. On this issue, Plaintiffs focus solely on whether individualized questions of damages predominate, arguing they do not because "[c]ommon issues as to the amount of underpaid loss … unquestionably predominate here." (Dkt. No. 71, at 21.) Plaintiffs ignore that their liability and damages theories do not align, as well as the many individualized liability issues that will overwhelm and dominate any class trial.

A. Individual Issues of Liability Will Predominate.

1. The issue of whether an "agreed value" was reached will predominate.

Because WAC 391 expressly allows an insurer and insured to reach an "agreed value" based on any methodology, the question whether State Farm's use of Autosource Reports violated some provision of WAC 391 will not resolve the issue of liability class-wide. Instead, an analysis of each individual transaction will be required, to determine whether the parties reached an "agreed value." Washington law renders this issue inherently individualized, and its impact is not theoretical. (*See supra* Argument § I.A.1.) As explained, whether an "agreed value" was reached is an individualized and fact-intensive inquiry, and it will predominate.

2. The issue of whether putative class members received "actual cash value" will predominate.

Similarly, the issue of whether putative class members received "actual cash value" will predominate. Because Washington law defines "actual cash value" to mean "fair market value," State Farm must be permitted to defend this action on the basis that any putative class member was not, in actuality, *underpaid*—that is, s/he received "fair market value" regardless whether a typical negotiation adjustment was applied. To answer the question whether a class member was

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underpaid, a fair market valuation analysis of each total-loss vehicle will be required.

On this same issue, *Lundquist* held that "[i]ndividual issues here predominate over all other issues" because of the necessity for "individual trials for those members of the proposed class who believe that they did not receive an appropriate dollar amount in the insurance settlements." 2020 WL 6158984, at *2. The court in *Leifer* reached the same result in a case also involving valuation reports from CCC. 2010 WL 11579014, at *9; *see also Morgan v. Mass. Homeland Ins. Co.*, 69 N.E.3d 584, 588-89 (Mass. App. Ct. 2017) (affirming the district court's denial of certification where "the beneficial or detrimental effect of the use of the CCC reports in determining even the original offer would depend on each putative class member's particular circumstances"). The same predominance problems exist here.

3. The issue of whether the application of a typical negotiation adjustment was improper *and* caused injury will predominate.

Relatedly, whether Autosource Reports appropriately "weighted" comparable vehicle prices to account for typical negotiation is a highly individualized fact-intensive inquiry that will require an in-depth analysis of each comparable vehicle to determine the difference (if any) between the "weighted" value and the vehicle's actual fair market value. (*See supra* Argument § I.A.3.) This same analysis will be required for each total-loss vehicle as well. These necessary and highly individualized valuation issues will predominate.

4. The issue of whether putative class members actually suffered injury will predominate.

The issues of whether an "agreed value" was reached, whether members of the putative class received "actual cash value," and the appropriateness of any "weighting" speak to a more fundamental predominance problem—whether putative class members suffered a compensable injury. Those who reached an "agreed value" and those who received "actual cash value" did not. *See Nw. Indep. Forest Mfrs.*, 899 P.2d at 9 (damages are an "essential element" of a breach of contract claim); *Marts*, 166 F. Supp. 3d at 1208 (plaintiffs must establish an injury under the CPA). To prove predominance, a plaintiff must present evidence of "a reliable way to ensure that all class members suffered some injury." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292

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F. Supp. 3d 114, 132 (D.D.C. 2017); *see also Tyson Foods, Inc.*, 136 S. Ct. at 1053 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

Here, there is significant evidence that the putative class includes a large percentage of uninjured class members who either reached an "agreed value" or received "actual cash value." (Ex. 2, ¶¶ 24-30; Lowell Decl. ¶ 38 & Ex. A; *see also* Ex. 1, ¶¶ 27-28 (assuming willingness to buy and sell, vehicle "sold" prices equate to "fair market value").) Plaintiffs have offered no evidence to reliably demonstrate that all class members suffered the fact of injury. *See Castillo v. Bank of Am., NA*, 980 F.3d 723, 732 (9th Cir. 2020) (affirming denial of class certification where plaintiff was "unable to provide a common method of proving the fact of injury and any liability"). Indeed, the only evidence that does exist proves the opposite: about 80% of putative class members agree with the final settlement amount. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624 (D.C. Cir. 2018) (reasoning that the presence of a sizeable percentage of uninjured class members (12.7%) "destroy[ed] predominance").

Plaintiffs' proposed class definition compounds the "no injury" problem. Plaintiffs define their putative class to include anyone who "received" an Autosource Report, regardless whether that report contains a typical negotiation adjustment and regardless whether State Farm paid the claim based on a valuation adjusted for typical negotiation. (Dkt. No. 71, at 1-2; Dkt. No. 72-1, ¶¶ 4, 15.) The definition necessarily includes putative class members who suffered no injury or damages, including anyone who was paid based on a valuation ***not*** adjusted for typical negotiation (Lowell Decl. ¶¶ 16, 21; *see also* Exs. 20-24); anyone who was paid based on a different Autosource valuation methodology, such as a two-dealer quote (Ex. 8, at 118:4-119:24); and anyone who was paid based on an appraisal (Graff Decl. ¶ 28). Ms. Ngethpharat provides a concrete example. She was paid $13,948 based on a two-dealer quote that was ***not*** adjusted for typical negotiation. (Ex. 8, at 118:4-119:24.) Ms. Ngethpharat could not have suffered injury or damages simply because she "received" an Autosource Report.

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5. The issue of causation will predominate.

Finally, individualized issues of proximate causation under the CPA will predominate. Under the CPA, "a plaintiff must show … that there's a causal link between the unfair or deceptive act and the injury suffered." *Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.*, 391 P.3d 582, 587 (Wash. Ct. App. 2017). Causation is a question of fact, and the plaintiff must establish that "but for the defendant's affirmative misrepresentation, the plaintiff would not have suffered an injury." *Id.*; *see also Schnall v. AT&T Wireless Servs., Inc.*, 259 P.3d 129, 138-39 (Wash. 2011).

Plaintiffs cannot prove causation on a class-wide basis. In *Kelley v. Microsoft Corp.*, 2011 WL 13353905 (W.D. Wash. May 24, 2011), the plaintiffs brought a putative class action against Microsoft alleging that Microsoft's marketing of its Vista operating system violated the CPA. *Id.* at *1. The court denied class certification, finding "that causation requires a fact-intensive individual inquiry into the motivations of each consumer." *Id.* at *3; *see also Wetzel v. CertainTeed Corp.*, 2019 WL 3976204, at *18 (W.D. Wash. Mar. 25, 2019) (reasoning that "individualized inquiries into both the causation and injury elements of Plaintiffs' CPA claim will overwhelm" any common issues). Similarly here, the only way to determine proximate causation is through an assessment of each class member's claim that State Farm's purported failure to explain the typical negotiation adjustment caused his or her damages. This is especially problematic given that whether a particular State Farm claim handler explained the typical negotiation adjustment will also vary claim to claim and claim handler to claim handler. (*See supra* Background § II.)

B. Individual Issues of Damages Will Predominate.

To determine damages in accordance with Washington law, Plaintiffs must analyze each putative class member's total-loss vehicle to determine its "true" actual cash value (or fair market value) and the difference (if any) between what State Farm paid and what Plaintiffs allege State Farm should have paid. That calculation will require an in-depth valuation process for each total-loss vehicle. Plaintiffs attempt to side-step this issue by simply *assuming* that

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refunding the amount of the typical negotiation adjustment will equal the "fair market value" of the total-loss vehicle. That assumption is incorrect, however, both as a matter of Washington law, *DePhelps*, 65 P.3d at 1240, and basic economics. (Ex. 1, ¶¶ 21-31; *see also* Herzog Decl., Ex. 9, Torelli Dep. 78:18-24.) WAC 391 gives insurers the discretion to choose which valuation method to use, including appraisal. (*See also* Ex. 9, at 78:10-17 ("[T]here may be multiple ways to come up with a compliant measure here.").) And because every putative class member's policy includes an appraisal provision (Graff Decl. ¶ 5 & Ex. A, at 31), State Farm can demand appraisal to determine "actual cash value" for each allegedly undervalued total-loss vehicle. *See Walker v. Allstate Prop. & Cas. Ins. Co.*, 2020 WL 1235626, at *4 (N.D. Ala. Mar. 10, 2020) ("[U]nless and until an appraisal is completed, it is impossible for the parties or the court to know whether Plaintiff's claim was, in fact, undervalued."). Doing so will necessarily devolve into thousands of fact-intensive mini trials, the results of which will vary appraisal-to-appraisal and appraiser-to-appraiser. (Ex. 5, at 46:14-47:2.) But regardless which methodology State Farm invokes, the result will be the same—highly individualized valuation determinations for each putative class member to determine whether he or she was *actually underpaid*.

III. PLAINTIFFS HAVE NO EVIDENCE OF CLASS-WIDE DAMAGES.

Plaintiffs' Dr. Torelli proposes to refund some or all of the typical negotiation adjustment to every class member even if a typical negotiation adjustment was not taken. (Dkt. No. 72-1, ¶¶ 4, 15.) This damages methodology fails for the reasons explained below.

A. Plaintiffs' Damages Methodology Does Not Fit Their Theory of Liability.

Under *Comcast*, a "model purporting to serve as evidence of damages in [a] class action must" be "sound" and measure "only those damages attributable" to Plaintiffs' theory of liability. 569 U.S. at 34. If the model "does not even attempt to do that," then "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 35. Plaintiffs' "refund" methodology flunks *Comcast*.

First, Plaintiffs' damages methodology does not measure damages consistent with their liability theory. To prove damages for breach of contract, Plaintiffs must establish damages that

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"put the injured party in as good a position as that party would have been in had the contract been performed." *Capitol Pros, Inc.*, 2018 WL 3390457, at *2. Here, the contract obligated State Farm to pay the "actual cash value" of a total-loss vehicle (Graff Decl. ¶ 4), so the proper measure of damages is the difference (if any) between the amount State Farm paid and the "true" actual cash value of the total-loss vehicle. So straightforward is the proposition that even Mr. Jama and his attorneys agree. (*Jama*, Dkt. No. 37, at 11.) That same measurement applies to Plaintiffs' damages claim under the CPA, given that "the defendant 'may set off the monetary value of his part performance against the aggrieved party's claim.'" *Brotherson*, 604 F. Supp. 2d at 1295. Plaintiffs' "refund" methodology does not measure those damages. Instead, it will necessarily overcompensate or undercompensate putative class members depending on the "true" actual cash value of each total-loss vehicle. (*See* Ex. 1, ¶ 25; *see also* Ex. 9, at 102:21-105:5, 134:7-136:11.) That is impermissible under *Comcast*. *See Lundquist*, 2020 WL 6158984, at *2 (concluding that "damages are not measureable across the entire class, as *Comcast* requires" because whether an adjustment affected "the final actual cash value" is an individualized issue); *accord Bess v. Ocwen Loan Servicing LLC*, 334 F.R.D. 432, 440 (W.D. Wash. 2020).

Second, Plaintiffs must show "that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017). Here, the allegedly "injurious conduct" is State Farm's use of the typical negotiation adjustment. Yet the putative class includes anyone who "received" an Autosource Report, without regard to whether a typical negotiation adjustment was taken. (Dkt. No. 72-1, ¶¶ 4, 15.) So, for a putative class member like Ms. Ngethpharat, who "received" an Autosource Report but was paid on a two-dealer quote (*see supra* Background § III), Dr. Torelli would apply the dealer quote as an offset (Ex. 9, at 128:7-129:14), meaning she would receive damages attributable to an alleged injurious course of conduct that did not apply to her. *Comcast* prohibits such a model. *See Comcast*, 569 U.S. at 34; *Castillo v. Bank of Am., NA*, 980 F.3d at 730 ("However, '[i]f the plaintiffs cannot prove that damages resulted from the defendant's conduct, then the plaintiffs cannot establish predominance.'").

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B. Plaintiffs Cannot Use "Aggregate" Damages Here.

Dr. Torelli proposes an "aggregate" damages model to calculate class-wide damages, meaning "one grand total number." (Ex. 9, at 105:15-23.) To calculate "aggregate" damages, Dr. Torelli proposes either (i) to calculate an average deduction from a "representative" sample of claim files and multiply that average by the number of class members; or (ii) to calculate a "flat" percentage deduction based on Autosource "price bands" and apply that deduction to each class member. (Dkt. No. 72-1, ¶¶ 17, 21; Ex. 9, at 102:21-105:5, 132:4-136:11.) Three fatal flaws exist.

First, aggregate damages may be proper where the "total damage caused by the defendant is independent of the number and identity of people harmed." *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 55 (1st Cir. 2018). But where, as here, the "one grand total number" of damages depends on whether a putative class member suffered injury or damages and the size of the putative class, *see Lundquist*, 2020 WL 6158984, at *2 ("liability and damages are inextricably bound together"), Plaintiffs may not simply aggregate "the sum of damages suffered by a number of individuals" and then propose reducing "the amount of the possible total damage" for any putative class member who suffered no injury or damages, or is found to fall outside the class. *See In re Asacol Antitrust Litig.*, 907 F.3d at 55. Such a methodology runs afoul of "the rules of evidence and procedure, the Seventh Amendment, [and] the dictate of the Rules Enabling Act," *id.* at 53, which guarantees State Farm "the opportunity to challenge each class member's proof that the defendant is liable to that class member." *Id.* at 55; *Dukes*, 564 U.S. at 366-67.

Yet aggregating damages and adjusting for "statistical observations of tendencies and distributions," *see In re Asacol Antitrust Litig.*, 907 F.3d at 55-56, is precisely what Plaintiffs propose. Dr. Torelli admitted he would include putative class members who suffered "zero" damages in his "aggregate" damages calculation (Ex. 9, at 122:3-18), meaning not only would uninjured putative class members receive damages (*id.* at 130:21-23), they would do so to the detriment of those who may have actually suffered them. (*Id.* at 129:15-130:1 (opining that

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putative class members with "zero" damages would "lower[] the sample mean," which "is going to be extrapolated [to] class-wide damages").) And Plaintiffs have not even attempted to show how to calculate class-wide damages "in a manner that protects the defendant's rights" to challenge them individually. *See In re Asacol Antitrust Litig.*, 907 F.3d at 55; Ex. 9, at 131:21-24; *see also id.* at 110:8-12; 130:7-15 (calling individual damages calculations "premature").)

Put simply, settled authority prohibits certification of a Rule 23(b)(3) damages class based on a model that generates aggregate damages different from and in excess of the sum of damages that would be provable by each class member if the case were tried on an individual basis. *See In re Asacol Antitrust Litig.*, 907 F.3d at 51-54 (rejecting damages model that would offer defendant "no meaningful opportunity to contest" injury on an individual basis); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) (aggregate damages calculation "that does not accurately reflect the number of plaintiffs actually injured by defendants" violates the Rules Enabling Act); *see also Sitton v. State Farm Mut. Auto. Ins. Co.*, 63 P.3d 198, 206 (Wash. Ct. App. 2003) ("aggregate" damages violated right to advance individual defenses).

Second, even if aggregate damages were appropriate in a case such as this, Plaintiffs cannot use an aggregate damages methodology where they cannot accurately identify putative class members or prove actual class size. (*See infra* Argument § IV.A). Plaintiffs propose an abstract "sampling" approach as an apparent cure-all to these issues, but Dr. Torelli could not explain how that approach would work practically (Ex. 9, at 148:11-150:2), nor could he identify a single instance where he had previously used such an approach in a case like this. (*Id.* at 150:3-153:4.)

Third, Plaintiffs may not use "representative" evidence to establish liability or damages because they could not use such evidence in an individual action. *See Tyson Foods, Inc.*, 136 S. Ct. at 1046-47 ("representative evidence" is allowed only if "each class member could have relied on that sample to establish liability if he or she had brought an individual action"). It is telling that Plaintiffs cite only inapposite employment class action cases as support for their

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"representative" evidence (*see* Dkt. No. 71, at 22), given that cases outside that context routinely reject the approach. *See, e.g.*, *Dzielak v. Whirlpool Corp.*, 2017 WL 6513347, at *11 (D.N.J. Dec. 20, 2017) (consumer class action plaintiffs' attempts to use representative evidence violated Rules Enabling Act). Here, each individual plaintiff must prove the difference (if any) between what State Farm paid and what s/he alleges State Farm should have paid. Plaintiffs have produced no such evidence (*see supra* Argument § III.A), nor can they manufacture common evidence by using "[a] sample set of the class members" "to arrive at the entire class recovery—without further individualized proceedings." *See Dukes*, 564 U.S. at 367. Such a "Trial by Formula" is prohibited by the Rules Enabling Act. *Id.*

IV. PLAINTIFFS HAVE NOT SHOWN A CLASS ACTION IS SUPERIOR.

A class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A class action is not superior here because it is not manageable, and other, better, alternatives exist.

A. A Class Action Is Not Manageable.

On top of other intractable manageability problems, the proposed class definition renders identification of class members administratively infeasible. *See Wetzel*, 2019 WL 3976204, at *19 (administrative feasibility of identifying class members "is relevant to assessing manageability"). Plaintiffs' putative class includes anyone who "received" an Autosource Report "which took a deduction/adjustment for 'typical negotiation.'" (Dkt. No. 71, at 2.) Plaintiffs then ***exclude*** anyone "where the insured submitted written evidence supporting a different valuation" and was paid on that evidence. (*Id.*) By its plain terms, any insured who submitted "written evidence" regarding mileage, options, equipment, or condition and received an adjusted amount is excluded from the class, as are insureds who submitted written evidence and received the amount they sought in appraisal. Identifying such insureds will require a review of each claim file, and Plaintiffs have not proposed any method to identify those excluded. (Ex. 9, at 147:24-150:2.) Because putative class members cannot be identified in an administratively feasible manner, Plaintiffs have not established superiority. *Morrison v. Esurance Ins. Co.*, 2020 WL

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583824, at *7 (W.D. Wash. Feb. 6, 2020) ("Determining who is in the class would likely require miniature trials"); *Wetzel*, 2019 WL 3976204, at *19-21 (denying certification on superiority grounds due to administrative infeasibility of identifying class members); *Cover v. Windsor Surry Co.*, 2017 WL 9837932, at *9 (N.D. Cal. July 24, 2017) (same).

B. The WAC Provides Two Superior Alternatives.

The "superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution." *Berry v. Transdev Servs., Inc.*, 2019 WL 117997, at *7 (W.D. Wash. Jan. 7, 2019). Two exist here.

First, WAC 391 expressly allows an insured to invoke appraisal to determine the actual cash value of the total-loss vehicle. In fact, Plaintiffs' Mr. Harber advertises that appraisal is the superior remedy because it is a "great method" that is "faster than litigation" and is "certainly less expensive than litigation." *See* https://youtu.be/VestCpngnLw?t=12m50s. For Mr. Kelley, for example, who believes he is entitled to $6,622.41 in damages (Herzog Decl., Ex. 16), appraisal undoubtedly would be the superior remedy, given that he apparently is willing to forgo thousands of dollars of damages to be "part of this class" (Ex. 6, at 120:23-121:9, 142:18-143:3); *see Wetzel*, 2019 WL 3976204, at *21 ("the availability of Washington's mandatory arbitration program to class members" is a factor precluding superiority).

Second, WAC 391(6) requires an insurer to reopen a claim if the insured is unable to purchase a replacement vehicle with the total-loss settlement proceeds. Once reopened, the insurer must (i) locate a comparable vehicle for the previously agreed settlement amount; (ii) pay the insured the difference between the agreed settlement amount and the comparable vehicle; (iii) purchase the comparable vehicle for the insured; or (iv) invoke appraisal. *Id.* This alternative, in light of the overwhelming unmanageability of this action, also precludes superiority. *See Morrison*, 2020 WL 583824, at *7; *Wetzel*, 2019 WL 3976204, at *19-21; *Cover*, 2017 WL 9837932, at *9.

CONCLUSION

The Court should deny Plaintiffs' Motion for Class Certification.

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Dated: March 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I certify that on March 26, 2021, I caused the foregoing **Defendant State Farm Mutual Automobile Insurance Company's Opposition to Plaintiffs' Motion for Class Certification** to be electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

- **Stephen M. Hansen**
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s/ Matthew Munson