# APPENDIX

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## APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| FAYSAL A. JAMA, on behalf of himself and all other similarly situated; JAMES KELLEY; ANYSA NGETHPHARAT,<br>*Plaintiffs-Appellants*,<br>v.<br>STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; STATE FARM FIRE AND CASUALTY COMPANY,<br>*Defendants-Appellees*. | No. 22-35449<br>D.C. Nos. 2:20-cv-00454-MJP 2:20-cv-00652-MJP<br>OPINION |

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted June 13, 2023
Portland, Oregon

Filed August 19, 2024

Before: Johnnie B. Rawlinson and Jennifer Sung, Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Rakoff;
Dissent by Judge Rawlinson

* The Honorable Jed. S Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

## SUMMARY**

### Washington Insurance Law

In a putative class action brought under Washington law by drivers who alleged that their insurers failed to pay them the actual cash value of their cars after their cars were totaled in accidents, the panel (1) reversed the district court's order decertifying the negotiation class, (2) affirmed the order decertifying the condition class, (3) vacated the district court's entry of summary judgment against each named plaintiff, and (4) remanded for the district court to analyze whether plaintiffs have introduced sufficient evidence of injury.

Plaintiffs contended that their insurers applied two putatively unlawful discounts in calculating their vehicles' actual cash value: (1) a negotiation discount meant to capture the typical amount buyers may negotiate down the price of a replacement car, and (2) a condition discount meant to capture the typical amount by which an insured's 3 car's actual condition might be worse than the condition of cars of comparable make and age on sale at dealers. The district court initially certified two classes: a negotiation class and a condition class. However, following this court's decision in *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022), the district court decertified each class and entered summary judgment against plaintiffs based on their putative failure to demonstrate injury.

The panel held that the district court abused its discretion in decertifying the negotiation class

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

because plaintiffs established that injury could be calculated on a class-wide basis by adding back the putatively unlawful negotiation adjustment to determine the value each class member should have received.

The panel held that the district court did not abuse its discretion in decertifying the condition class because measuring each class member's injury required an individualized comparison of the putatively unlawful condition adjustment that their insurers actually applied and the hypothetical condition adjustment that their insurers could have lawfully applied.

The panel reversed the district court's summary judgment in favor of insurers as to the named plaintiffs' individual claims, and remanded for the district court to evaluate anew whether the named plaintiffs have adduced sufficient evidence of injury consistent with this opinion.

Finally, the panel rejected the insurers' alternative argument that Article III was a barrier to plaintiffs' suit.

Dissenting, Judge Rawlinson would hold that the majority opinion directly conflicts with *Lara*, and creates an unnecessary circuit split.

## COUNSEL

Scott P. Nealey (argued), Law Office of Scott P. Nealey, San Francisco, California; Mark A. Trivett, Badgley Mullins Turner PLLC, Shoreline, Washington; Daniel R. Whitmore, Law Office of Daniel Whitmore, Tukwila, Washington; Stephen M. Hansen, Law Offices of Stephen M. Hansen PS, Tacoma, Washington; for Plaintiffs-Appellants.

Bradley J. Hamburger (argued), Daniel R. Adler, and Matt A. Getz, Gibson Dunn & Crutcher LLP, Los Angeles, California and Kristin A. Linsley, Gibson Dunn & Crutcher LLP, San Francisco, California; Peter W. Herzog III, Wheeler Trigg O'Donnell LLP, St. Louis, Missouri; Eric L. Robertson, Wheeler Trigg O'Donnell LLP, Denver, Colorado; Daniel N. Nightingale, Yetter Coleman LLP, Houston, Texas; for Defendants-Appellees.

## OPINION

RAKOFF, District Judge:

Plaintiffs represent a class of drivers whose cars were "totaled" in accidents such that repair is impracticable and replacement necessary. Under Washington law, their insurers, State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, "State Farm")[1] must pay them the "actual cash value" of their cars. Plaintiffs contend that State Farm did not do so, because in calculating their vehicles' actual cash value, State Farm applied two putatively unlawful discounts: (1) a "negotiation" discount meant to capture the typical amount buyers may negotiate down the price of a replacement car, and (2) a "condition" discount meant to capture the typical amount by which an insured's car's actual condition might be worse than the condition of cars of comparable make and age on sale at dealers. Plaintiffs contend that Washington law entirely forbids the negotiation discount and does not allow State Farm to apply the condition discount in the manner it did.

The district court initially agreed with Plaintiffs as to their theories of liability and certified two classes of similarly situated insureds: a "negotiation" class and a "condition" class. Following our decision in *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022), however, the district court decertified each class and entered summary judgment against the named Plaintiffs based on their putative failure to demonstrate injury. Because we conclude

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[1] Defendant State Farm Fire and Casualty Company is a wholly owned subsidiary of Defendant State Farm Mutual Automobile Insurance Company.

that the class based on the negotiation discount can prove injury on a class-wide basis, we reverse the district court's decision decertifying the negotiation class. However, because the condition class here is in all relevant aspects identical to the one in *Lara*, we affirm the district court's decision to decertify the condition class.

## I. BACKGROUND

This appeal concerns putative class actions against State Farm based on how it compensates vehicle owners following crashes where the vehicles are "totaled"—meaning they are not reparable as a practical matter and need to be entirely replaced. Under the State of Washington's insurance regulations, an insurer owes an insured the "actual cash value" of a totaled car. Wash. Admin. Code § 284-30-391. "Actual cash value" is defined as "the fair market value of the loss vehicle immediately prior to the loss." *Id*. § 284-30320(1). Washington's insurance regulations set forth various ways in which an insurer may go about ascertaining actual cash value, including by basing it on data for comparable vehicles in the local area, obtaining quotes from licensed dealers, analyzing data of advertised comparable vehicles, and so on. *Id*. § 284-30-391(2). While these regulations do not themselves create a direct cause of action, Plaintiffs contend they are incorporated into their insurance contracts and that a violation of the insurance regulations also constitutes a violation of the Washington Consumer Protection Act ("WCPA"), pursuant to which they are authorized to sue. *See Lara*, 25 F.4th at 1136.

As relevant here, after an insured's vehicle is totaled, the claims process ordinarily begins with an inspection of the car by a State Farm estimator.

Following this inspection, something called an "Autosource" report is prepared by a third-party vendor called Autodex. Such reports are used in over 99% of cases to prepare an initial valuation of the totaled car. The Autosource reports survey databases of the advertised price of comparable makes and models, and then make various "adjustments." The relevant adjustments include: (1) a "condition" adjustment, and (2) a "negotiation" adjustment. The condition adjustment assumes that the typical car in use is in worse condition and would sell for less than comparable cars advertised by dealers and reduces the advertised price by that difference. The negotiation adjustment assumes that the typical customer negotiates with the dealer and buys a car for less than the advertised price and is designed to capture that price difference.

Following preparation of the Autosource report, a State Farm claims handler reviews it to verify, among other things, the car's mileage, equipment, and condition. The handler then contacts the insured to discuss the preliminary valuation; if the insured can provide new information regarding the car's value, that may feed back into the valuation. If anything other than the Autosource report is used for valuation, that is documented and management approval is sought. If the parties cannot reach agreement as to the valuation, they instead pursue a process involving independent appraisers.

In both of the cases consolidated and under review here, Plaintiffs challenge the negotiation adjustment. They argue that Washington law specifies which price components insurers may consider when determining "actual cash value," and that negotiation discounts are not among them. State Farm moved to dismiss, but the district court agreed with Plaintiffs that

Washington law does not allow insurers to make negotiation adjustments and that Plaintiffs had therefore stated claims for both breach-of-contract and unfair trade practices under the WCPA.

In one of the cases, plaintiff Faysal A. Jama also challenges the condition adjustment. Unlike negotiation adjustments, Washington law expressly allows insurers to make "appropriate" condition adjustments. *See* Wash. Admin. Code § 284-30-391(4)(b), but Jama claims that State Farm's condition adjustments are inappropriate because they lack sufficient empirical foundation. The district court denied State Farm's motion to dismiss the condition adjustment claim, concluding that Jama's allegations that State Farm had "provided no basis on which to verify whether the perceived condition deduction was 'appropriate' were sufficient to show a violation of Section 391(4)(b) and state a breach of contract claim.

The district court then certified two classes. For both cases, it certified a "negotiation class," consisting of: (1) Washington-based, State Farm insured car-owners whose vehicles were totaled, (2) "where [their] claims for total loss were evaluated by State Farm using the Autosource valuation system which took a deduction/adjustment for 'typical negotiation,' " (3) "where such claims were settled and paid using the amount determined in the Autosource valuation which took a deduction/adjustment for 'typical negotiation,' " and (4) "where such claims were paid . . . without the parties . . . using[ ] an alternative appraisal process." And, in *Jama*, the court certified a "condition" class consisting of (1) Washington-based, State Farm insured car-owners whose vehicles were totaled, (2) where loss claims were evaluated "using the Autosource valuation system which took deductions for the

condition of the loss vehicle," (3) where such claims were later paid using an amount determined by Autosource that "took deductions for the condition of the loss vehicle," and (4) "where such claims were paid . . . without the parties . . . using[ ] an alternative appraisal process."

Although the Plaintiffs proposed broader classes that would have included anyone who simply received an Autosource report containing one or both of the disputed adjustments, the district court reasoned that such classes would include persons not actually injured by such adjustments. (This might happen if, for instance, the parties negotiated a different payment from that laid out in the Autosource report, or if they pursued the appraisal route.) It therefore narrowed the proposed classes to "include only those paid the value determined in an Autosource Report with the [relevant] discount applied." This ensured that the value of any unlawful adjustment could be determined on a class-wide basis.

Subsequently, this Court decided *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022) where we held that a district court faced with what was in some respects a similar putative class action—but which focused only on disputed "condition" adjustments—did not abuse its discretion in declining to certify a class. *Id.* at 1138-40. In *Lara*, the valuation process of insurer Liberty Mutual ("Liberty") involved, as here, obtain[ing] a "report about the value of 'comparable vehicles,' " following an inspection. *Id.* at 1136. Liberty worked with CCC Intelligent Solutions ("CCC") to develop these valuation reports. *Id.* And as in this case, that report "us[ed] a database of cars at dealerships all around the country," "start[ing] with the value of comparable cars—

other cars that are a similar make and model, are in similar condition, and have similar features," before applying various adjustments. *Id*. Again, as in this case, one such adjustment—applied uniformly across totaled cars—was a "condition adjustment" that reduced the estimated value of a totaled car relative to comparable cars sold at dealerships on the theory that comparable cars sold at dealerships "are usually in pretty good condition," and therefore likely worth more than an insured's totaled vehicle even if in most respects comparable. *Id*. at 1136-37. In *Lara*, "[p]laintiffs' theory of the case [w]as that Liberty violate[d] Washington's insurance regulations by not itemizing or explaining this downward 'condition adjustment,' which makes it impossible to verify." *Id*. at 1137.

The *Lara* plaintiffs defined their proposed class to include any Washington-based driver whose car was totaled and who received at some point during Liberty's claims evaluation process a valuation report including the putatively unlawful (because it was unitemized) condition adjustment. *Id*. at 1137, 1139. The proposed class included plaintiffs whose cars were valued using the CCC report with no further adjustments, plaintiffs for whom the CCC report provided a starting point for a higher negotiated offer, and plaintiffs who availed themselves of an alternative appraisal process. *Id*. Given this lack of uniformity, the district court declined to certify a proposed damages class "because it held both that individual questions predominated over common questions and that individualized trials were superior to a class action." *Id*. at 1136. On appeal, we concluded that "[n]either holding was an abuse of discretion" and affirmed. *Id*.

In *Lara* we recognized that "[w]hether Liberty and CCC's condition adjustment violates the Washington

state regulations" was a question common to the class. *Id*. at 1138. But, answering that common question "require[d] an individualized determination for each plaintiff" because Washington's insurance regulations did "not provide a private cause of action," such as would allow plaintiffs to prevail on any element of their claim merely by showing the illegality of Liberty's non-itemized conditions adjustment. *Id*. at 1138-40. Plaintiffs' actual causes of action for breach of contract and unfair business practices under the WCPA each included an element of injury. *Id*. at 1139. This meant each plaintiff had to show that they received less money than they were owed; in other words, that they received less than the vehicle's pre-crash "actual cash value," which in turn was defined as its "fair market value." *Id*. at 1136 (quoting Wash. Admin. Code § 284-30-320(1)).

First, we held that the class proposed in that case might easily include class members who were not actually injured by the un-itemized adjustments to vehicle value in CCC reports.[2] *Id*. at 1139. For example, we observed such a class might include: (1) persons for whom the condition adjustment was ultimately revised upward, (2) persons with whom Liberty negotiated a different amount, and (3) persons who challenged Liberty's valuation and ultimately received an appraisal to determine value. None of these persons would have been obviously injured by the inclusion of the disputed adjustment. *Id*. Second, we noted that

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[2] As explained *supra* at 9, the district court in this case avoided this problem by narrowing the class to include only those who were paid the value assessed in the Autosource report, less the negotiation discount. Individuals who negotiated a higher payment than the Autosource valuation and individuals who used an alternative appraisal process were excluded from the modified class.

even those individuals whose claims were paid based on CCC reports containing the disputed condition adjustments might not have been injured if the adjustment accurately approximated or overestimated the condition of their vehicles. *Id*. That might happen, for instance, if an individual's car was in worse condition than comparable cars considered by CCC, such that Liberty, consistent with Washington law, could have applied an even greater adjustment if it had been appropriately itemized. Because such questions would need to be resolved individually, this Court held that the district court did not err in declining to certify a class. *Id*.

Following *Lara*, the district court in this case decertified both the negotiation and condition classes and granted summary judgment to State Farm on the individual Plaintiffs' claims. It reasoned that, under *Lara*, the mere fact of an illegal adjustment under Washington's insurance regulations did not suffice to establish injury. Because an insured might ultimately be paid their vehicle's actual cash value or more notwithstanding an unlawful adjustment, the district court found that the Plaintiffs could not prove injury on a class-wide basis by relying on class members' car value as calculated in the Autosource reports less the amount of the challenged negotiation or condition adjustments. And the Court went further, reasoning that "[t]he Ninth Circuit's decision in *Lara* makes clear that Plaintiffs have not provided sufficient evidence of injury to sustain their claims and that they lack standing," and that accordingly *"Lara* compels summary judgment in State Farm's favor."

This appeal followed.

## II. ANALYSIS

We have jurisdiction under 28 U.S.C. §§ 1291 and 1294. The district court's decision to decertify a class is reviewed for abuse of discretion. *Lara*, 25 F.4th at 1138. However, because courts lack "discretion to get the law wrong," any order granting or denying certification based on a legal error necessarily involves an abuse of discretion. *Id*. (citing *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001)). We review the district court's entry of summary judgment de novo. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

Regarding the class decertifications, we conclude that the district court abused its discretion in decertifying the negotiation class. For this class, Plaintiffs established that injury could be calculated on a class-wide basis by adding back the putatively unlawful negotiation adjustment to determine the value each class member should have received. However, we affirm the district court's decertification of the condition class, since no one disputes that State Farm *could* have applied a lawful condition adjustment to each member of that class. Accordingly, it was not an abuse of discretion to conclude that measuring each class member's injury requires an individualized comparison of the putatively unlawful condition adjustment that State Farm actually applied and the hypothetical condition adjustment that State Farm could have lawfully applied.

We also reverse the district court's grant of summary judgment in State Farm's favor as to all of the named Plaintiffs' individual claims. We hold that nothing in *Lara* prevents Plaintiffs from relying on the Autosource reports as evidence of injury. We do not decide whether Plaintiffs have presented sufficient evidence

of injury to survive summary judgment. Instead, we remand that question to the district court.

We discuss each conclusion below.

## A. The district court's decertification orders

### 1. The Negotiation Class

The district court made an error of law by assuming *Lara* required decertification of the negotiation class despite (1) material differences between the negotiation class definition presented here and the condition class definition presented in *Lara*, and (2) material differences between the negotiation claim presented here and the condition claim presented in *Lara*.

In *Lara*, we held that common proof that an insurer unlawfully applied a standardized adjustment for the condition of a totaled vehicle in violation of Washington regulations would not suffice to establish class-wide injury. This was so for two reasons. *First*, the proposed class in *Lara* included any insured for whom such an adjustment was used in the insurer's initial valuation report, even if that adjustment was not ultimately reflected in the insurer's final payout. For instance, while the disputed condition adjustment in *Lara* involved a uniform *downward* adjustment to Liberty's estimate of value, that adjustment merely provided a starting place. Liberty and its contractee responsible for preparing the reports, CCC, "also look[ed] at the actual pre-accident condition of the totaled car," such that, "[i]f [the car] was in great condition, then CCC reverse[d] the negative adjustment and sometimes even applie[d] a positive adjustment." *Id.* at 1137. Because of this process, the proposed class of all drivers whose valuation process began with a report including the disputed condition adjustment would

"include [ ] plaintiff[s] for whom Liberty used the CCC report with the disputed condition adjustment but ultimately gave a higher offer, either because of an upward adjustment or just as part of negotiations." *Id.* at 1139. Further, since insureds who challenged Liberty's valuation could opt instead into a process for having their car appraised, the proposed class would "also include [ ] plaintiff[s] who at first received the CCC report [with the challenged adjustment] but whose car was valued with an appraisal." *Id.* In other words, the class proposed in *Lara* would have included an unknown number of class members whose actual payout was untethered from the putatively unlawful adjustment, precluding common proof that all class members were injured by that adjustment.

Here, however, the district court, well before *Lara*, anticipated and solved this problem through its definition of the negotiation class. The district court rejected Plaintiffs' proposed class[3] precisely because such class would "include[ ] insureds who were not necessarily paid the amount determined in an Autosource Report with the typical negotiation discount applied" and who would therefore "not have injuries directly traceable to the negotiation discount and resolution of the legality of the deduction would not necessarily resolve their claims." But "[r]ather than deny class certification" on this basis, the district court "revise[d] the class definition to include only those [who were] paid the value determined in an Autosource report with the negotiation discount applied." On this basis, the district court declined to appoint one of the named plaintiffs, Ngethpharat, as a class representative because

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[3] Like the class proposed in *Lara*, Plaintiffs' proposed class would have included any insured whose initial valuation report included one of the disputed adjustments.

her payout was in fact not based on her initial Autosource report including the disputed adjustment. This narrowing of the proposed class sufficed by itself to prevent many of the situations we discussed at length in *Lara* where class members might not have been injured by the putatively unlawful adjustment.

*Second*, *Lara* anticipated that even as to "a plaintiff whose car was valued using the CCC report with the disputed condition adjustment, and for whom Liberty used CCC's estimate without making any further adjustments . . . the district court would have to look into the actual value of the car, to see if there was an injury." *Id*. In *Lara*, class members for whom the disputed condition adjustment was too big (because their car's condition was better than CCC reported) were injured, but class members for whom the disputed condition adjustment was correct or too small (because their car's condition was as bad or worse than CCC reported) were not injured, and there was no way to determine whether a class member was injured on a class-wide basis.

Here, the district court took the *Lara* court's language regarding the condition adjustment and, assuming it applied equally to the negotiation adjustment, concluded that its narrowing of Plaintiffs' class definitions was insufficient to ensure that injury could be proved on a class-wide basis for the negotiation class. The district court reasoned that *Lara* required some additional individualized assessment of injury beyond the showing that an insured's payout was based on an unlawful adjustment. In so holding, the district court ignored the nature of the putatively unlawful condition adjustment at issue in *Lara* and how it differs critically from the negotiation adjustment at issue here: in essence, the parties agree that Washington law allows

a condition adjustment; the parties dispute only whether State Farm calculates the condition adjustment lawfully. But Plaintiffs contend that Washington law flatly prohibits *any* negotiation adjustment; and if Plaintiffs are correct about that legal issue, then each Plaintiff suffered damages equal to the amount of the negotiation adjustment that State Farm made. As explained further below, that difference between the condition and negotiation claims dictates a different outcome for the negotiation class.

As described above, Washington law requires insurers to pay the owners of totaled vehicles their vehicles' "actual cash value," defined as "the fair market value of the loss vehicle immediately prior to the loss." Wash. Admin. Code § 284-30-320(1). But Washington law does not leave it at that. It also tells insurers in some detail how to estimate vehicles' "actual cash" or "fair market value." For example, insurers may do so by: (1) obtaining quotes for a similar vehicle from multiple local licensed dealers, (2) averaging locally advertised prices of comparable vehicles, or (3) relying on "a computerized source to establish a statistically valid actual cash value" based on data sources meeting certain criteria. *Id*. § 284-30-391(2). Washington law further requires insurers to "[b]ase all offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability." *Id*. § 284-30-391(4)(b).

There is, therefore, no dispute that insurers may adjust an estimate based on comparable vehicles' value to take into account the totaled vehicle's pre-crash value. In fact, as just described, Washington's

regulations affirmatively contemplate that insurers will do precisely this. *Id*. (allowing "appropriate deductions or additions," where "itemized and verifiable," based on, among other things, the loss vehicle's *"condition"* (emphasis added)). Plaintiffs' theory in *Lara* was that Liberty's standardized downward condition adjustment "violate[d] Washington's insurance regulations [because it was] not itemiz[ed] or explain[ed] . . . which ma[de] it impossible to verify." 25 F.4th at 1137. No one in *Lara* disputed that Liberty *could* lawfully have applied a properly itemized and verifiable condition adjustment to calculate putative class members' actual cash value. Thus, there was no way to know whether any individual putative class member was injured by the standardized and unitemized adjustment without individually inquiring into whether the adjustment *exceeded* whatever condition adjustment Liberty could lawfully have applied. Even for those class members "whose car[s] w[ere] valued using the CCC report with the disputed condition adjustment, and for whom Liberty used CCC's estimate without making any further adjustments . . . the district court would have [had] to look into the actual value of the car, to see if there was an injury." *Id*. at 1139.

Here, however, Plaintiffs have advanced an entirely different theory with respect to the *negotiation* class. As to that class, their theory is not that State Farm failed to follow the correct procedure for making permissible adjustments, but rather that Washington law does not permit State Farm to apply a discount for typical negotiation *at all*. *See* Wash. Admin. Code § 284-30-391(4)(b). The district court accepted this argument, holding that Washington law permits insurers to apply only those deductions explicitly laid out in Section 391(4)(b) and no others. State Farm has not

challenged that holding here. Accordingly, Plaintiffs' challenge to the negotiation class here is materially distinguishable from the challenge in *Lara*: A class member in *Lara* might have been subject to the challenged condition deduction but been uninjured by it because a greater or equal condition addition could *also* have been lawfully applied. This would lead a class member to receive the actual cash value of their vehicle or more. All members of the negotiation class[4] in this case, however, received less than they were owed in the exact amount of the impermissible negotiation deduction. As to the proposed negotiation class in this case, we therefore conclude that class members could measure their injuries on a class-wide basis by adding back to the value of their vehicles as calculated in the Autosource reports the amount of the unlawful negotiation discount.[5]

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[4] As explained *ante* at 9, the district court narrowed the class here to include only those who were paid the value in the Autosource report with the unlawful negotiation deduction.

[5] The dissent incorrectly claims our decision today creates a circuit split. *See Dissenting Opinion*, at pp. 33-35. The Fifth Circuit decision that the dissent cites, *Sampson v. United Services Automobile Association*., 83 F.4th 414 (5th Cir. 2023), is easily distinguishable. That case involved a Louisiana statute that permitted actual cash value of a totaled vehicle to be calculated using "a generally recognized motor vehicle industry source." *Id*. at 417 (quotation omitted). Plaintiffs there argued that the method used by the defendant-insurer was unlawful because it was not a "generally recognized motor vehicle industry source" and proposed calculating damages by "arbitrarily choosing" another method that plaintiffs claimed was "generally recognized," called NADA. *Id*. at 417, 420. The problem with the class in that case was that there existed innumerable other "legally permissible method[s] of determining" actual cash value and those other methods could "produce lower damages than NADA (or no damages at all),"

In holding otherwise, the district court reasoned that Plaintiffs "ask[ ] the Court and fact finder to assume that one portion of an Autosource report got the [adjusted cash value] right, without any evidence as to why this is true." But what Plaintiffs in the negotiation class actually asked the factfinder to credit was the *whole* Autosource report[6], minus one specific uniformly applied downward adjustment that Plaintiffs contended and the district court agreed State Farm could not lawfully make.[7]

In resisting this conclusion, State Farm protests that measuring injury this way would allow Plaintiffs to rely solely on the fact of illegality to establish injury, a "shortcut" *Lara* supposedly rejected. And it is

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depending on the individual case. *Id*. at 420. This created an "an explosion of predominance issues" because there was just as strong of an argument that any of those other permissible methods should be used, and so, as to each class member, there would be a dispute over which alternative method to select and over whether that method showed each class member was injured at all. *Id*. Here, by contrast, the unlawful conduct challenged by the negotiation class is applying one specific deduction, not using a categorically unlawful method, and so there is no need to pick among alternative calculation methods. In the absence of defendants' allegedly unlawful conduct, each class member indisputably would have been paid the amount they actually received, plus the amount of the putatively unlawful negotiation deduction.

[6] State Farm itself used these reports to calculate adjusted cash value, and submitted extensive record evidence demonstrating why they constituted appropriate measures of cash value.

[7] While a declaration submitted by State Farm suggests that *condition* adjustments in the initial Autosource report are often subsequently refined for individual insureds based both on the State Farm claim handler's investigation of the condition of the totaled vehicle and negotiation with the insured, there is no comparable suggestion that any *negotiation* adjustment that is applied is subject to further individualized adjustment.

true that *Lara* held that merely "[c]alling Defendants' adjustments 'illegal' " does not suffice to prove injury. 25 F.4th at 1140. But State Farm ignores *why* that was. Class members in *Lara* might have received a report containing an unlawful adjustment while nonetheless receiving actual cash value. This would have been the case, for instance, where class members' payout was based on an alternative appraisal. *Id*. at 1139. This also would have been the case where payout was based on a valuation report, but the condition adjustment accurately reflected the actual condition of the car—notwithstanding the fact that it was un-itemized. *Id*. None of these factors is relevant to the negotiated adjustment as applied to the class here, where members of the narrowed class were simply paid what the Autosource report determined, including the putatively unlawful negotiation discount. While an unitemized condition adjustment could nevertheless have accurately reflected the condition of the car for some class members in *Lara*, there is no negotiation adjustment that could accurately price the negotiation discount here if Plaintiffs are correct that the adjustment is *always* unlawful, regardless of the amount.

State Farm also avers that, in *Lara*, plaintiffs argued "that the only possible definition of 'actual cash value' in the regulations is the value given by the prescribed process, and thus that the injury for each plaintiff is the amount of the condition adjustment." *Id*. at 1140. And since *Lara* rejected this argument, State Farm contends that determining "actual cash value" in litigation requires some assessment *independent from* Washington's regulatorily prescribed process.

But, once again, State Farm ignores why *Lara* found plaintiffs' argument unconvincing. As we explained in *Lara*,

> [i]f the condition adjustment was applied for a plaintiff but then that plaintiff still got an amount equal to what he or she would have gotten if the adjustment was not applied (or more than that), then there was no breach of contract [or WCPA claim] because there was no injury . . . [which] could easily have happened [if] CCC or Liberty . . . adjusted the value back up, Liberty . . . made a higher offer, or the parties [did] appraisals.

*Id*. In other words, *Lara* rejected measuring injury based on a failure to "follow the prescribed process" because a procedural violation does not necessarily lead to an incorrect result; if the improper process happened to produce a correct result (or a result that favored plaintiffs), then plaintiffs were not actually paid less than they were owed. The *Lara* class, unlike the narrowed negotiation class in this case, included members who may not have been injured by the allegedly unlawful process. Here, by contrast, the narrowing of the class leaves only those class members who (1) were paid based on the Autosource report, excluding those who negotiated or pursued an appraisal, and (2) were paid a negotiation adjustment that, according to the Plaintiffs, can never measure a lawful deduction. By narrowing the class, the district court thus avoided the injury irregularity problem we identified in *Lara*.

*Lara* did not hold, as State Farm claims, that Washington law either does not or cannot define the substantive inputs that constitute actual cash value. And here, Plaintiffs' argument is that State Farm accurately estimated the actual cash value of their vehicles based on several permissible inputs and then applied one further subtraction that Washington law

entirely forbids. Nothing in *Lara* precludes common proof of injury as the amount of State Farm's estimates less the impermissible deduction as to the class of owners who were paid the Autosource valuation.[8] Accordingly, we conclude the district court abused its discretion in decertifying the negotiation class.

### 2. The Condition Class

Our analysis above does not hold true for the condition class. As discussed above, the district court's narrowed class definition avoided many of the problems of common proof discussed in *Lara*. Specifically, the condition class certified here excluded those Plaintiffs whose ultimate payout was not directly based on a valuation report containing the challenged deduction. *See Lara*, 25 F.4th at 1139-40. But the narrowed class definition alone does not exclude the "plaintiff whose car was valued using the [Autosource] report with the disputed condition adjustment, and for whom [State Farm] used [Autodex's] estimate without making any further adjustments," whose payout nonetheless equaled or exceeded their pre-crash car's actual cash value because the adjustment accurately reflected the condition of the car. *Id*. at 1139.

Plaintiffs in *Jama* raise various distinctions between the condition class presented here and that in *Lara*. They argue, for instance, that the plaintiffs in *Lara* merely challenged Liberty's refusal to itemize, whereas here the *Jama* Plaintiffs challenge the substance of State Farm's condition adjustment because they were not made "when determining comparability." Wash. Admin. Code § 284-30-391(4)(b). We note that the district court characterized the condition

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[8] We address (and reject) State Farm's argument that measuring injury this way violates Article III below. *See* II.B.2, *infra*.

class here as materially identical to that in *Lara*: as based on State Farm's failure "to verify whether the perceived condition deduction was 'appropriate.' " In any event, as Plaintiffs' counsel confirmed at oral argument, the condition class in *Jama* does not differ from that in *Lara* in the way most relevant. As to the condition class, Plaintiffs do not dispute that *some* condition adjustment could lawfully have been taken. Accordingly, just as in *Lara*, there is no way to know as to any individual class member in the condition class whether their actual payout was more, less, or equal to what State Farm *could* lawfully have paid if it had calculated a condition adjustment appropriately. *Lara*, 25 F.4th at 1139. There is therefore no way to know without individualized inquiry whether such a class member received less than their car's actual cash value and therefore suffered any injury. For this reason, the district court did not abuse its discretion in decertifying the condition class.

### B. The district court's entry of summary judgment

#### 1. Proof of injury under Washington law

Because we conclude that the district court misread *Lara* as to the negotiation discount, it follows that the district court's entry of summary judgment against the named Plaintiffs based on their claims for the negotiation discount was in error. We further hold that—even as to the challenged condition adjustment—the district court also erred in holding that Plaintiffs could not rely on the Autosource reports, and the amount of a challenged adjustment, as relevant evidence of value and injury.

The district court based its entry of summary judgment largely on its reading of *Lara*. But *Lara* did

not purport to address the actual evidence any individual Plaintiff must adduce to give rise to a genuine dispute of material fact. The question at issue in *Lara* was whether the district court abused its discretion in declining to certify a class where common issues did not predominate over individual ones, therefore requiring an individualized injury inquiry. *Lara*, 25 F.4th at 1138-40.[9]

To be sure, in analyzing whether individualized issues relating to injury predominated over common ones, *Lara* necessarily discussed how plaintiffs alleging breach of contract or violations of the WCPA could go about demonstrating injury. As to that question, *Lara* held that merely adding back to the insurer's valuation report the full amount of a putatively unlawful applied condition adjustment might, in many cases, not embody the proper measure of a class member's injury. 25 F.4th at 1139. This would be the case, for example, where payouts were not actually based on the challenged adjustment, or where, even if payouts were based on the challenged adjustment, they still exceeded actual cash value. *Id*.

But the fact that an insurer's own valuation of an insured's pre-crash vehicle minus one putatively unlawful adjustment may not correctly measure injury for all plaintiffs does not mean that it cannot provide

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[9] Indeed, the same district court whose order denying class certification we affirmed in *Lara* issued just three weeks before that order an order *denying* the motion of one of the defendants for summary judgment. There, that district court rejected that defendant's argument that plaintiffs who received payment after their cars were initially valued by reports with a challenged condition adjustment could not demonstrate injury based on that adjustment. Order at 10-13, *Lundquist v. First Nat'l Ins. Co.*, No. 18-cv-5301 (W.D. Wash. Oct. 1, 2020), ECF No. 14.

a starting place. In fact, in language entirely ignored by the district court, *Lara* explicitly agreed that "the amount of the [putatively unlawful] deduction would still be . . . [s]ome relevant evidence" of injury. 25 F.4th at 1140. Nothing in *Lara* required (as the district court appeared to believe) "[p]laintiffs [to] undertake[ ] a[ ] separate valuation process or retain[ ] an expert to opine on the value of the loss vehicles." Indeed, State Farm itself used the Autosource reports as one proper measure of actual cash value. And ample evidence provided by State Farm itself demonstrated how the Autosource reports were prepared and why they provided an accurate measure of the pre-crash actual cash value of drivers' cars. We see no reason why a plaintiff seeking to prove injury cannot rely on the Autosource reports themselves to establish value, minus the unlawful negotiation adjustment. And here, as noted, the class is limited to those who were paid the Autosource valuation. Accordingly, the district court's conclusion that *Lara* requires individual plaintiffs to introduce evidence of value independent of the valuation reports was error. We therefore vacate its entry of summary judgment in favor of State Farm. On remand, the district court should evaluate anew whether the named Plaintiffs have adduced sufficient evidence of injury consistent with this opinion.[10]

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[10] As to specific named plaintiffs, it may be clear from the records that the Autosource reports less a challenged adjustment do not provide sufficient evidence of injury to get past summary judgment. For instance, named plaintiff Ngethpharat's payout was not directly based on an Autosource report containing a challenged deduction since she challenged State Farm's initial valuation and subsequently obtained a second valuation excluding the challenged deduction, which is why the district court excluded her from the class it certified. We do not today decide

### 2. Standing

With a drumbeat of citations to *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), State Farm argues in the alternative that Article III precludes relying on an unlawfully applied adjustment as evidence of injury, because allowing Plaintiffs to recover the amount of an unlawful adjustment would somehow result in their recovering for an "injury in law" without any actual reference to the lost value of the car. But assessing the actual value of the car is unnecessary to determine there is standing here. Plaintiffs' claim is that they were paid less than they were owed under their insurance policies with State Farm. Had the challenged negotiation adjustment not been applied, the valuation in the Autosource reports of Plaintiffs' vehicles would have been higher and they would have been paid more by State Farm. That is "a classic pocketbook injury sufficient to give [a plaintiff] standing." *Tyler v. Hennepin Cty.*, 598 U.S. 631, 636 (2023) (holding that plaintiff had Article III standing where defendant "illegally appropriated" a "surplus" of a debt plaintiff owed to defendant).

*TransUnion* is inapposite. There, the purported "injury" that the Supreme Court held did not confer standing was "the mere existence of inaccurate information in a database." *TransUnion*, 594 U.S. at 434. By contrast, the injury here—a lighter wallet—has long been "traditionally recognized as providing a

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whether Ngethpharat or any other named plaintiff in fact adduced sufficient evidence of injury to survive summary judgment. Rather, we merely hold that nothing about *Lara* precludes plaintiffs from relying on the difference between an insurer's calculation of value and the amount of a challenged adjustment as relevant evidence of injury. The district court should apply this standard to the claims before it in the first instance.

basis for a lawsuit in American courts." *TransUnion*, 594 U.S. at 432. Article III is thus no barrier to Plaintiffs' suit.

## CONCLUSION

For the foregoing reasons, we reverse the district court's order decertifying the narrowed negotiation class, but affirm its order decertifying the condition class.[11] We also vacate the district court's entry of summary judgment against each named Plaintiff and remand for the district court to analyze whether Plaintiffs have introduced sufficient evidence of injury consistent with this opinion.

Each party shall bear their own costs.

REVERSED IN PART AND REMANDED.

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[11] We deny plaintiffs' motion to certify to the Washington Supreme Court the question of whether the district court's application of *Lara* to require individualized proof of injury outside the Autosource reports is contrary to Washington law. We read *Lara* as relating to how plaintiffs may demonstrate the predominance of common inquiries under Rule 23, and not, as the district court held, as imposing substantive new barriers on plaintiffs seeking to prove injury under Washington law. Therefore, we do not believe this case involves any substantial unresolved question of state law. *See Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019).

**RAWLINSON, Circuit Judge, dissenting:**

I respectfully dissent from the majority opinion because, in my view, it directly conflicts with our recent precedent as set forth in *Lara v. First National Insurance Co.*, 25 F.4th 1134 (9th Cir. 2022), and creates an unnecessary circuit split.

In *Lara*, a case with facts similar to those presented in this appeal, we concluded that the district court did not abuse its discretion when it denied class certification. *See id.* at 1136. The plaintiffs sought certification of a damages class comprised of individuals whose automobiles were totaled in a motor vehicle accident. *See id.* In assessing the "actual cash value" of the totaled vehicle, the insurance company relied upon a report that set forth the "value of comparable vehicles." *Id.* (internal quotation marks omitted). From that report, the insurance company adjusted the valuation based on "a condition adjustment," derived from the difference between the condition of the vehicle being valued and the condition of "[u]sed cars for sale at dealerships." *Id.* at 1136-37.

After the insurance company valued the plaintiffs' vehicles using the "downward condition adjustment," they sued their insurer and the company that prepared the valuation report. *Id.* at 1137 (internal quotation marks omitted). Plaintiffs asserted that the insurer violated the state's "insurance regulations by not itemizing or explaining [the] downward condition adjustment." *Id.* (citation and internal quotation marks omitted).[1]

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[1] The applicable regulation required insurers "to itemize the deductions or additions that they make, and that these adjustments be appropriate." *Id.* (citing Wash. Admin. Code § 284-30-

Following the district court's denial of class certification, the plaintiffs filed an appeal with this court. We concluded that a common question existed as to whether the conditions adjustment violated the state regulations. *See id*. at 1138. However, we added that "to show liability for breach of contract or unfair trade practices, Plaintiffs must also show an injury. And to show an injury will require an individualized determination for each plaintiff." *Id*.

We explained that the insurer "only owed each punitive class member the actual cash value of his or her car." *Id*. at 1139. If a class member received the actual cash value or more, that class member has not been injured. *See id*. Consequently,

> figuring out whether each individual putative class member was harmed would involve an inquiry specific to that person. More particularly, it would involve looking into the actual pre-accident value of the car and then comparing that with what each person was offered, to see if the offer was less than the actual value. Because this would be an involved inquiry for each person, common questions do not predominate.

*Id*.

We clarified that even for a plaintiff whose car was valued using the disputed report, the court would

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320(3)). "Because these regulations are enforced by the Washington insurance commissioner, and do not create a private cause of action, Plaintiffs couldn't sue [the insurer and the company that prepared the report] directly for violating [the regulations], so they sued [the insurer] for breach of contract and both companies for unfair trade practices and civil conspiracy." *Id*. (citations omitted).

still "have to look into the actual value of the car, to see if there was an injury." *Id*.

We further clarified that "[a] violation of the regulation isn't a breach. Breach of contract requires not just a violation of the terms of the contract but also an injury." *Id*. (citation and footnote reference omitted). The same was true for Plaintiffs' unfair trade practices claim. *See id*.

We rejected the plaintiffs' argument that their injuries could be established simply by referring to "the amount of the condition adjustment" for each plaintiff. *Id*. at 1140. We responded:

> But that's still not right. If the condition adjustment was applied for a plaintiff but then that plaintiff still got an amount equal to what he or she would have gotten if the adjustment was not applied (or more than that), then there was no breach of contract because there was no injury.

*Id*.

We observed that the situation of a plaintiff receiving equal to or in excess of "what he or she would have gotten if the adjustment was not applied" "could easily have happened." *Id*. By way of example, we noted that the company preparing the report or the insurer "could have adjusted the value back up, [the insurer] could have made a higher offer, or the parties could have done appraisals." *Id*. We agreed that the insurer was "correct to say that on this point, Plaintiffs essentially ask for a strict liability remedy which is not provided by their causes of action." *Id*. We concluded that "because figuring out whether each plaintiff was injured would be an individualized process, the district court did not abuse its discretion in finding

that individual questions predominated." *Id*. Stated differently, the existence of the condition adjustment is not the end of the story or the analysis.

The facts in the case before us are virtually identical to those in *Lara*. The only difference is that in addition to a condition adjustment, the insurer in this case also applied a negotiation discount reflecting the average amount a buyer could negotiate from the price of a replacement vehicle.

My colleagues in the majority followed the *Lara* decision and do not challenge the denial of certification for the condition adjustment claims. *See Majority Opinion*, pp. 23-24. However, their attempt to distinguish *Lara* as applied to the negotiation adjustment claims, in my view, is singularly unpersuasive.

The majority offers the following reasoning for excepting the negotiation condition from the *Lara* analysis. First, the majority reasons that "Plaintiffs contend that Washington law flatly prohibits *any* negotiation adjustment; and if Plaintiffs are correct about that legal issue, then each Plaintiff suffered damages equal to the amount of the negotiation adjustment that [the insurer] made." *Majority Opinion*, pp. 16-17 (emphasis in the original). However, *Lara* squarely forecloses this reasoning. *See* 25 F.4th at 1139 ("A violation of the regulation isn't a breach of the contract between the insurer and the insured.") (footnote reference omitted). In any event, "even if a violation of the regulations [were] a breach of the contract, Plaintiffs still have to show harm." *Id*. at 1139 n.4. And Plaintiffs may not use the report to establish harm. *See id*. at 1140 (describing this argument as "essentially ask[ing] for a strict liability remedy which is not provided by their causes of action."); *see also id*. ("Plaintiffs finally resort to calling Defendants' adjustments 'illegal.' But

that's an argument for the Washington insurance commissioner, the official who could prosecute this kind of alleged violation. . . .").

Next, the majority reasons that proposed negotiation class members "could measure their injuries on a class-wide basis by adding back to the value of their vehicles as calculated in the . . . reports the amount of the unlawful negotiation discount." *Majority Opinion*, p. 19. However, this approach is also specifically foreclosed by the analysis in *Lara*. *See* 25 F.4th at 1139 ("[F]iguring out whether each individual putative class member was harmed would involve an inquiry specific to that person. More particularly, it would likely involve looking into the *actual* pre-accident value of the car and then comparing that with what each person was offered . . .") (emphasis added). The quoted language nullifies the majority's implied argument that the actual value is the value of the vehicles "as calculated in the . . . reports" plus "the amount of the unlawful negotiation discount." *Majority Opinion*, p. 19. But, as we observed in *Lara*, "that's still not right." 25 F.4th at 1140. "While the condition adjustment here is applied across the board, other compensating adjustments and the ultimate valuation are made individually. And it's those other things that would require more individualized inquires here." *Id*.; *see also id*. at 1136 (discussing the baseline evaluation for each car based on "comparable vehicles").

The majority's approach is not only contrary to our precedent, but it would also create a circuit split, a circumstance we strive to avoid. *See Global Linguist Solutions*, *LLC v. Abdelmeged*, 913 F.3d 921, 923 (9th Cir. 2019). In *Sampson v. United Servs. Auto. Ass'n*, 83 F.4th 414, 422 (5th Cir. 2023), the Fifth Circuit found our decision in *Lara* "particularly instructive" to

its analysis in a case that, as in *Lara*, involved a valuation report utilized by the insurer to calculate the actual cash value (ACV) of a totaled car. *See id*. at 417.

Under Louisiana statutes, the actual cash value of the vehicle "shall be derived by using a method that falls into one of three broadly defined categories, one of which is use of a generally recognized motor vehicle industry source." *Id*. (citation and internal quotation marks omitted). As in *Lara*, the plaintiffs in *Sampson* argued that the valuation method used by the insurer was "not a legal method" under the statute, including because the method "negatively adjust[ed] vehicles' ACV based on such things as damage to the vehicle." *Id*.

In rejecting this argument, the Fifth Circuit drew a distinction between the selection of a damages model and the determination of liability for injuries incurred. *See id*. at 421-22. The Fifth Circuit reasoned that in the class certification context, "although ample authority suggests" that district courts

> have great discretion in choosing among damages models, especially estimative damages models at the certification stage, those authorities do not say that courts have similar discretion in choosing among models of injury and liability. *See*, *e.g*., *Terrebonne Fuel & Lube*, *Inc*. *v*. *Placid Refin*. *Co*., 681 So.2d 1292, 1300 (La. App. 4 Cir. 1996) (There must be "proof that there has been some damages," *i.e*., "that damage has actually occurred, before there is discretion to assess the *amount* of damages").

*Id*. at 422 (emphasis in the original).

The Fifth Circuit emphasized the accepted premise "that common questions may predominate under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages. But while damages are specifically described among these other important matters, liability and injury are not." *Id*. (citations and internal quotation marks omitted).

The Fifth Circuit concluded that "a district court's wide discretion to choose an imperfect estimative-damages model at the certification stage does not carry over from the context of damages to the context of liability." *Id*. at 422-23; *see also Bourque v. State Farm Mutual Auto Ins. Co*., 89 F.4th 525, 528-29 (5th Cir. 2023) (following the analysis articulated in *Sampson*).

The Fifth Circuit's rulings are consistent with our analysis in *Lara*. The majority opinion is not. Like the plaintiffs in *Sampson*, the majority opinion conflates a damages model with the required demonstration of injury. *See Lara*, 25 F.4th at 1140 (noting the existence of adjustments other than the condition adjustment that were "made individually").

The same is true for the negotiation adjustment. Under the facts of this case, we know that in addition to the negotiation adjustment, a condition adjustment was also applied on an individualized basis. *See Majority Opinion*, pp. 23-24. The Majority Opinion acknowledges that "the district court did not abuse its discretion in decertifying the condition class." *Majority Opinion*, p. 24. However, the Majority Opinion nevertheless seeks to rationalize reliance on the condition adjustment and the negotiation adjustment to establish injury. *See Majority Opinion*, p. 25 *("Lara* explicitly agreed that the amount of the putatively unlawful deduction would still be some relevant evidence of

injury. . . .") (citation, alterations, and internal quotation marks omitted). But the Majority Opinion deletes the rest of the discussion. Immediately following the language quoted by the majority, the *Lara* decision explained that even if the amount of the deduction would be "relevant evidence," that fact is "beside the point" because "[s]ome relevant evidence could be in common, but much of it wouldn't be, and that's why the district court didn't abuse its discretion in finding that individual questions predominate." 25 F.4th at 1140. *See also Sampson*, 83 F.4th at 422 (interpreting *Lara* as "finding that predominance was not satisfied where plaintiff class members could show that an insurer's use of [a valuation report] was unlawful but could not prove an actual underpayment by class-wide proof"). Indeed, *Lara* characterized this very argument as "essentially ask[ing] for a strict liability remedy." 25 F.4th at 1140.

The same analysis forecloses the majority's contention that "a plaintiff seeking to prove injury [can] rely on the [valuation] reports themselves to establish value, minus the unlawful negotiation adjustment." *Majority Opinion*, p. 26. But there are two problems with this argument. The first problem is that equating value with a demonstration of injury impermissibly conflates the injury issue with the damages issue. *See Sampson*, 83 F.4th at 422-23; *see also Lara*, 25 F.4th at 1140 (describing this argument as "essentially ask[ing] for a strict liability remedy"). The second problem is that the "unlawful" nature of the adjustment cannot establish an injury. *See Lara*, 25 F.4th at 1140.

The majority concedes that *"Lara* held that merely calling Defendants' adjustments illegal does not suffice to prove injury." *Majority Opinion*, p. 20 (citation and internal quotation marks omitted). The majority

seeks to avoid this ruling by giving its explanation of "*why*" the *Lara* court reached the conclusion that alleged illegality is insufficient to establish an injury. *Id*. (emphasis in the original). But no "explanation" can change the unqualified language used by the *Lara* court. Regardless of why the ruling was made, it is clear: the alleged illegality of the condition does *not* establish injury. *See Lara*, 25 F.4th at 1140. At bottom, the majority cannot articulate a principled basis upon which to distinguish this case from our holding in *Lara*. In addition, the majority opinion creates an unwarranted circuit split. For these reasons, I respectfully dissent.

## APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| ANSYA NGETHPHARAT, individually, and JAMES KELLEY, individually and on behalf of those similarly situated,<br>Plaintiffs,<br>v.<br>STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,<br>Defendant. | CASE NO. C20-454 MJP<br>ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DECERTIFY<br>May 4, 2022 |
| FAYSAL JAMA, individually and on behalf of those similarly situated,<br>Plaintiff,<br>v.<br>STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,<br>Defendant. | |

This matter comes before the Court on the Parties' Cross-Motions for Summary Judgment (Dkt. Nos. 185, 188) and Defendants' Motion to Decertify Classes (Dkt. No. 189). Having reviewed the Motions, the Oppositions (Dkt. Nos. 191, 195, 202), the Replies (Dkt. Nos. 196, 198, 207), Defendants' Surreply (Dkt. No. 201), the Notice of Supplemental Authority (Dkt. No. 214), and all supporting materials, and having held oral argument on April 21, 2022, the Court GRANTS Defendants' Motion for Summary Judgment in Defendants' favor on all claims, DENIES Plaintiffs' Motion for Summary Judgment as MOOT, GRANTS Defendants' Motion to Decertify, and VACATES the certification of the classes.

## BACKGROUND

Plaintiffs challenge Defendants State Farm Mutual Automobile Insurance Company's and State Farm Fire and Casualty Company's (together, State Farm) methodology for determining the actual cash value (ACV) of an insured's total loss vehicle. Plaintiffs Anysa Ngethpharat and James Kelley attack State Farm's practice of applying a "typical negotiation discount" to the comparable cars used to determine the ACV of an insured's total loss vehicle. Plaintiff Faysal Jama attacks State Farm's practice of applying a "typical negotiation discount" and condition deductions to the comparable cars used to determine the ACV of an insured's total loss vehicle. These deductions appear in reports prepared by a third-party Audatex, which are referred to as "Autosource Reports." Through these consolidated actions, Plaintiffs variously pursue the following claims: breach of contract, violations of the Washington Consumer Protection Act, breach of the implied covenant of good faith and fair dealing, and bad faith.

The Parties now seek summary judgment in their favor and State Farm asks the Court to decertify the classes. Resolution of the pending motions all turn on a recent Ninth Circuit decision in *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134 (9th Cir. 2022), as explained below.

## ANALYSIS

### A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Id.* at 248. The moving party bears the initial burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323-24.

## B. *Lara* Compels Summary Judgment for State Farm

The Ninth Circuit's decision in *Lara* makes clear that Plaintiffs have not provided sufficient evidence of injury to sustain their claims and that they lack standing. Before explaining this conclusion, the Court examines its prior orders, the contours of the *Lara* opinion, and why *Lara* compels summary judgment in State Farm's favor.

### 1. The Court's Earlier Orders

Before the *Lara* decision issued, the Court provided several relevant rulings on the sufficiency of Plaintiffs' claims that are worth considering for context.

First, in ruling on State Farm's motions to dismiss, the Court found the regulatory violations Plaintiffs alleged were sufficient to state a claim for breach of contract and a violation of the CPA. (*See* Order on MTD (Dkt. No. 49); *see id*. at 3 n.2 (noting that State Farm did not challenge Jama's claims of bad faith and breach of the implied covenant of good faith and fair dealing).) The Court first found that Washington's regulatory claim settlement methodology does not allow a typical negotiation or a negative condition adjustment as alleged in the complaints. (*Id*. at 10-15.) The Court then explained that to reach the ACV of the total loss vehicle, the insurer must follow the regulatory process and that failure to do so constitutes a breach of contract and a CPA violation. (*Id*.) The Court rejected State Farm's argument that ACV could be arrived at through some process that does not track the insurance regulations because that conclusion would render the regulations superfluous. (*Id*. at 10.) The Court did not expressly discuss injury and damages.

Second, the Court evaluated damages and injury in the context of its Order Granting Class Certification. (Order on Class Certification (Dkt. No. 136).) In that order, the Court rejected State Farm's argument that Plaintiffs must prove they received less than the ACV for their vehicle or that this was an individualized process defeating certification. (*Id*. at 15.) The Court explained that "Plaintiffs do not quibble with the ACV determination in the Autosource Reports except as to the amount deducted for the negotiation discount and related sales tax." (*Id*.) The Court accepted Plaintiffs' theory that the correct ACV was set out in the Autosource reports if one backed out the "typical negotiation discount" or the negative condition adjustment. (*Id*.) Given that conclusion, damages could be shown on a classwide basis by simply showing the amount of the impermissible deductions. In so concluding, the Court distinguished the district court decision in *Lara* denying class certification (under the name *Lundquist*) by pointing out that unlike the claims in these consolidated cases, the claims in *Lara* "required a determination of whether the correct comparable vehicles and condition adjustments were used, which required plaintiffs to 'prove that the dollar amount of a "comparable vehicle" was inappropriate.' " (*Id*. (quoting *Lundquist v. First Nat'l Ins. Co. of Am*., No. C18-5301RJB, 2020 WL 6158984, at *2 (W.D. Wash. Oct. 21, 2020)).) The Court concluded that the question of damages was common because the Plaintiffs here "challenge only the legality of the deduction of the typical negotiation discount, not whether the comparable cars or condition adjustments were 'inappropriate.' " (*Id*.)

**2. *Lara***

The Ninth Circuit's order in *Lara* undermines Plaintiffs' claims and casts doubt on the Court's ruling on Class Certification. There are several important components in the *Lara* decision the Court must consider.

First, *Lara* begins with the premise that "[i]n Washington, the insurer only has to pay the 'actual cash value' of the car—the 'fair market value.' " *Lara*, 25 F.4th at 1136 (citing WAC 284-30-320(1)). So to show an injury sufficient to sustain a claim for breach of contract or a CPA violation, the plaintiff must demonstrate that they received less than the ACV. The insurer "only owe[s] each putative class member the actual cash value of his or her car, [and] if a putative class member was given that amount or more, then he or she cannot win on the merits." *Id*. at 1139.

Second, *Lara* rejects the theory that the plaintiff may show injury merely by proving that the insurer failed to follow Washington's regulatory process for determining ACV. *Lara* explains that "[a] violation of the regulation isn't a breach . . . [because b]reach of contract requires not just a violation of the terms of the contract but also an injury." *Lara*, 25 F.4th at 1139. And the court in *Lara* reasoned that deductions that deviate from the "prescribed [regulatory] process" do not show an injury. *See id*. at 1140 (noting that "Plaintiffs essentially ask for a strict liability remedy which is not provided by their causes of action").

Third, *Lara* explains that simply "calling Defendants' adjustments 'illegal' " is insufficient to demonstrate an injury because even an adjustment that deviates from the regulatory process might still lead to the correct ACV. *Lara*, 25 F.4th at 1140. The *Lara* court concluded that because the "causes of action

require proof of an injury, . . . the district court was correct to apply the old basketball phrase, no harm, no foul." *Id*. (quotation omitted).

### 3. *Lara*'s Application to *Kelley* and *Jama*

While the Court had previously distinguished the district court decision in *Lara*, it finds the Ninth Circuit's decision now compels entry of summary judgment in State Farm's favor on Plaintiffs' individual claims. Having considered the arguments and evidence presented (viewed in the light most favorable to Plaintiffs), the Court concludes that Plaintiffs have not identified any evidence that they received less than ACV. As such, they have not identified any injury and therefore lack standing. *See Lara*, 25 F.4th at 1139-40.

First, as Plaintiffs admit in their briefing, they have never intended to show that they received less than the ACV. Plaintiffs proclaim that they "are not so much alleging that State Farm breached its contract by failing to pay the actual cash value of vehicles deemed a total loss but alleging that State Farm engaged in an improper valuation process by deducting unlawful amounts from what was otherwise (as determined by State Farm) the actual cash value." (Pls. Opp. to Defs' MSJ at 9.) This position is fatal under *Lara* because Plaintiffs bear the burden of providing evidence that what State Farm offered is less than the actual ACV for each loss vehicle. 25 F.4th at 1139.

Second, Plaintiffs provide no evidence of what the correct ACV should be for Plaintiffs' and the classes' loss vehicles. Instead, Plaintiffs maintain that the Autosource reports themselves contain the correct ACV if one backs out the deductions. But this asks the Court and fact finder to assume that one portion of an

Autosource report got the ACV right, without any evidence as to why this is true. Plaintiffs have not undertaken any separate valuation process or retained an expert to opine on the value of the loss vehicles or why backing out these deductions from the Autosource reports arrives at a correct ACV. Plaintiffs instead argue that "[t]here is no credible rationale for forbidding the Plaintiffs, nor the trial court and fact-finder, from relying on the WAC § 284-30-391-compliant portions of the Autosource valuation as evidence of 'actual cash value.' " (Pls. Opp. to Mot. to Decertify at 11.) But the Ninth Circuit in *Lara* rejected Plaintiffs' position when it found no merit in the theory "that the only possible definition of 'actual cash value' in the regulations is the value given by the prescribed process." *Lara*, 25 F.4th at 1140. Plaintiffs also suggest that State Farm should be bound to accept that the Autosource report without the deductions correctly shows the ACV. (*See* Pl. Opp. to Def MSJ at 10 (arguing that State Farm "affirmatively represented" the Autosource reports as setting forth the ACV).) But this is factually inaccurate. State Farm never represented that the correct ACV is the Autosource's valuation minus the deductions. It only represented that the Autosource correctly reported the ACV *with* the deductions.

The Court also notes that Plaintiff's failure of proof is equally applicable to Plaintiff Ngethpharat's individual claim. Ngethpharat offers no evidence why the Autosource report without a negotiation discount correctly reports the ACV or why the two-dealer quote fails to show the correct ACV. Nor is Ngethpharat's decision to "dispute" one portion of the first Autosource report's valuation competent evidence that the remaining portion correctly reports the ACV.

Third, Plaintiffs cannot meet their burden to show injury by labeling the deductions "illegal," as *Lara* makes abundantly clear. *Lara*, 25 F.4th at 1140 (rejecting the notion that "calling Defendants' adjustments 'illegal' " is proof of injury). The Court had earlier been convinced that *Lara* was factually distinguishable because the condition adjustment at issue in *Lara* could have been permitted, while both deductions in *Kelley* could never be allowed under the insurance regulations. But given the broad pronouncement in *Lara* that a regulatory violation is not evidence of injury, this distinction loses any persuasive value. Ultimately the deductions in this case and in *Lara* are both "illegal" and impermissible. As such, the Court is not convinced that it may distinguish *Lara* based on the nature of the different deductions.

Plaintiffs fail to provide any other cogent basis on which to distinguish *Lara.* First, Plaintiffs primarily focus on the fact that the *Lara* class included claims where the individual could have ultimately been paid something more than what was set out on the valuation report. (*See* Opp. to Mot. to Decertify at 10-11.) But the Ninth Circuit rejected this possible point of distinction. In explaining its decision, the Court considered the example of a "plaintiff whose car was valued using the CCC report with the disputed condition adjustment, and for whom Liberty [the insurer] used CCC's estimate without making any further adjustments." *Lara*, 25 F.4th at 1139. This is precisely the posture of the case before this Court. And the *Lara* court stated that "[e]ven for that plaintiff, the district court would have to look into the actual value of the car, to see if there was an injury." This conclusion applies squarely to Plaintiffs' claims here, given that each class member was paid an amount with a valuation that included a disputed adjustment. Per *Lara*,

Plaintiffs must still prove that the ACV was less than what was offered and paid. *Id*. Plaintiffs' failure to do so here is fatal.

Second, Plaintiffs make much about the fact that the Ninth Circuit applied an abuse of discretion standard in deciding *Lara* and that its decision therefore has limited import. But the Court's broad pronouncements on the key legal issue of the necessary injury cannot be ignored merely because it applied an abuse of discretion standard. The opinion makes clear what the injury must be in order to state a claim, not just to obtain class certification.

Lastly, the Court notes that Plaintiffs' failure to show injury and damages is equally fatal to the *Jama* classes' claims of bad faith and breach of the implied covenant of good faith and fair dealing. Just as with a CPA and breach of contract claim, these two claims require proof of injury and damages. *See Smith v. Safeco Ins. Co*., 150 Wn. 2d 478, 485 (2003) ("Claims by insureds against their insurers for bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty."); *Rekhter v. State*, *Dep't of Soc. & Health Servs*., 180 Wn. 2d 102, 114, 116 (2014) (noting that "the implied duty of good faith and fair dealing applies when one party has discretion to select the formula or method used to calculate a particular value in the contract," but that the claim cannot be based on breach of a duty imposed by statute). The premise of both claims is that the insureds received less than the ACV—what was owed by contract—which under *Lara* means the insureds must still show actual damages, not just a regulatory violation. Summary judgment is therefore appropriate as to these claims for the reasons set out above.

### 4. Summary Judgment for State Farm

Given the named Plaintiffs' failure to provide any evidence of individual injury or damages sufficient to meet the standard announced by *Lara*, the Court finds summary judgment is appropriately entered in State Farm's favor as to all of Plaintiffs' individual claims. Plaintiffs have also failed to satisfy Article III standing. *See Trans Union TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2206 (2021) (noting that an action merely to ensure compliance with a regulatory law is not evidence of a concrete harm required for standing). And because standing is a threshold issue and each named plaintiff must have standing to represent a class, the Court VACATES its prior certification order. This follows from the Ninth Circuit's direction that "[b]ecause individual standing requirements constitute a threshold inquiry, the proper procedure when the class plaintiff lacks individual standing is to dismiss the complaint, not to deny the class for inadequate representation." *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003); *see Moreno v. Autozone, Inc.*, No. CV 05-4432 CRB, 2009 WL 3320489, at *3 (N.D. Cal. Oct. 9, 2009), *aff'd*, 410 F. App'x 24 (9th Cir. 2010) (granting summary judgment for lack of standing and vacating an earlier decision to certify a class). On this basis, the Court GRANTS State Farm's Motion to Decertify. Nor does the Court find it appropriate for substitution of the named class plaintiffs given that Plaintiffs have not provided any evidence that any class members received less than ACV. Substitution would therefore be futile.

## C. Motion to Certify Questions

The Court is aware that Plaintiffs have filed a motion to certify questions to the Washington Supreme Court that is not yet ripe for decision. (Dkt. No. 218.)

But the Court is disinclined to grant the relief requested in that Motion. The Court in *Lara* addressed the questions Plaintiffs ask to be certified to the Washington Supreme Court. By asking for certification, Plaintiffs are effectively asking the Court to ignore *Lara* and potentially obtain a decision from the Washington Supreme Court that is at odds with *Lara*. The Court is unpersuaded that certification is proper given these considerations. The proper venue for Plaintiffs dispute is in the Ninth Circuit. And the Court notes that should Plaintiffs appeal this Order, they may still ask the Ninth Circuit to certify their questions. *See* RCW 2.60.020.

## III. CONCLUSION

The Court GRANTS State Farm's Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment as MOOT. The Court finds that Plaintiffs have failed to present any evidence that they received less than ACV and therefore have failed to provide evidence of injury or standing. The Court therefore enters summary judgment in State Farm's favor as to the individual claims and VACATES the certification orders. To this end it GRANTS the Motion to Decertify.

The clerk is ordered to provide copies of this order to all counsel.

Dated May 4, 2022.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States Senior District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| ANSYA NGETHPHARAT, individually, and JAMES KELLEY, individually and on behalf of those similarly situated,<br>Plaintiffs,<br>v.<br>STATE FARM MUTUAL INSURANCE COMPANY, STATE FARM AUTOMOBILE INSURANCE COMPANY,<br>Defendants. | CASE NO. C20-454 MJP<br>ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION<br>July 1, 2021 |

This matter comes before the Court on Plaintiffs' Motion for Class Certification. (Dkt. No. 74.) Having reviewed the Motion, the Opposition (Dkt. No. 83), the Reply (Dkt. No. 97), the Surreply (Dkt. No. 99), Plaintiffs' additional brief on Rule 23(g) (Dkt. No. 130), Defendants' Notices of Supplemental Authority (Dkt. Nos. 87, 135), and all supporting materials, and having held oral argument on the Motion on June 22, 2021, the Court GRANTS in part the Motion.

### BACKGROUND

This case involves Defendants State Farm Mutual Insurance Company's and State Farm Mutual Automobile Insurance Company's (together "State Farm")

claims settlement process used to determine the actual cash value (ACV) of an insured's total loss vehicle. Plaintiffs Anysa Ngethpharat and James Kelley attack State Farm's practice of applying a "typical negotiation discount" to the comparable cars used to determine the ACV of an insured's total loss vehicle. This discount appears in reports prepared by a third-party Audatex, which are referred to as "Autosource Reports." Plaintiffs allege that valuations based on Autosource Reports with the typical negotiation discount violate Washington's insurance regulations. They pursue claims for: (1) breach of contract; (2) violation of the Washington Consumer Protection Act; and (3) declaratory and injunctive relief. (First Amended Complaint ¶¶ 6.3, 7.2, 8.1-8.3 (Dkt. No. 5).)

**A. Regulatory Framework**

The parties agree that a "necessary predicate" to Plaintiffs' claims is State Farm's alleged violation of WAC 284-30-391 ("Section 391"). (Def. Opp. at 8 (Dkt. No. 83 at 14).) The Court has already analyzed the regulatory framework of Section 391 in ruling on State Farm's Motion to Dismiss. (Order on Motion to Dismiss (Dkt. No. 49).) The Court reviews several pertinent aspects of that analysis to help frame the legal issues presented in the Motion.

Section 391 establishes the methods by which an insurer "must adjust and settle vehicle total losses" and the standards of practice for the settlement of total loss vehicle claims. WAC 284-30-391. The settlement methodology and standards of practice work in tandem and impose intertwined, but independent requirements on the insurer. Section 391 states that "[u]nless 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 284-30-391 (emphasis added). But the insurer need follow just one of these three methods. At issue in this case is Section 391's "cash settlement" methodology. This provision permits the insurer to "settle a total loss claim by offering a cash settlement based on the actual cash value of a comparable motor vehicle, less any applicable deductible provided for in the policy." WAC 284-30-391(2). Section 391(2) includes two key provisions to determine actual cash value of a comparable motor vehicle. First, to determine the actual cash value, "only a vehicle identified as a comparable motor vehicle may be used." WAC 284-30-391(2)(a). Second, the insurer must "determine the actual cash value of the loss vehicle by using any one or more of the following methods": (1) comparable motor vehicle; (2) licensed dealer quotes; (3) advertised data comparison; or (4) computerized sources. WAC 284-30-391(2)(b)(i)-(iv).

Section 391 also "establish[es] standards of practice for the settlement of total loss vehicle claims" which the "insurer must" follow. WAC 284-30-391(4). Relevant here is Section 391(4)(b), which says that the insurer must "[b]ase all offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability."

In ruling on the Motion to Dismiss, the Court concluded that "[t]o give full effect to the language of Section 391(2), the Court finds that the 'actual cash value' determination must comply with the methodologies set forth in Section 391(2)." (MTD Order at 10.) "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 also held that Section 391(4) provides the exclusive list of deductions that can be taken from the actual cash value determination. (*Id.* at 12-13.) To comply with Section 391(4), any deduction must also be itemized and verifiable. (*Id.* at 13-14.) In so holding, the Court defined the terms "itemized" and "verifiable" as follows: 'Merriman Webster defines the term 'itemized' as 'to set down in detail or by particulars; list' and defines 'verifiable' as to be able to 'establish the truth, accuracy or reality of.' " (*Id.* at 13 (citation and quotation omitted).)

**B. Facts Relevant to the Named Plaintiffs**

The Court reviews the facts related to the settlement of Ngethpharat's and Kelley's total loss claims to understand whether they may represent a class of similarly situated individuals.

After declaring Ngethpharat's car a total loss, State Farm offered her $13,378 as her car's actual cash value, based on an Autosource Report using multiple comparable vehicles adjusted for a "typical negotiation." (Declaration of Peter Herzog, Exs. 11 & 12 (Dkt. No. 85).) Through counsel, Ngethpharat objected to the valuation and the negotiation discount, and provided her own valuation proposal based on comparable vehicles she had identified. (Herzog Decl., Ex. 13.) State Farm then "escalated" her claim and obtained a second Autosource Report based on two dealer quotes which included no adjustment for a "typical negotiation." (Herzog Decl., Ex. 14.) That second valuation was somewhat higher, at $13,948. (*Id.* at 2 (365).) When Ngethpharat continued to object to the valuation, State Farm paid Ms. Ngethpharat $13,948, representing the amount it did not dispute it owed her, which was the amount listed on the second

Autosource Report. (Expert Report of Paul Torelli ¶ 16 (Dkt. No. 75-1).)

Kelley had a somewhat different experience when State Farm settled his total loss claim. After determining Kelley's vehicle to be a total loss, State Farm offered him $54,056 based on an Autosource Report that used a single comparable vehicle with a typical negotiation discount applied. (Herzog Decl. Ex. 15.) Kelley was then paid that same amount and he did not "escalate" the claim as Ngethpharat did.

### C. Facts Relevant to Class Certification

Plaintiffs assert that State Farm follows a uniform claims settlement practice through which it underpays its insureds' total loss claims by using an ACV determined in Autosource Reports that includes a typical negotiation discount applied to the comparable vehicles. The evidence bears this out. The typical claims handling process starts with a car inspection performed by a State Farm "estimator" or repair facility representative which leads to the creation of a Vehicle Inspection Report. (Declaration of Douglas Graff TT 11-12 (Dkt. No. 84).) This "triggers the valuation process" which includes obtaining an "Autosource Report" created by a third-party vendor called Audatex/Solara. (*Id.* ¶¶ 11-13.) From March 25, 2014 to the present, State Farm has used Autosource Reports to provide computerized ACVs on total loss claims. (Deposition of Douglas Graff at 29:7-20 (Dkt. No. 75-11).) Autosource Reports are used "99-plus percent of the time" when there is a total loss claim in Washington. (*Id.* at 32:16-21.) And absent rare circumstances (when no comparable vehicles are found or when the comparable vehicle either has a "sold" price or sold by a "no-haggle" dealer), the Autosource Report will apply a typical negotiation discount to the advertised

price of the comparable vehicles. (*Id.* at 45:8-46:3; Declaration of Neal Lowell ¶ 15 (Dkt. No. 86).)

Once the claims handler has reviewed and "verified" the Autosource Report as to the condition, equipment, mileage, and options, they will reach out to the customer to discuss the valuation. (Graff Decl. ¶ 17.) Claims handlers do not provide insureds the Autosource Report as a matter of course—only if requested. (*Id.* ¶ 20.) If the insured contests the valuation, then the claims adjuster may change the valuation based on objective information from the insured and they can request an updated Autosource Report reflecting that new data. (Graff Decl. ¶¶ 20-22.) The claims file should note whether the claims adjuster specifically discussed the negotiation discount and/or if the insured was sent the Autosource Report. (Graff Dep. 163:24-164:8; Deposition of Ellie Gray at 45:15-46:24, 47:14-50:2, 54:22-55:22 (Dkt. No. 75-14).) If the insured objects to the negotiation discount, State Farm will not "back out" the discount but will instead consider a two-dealer quote report. (Graff Dep. at 168:1-169:20.) Using anything other than the Autosource Report for the valuation requires management approval and documentation in both the claims file and State Farm's computer-searchable database. (Graff Dep. at 171:3-72:20, 202:1-13, 235:7-235:14, 245:3-247:4.) If the insured and State Farm cannot agree, then the next step is appraisal. (Graff Dep. at 172:21-175:6; 236:13-237:8.)

State Farm focuses much of its briefing on its contention that insureds often reach agreement on the value of the total loss claim, which is relevant to State Farm's theory of compliance with Section 391. According to State Farm, when an insured agrees to the value State Farm proposes, "the agreement is documented in

the claim file." (Graff Decl. ¶ 23.) State Farm also sends a letter to the insured explaining the valuation and the total-loss settlement process, and it includes a release of interest/power of attorney. (*Id.* ¶ 24.) The sole example State Farm points to is found in the call notes in Faysal Jama's claim file (the plaintiff in the related matter—*Jama v. State Farm*, C20-652 MJP), which state:

> "RCF [Received Call From] Anna from the Law offices of Daniel Whitmore the NI's [Named Insured's] attorney's office stating the NI [Named Insured] wants to settle out the claim . . . Value Accepted (Y/N): Y."

(Graff Decl. ¶ 23.) The parties dispute whether this shows Jama agreed to the negotiation discount, and Jama argues that he merely sought payment without waiving his objection to the negotiation discount. State Farm has not provided evidence from the claim files of any insureds in the proposed class that the insured specifically and expressly agreed to the use of the typical negotiation discount being applied to reach the ACV.

Instead, State Farm relies heavily on a survey that its expert, John Lynch, Jr., conducted of a small sample of insureds and argues that class members frequently agree to the ACVs presented by State Farm. Lynch designed a survey of putative class members based on Plaintiffs' original class definition. Of the list of 60,689 claims, he found only 50,970 of the insureds had email addresses. (Expert Report of John Lynch, Jr. ¶ 14 (Dkt. No. 85-2).) After some testing, he ultimately sent a survey to 4,000 randomly-sampled individuals and only 10.7% completed (427) the survey. (*Id.* ¶ 22 and Ex. 5 to Lynch Report.) Through what

looked like a communication directly from State Farm, Lynch's survey asked the following questions:

1. Did you call your State Farm insurance agent after your total loss accident?
2. Did you speak with a State Farm claim specialist after your total loss accident?
3. Were you satisfied or dissatisfied with the speed of the final settlement you received from State Farm?
4. Were you satisfied or dissatisfied with the amount of the final settlement you received from State Farm?
5. Did you tell State Farm that you disagreed with the dollar value of the settlement for your totaled vehicle?
6. When you made your total loss claim, did you do your own research to figure out the fair market value of your vehicle?
7. What sources did you consult to figure out the fair market value of your vehicle just prior to your accident? Select all that apply
8. When you replaced your totaled vehicle, did you negotiate the price of the replacement vehicle you purchased or leased?

(Dkt. No. 85-2 at 9-10.) The results showed that 81.7% of the people polled stated they were satisfied with the amount of the final settlement, but 20.6% stated they disagreed with the dollar value of the settlement. (Lynch Report ¶ 24.) Absent from the survey are any questions about whether the recipient agreed with the value State Farm came up with for the loss vehicle, whether the person knew about the typical negotiation

discount, whether the insured agreed with the typical negotiation discount, or whether the typical negotiation discount was applied to the insured's claim. Lynch initially did not determine what portion of the respondents are current or former insureds. His supplemental declaration states that the reporting rate was slightly higher for current insureds, but that the no differences in "satisfaction or in any other survey measure" as between the two population. (Declaration of John Lynch in Opposition to Plaintiffs' Motion to Exclude ¶ 4 (Dkt. No. 114-4).)

**D. Proposed Class Definition**

Plaintiffs seek to certify the following class:

> 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 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.

(Mot. at 1-2 (Dkt. No. 74).)

## ANALYSIS

### A. Class Certification Standard

Courts must undertake a "rigorous analysis" of all the Rule 23 factors to determine whether to certify a class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The plaintiff must first meet all four requirements in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *See Leyva v. Medline Indus.*, 716 F.3d 510, 512 (9th Cir. 2013); Fed. R. Civ. P. 23(a). The plaintiff must also satisfy one of the Rule 23(b) factors. Here Plaintiff seeks certification under the "predominance" standard of Rule 23(b)(3). "To obtain certification of a class action for money damages under Rule 23(b)(3)," a putative class must also establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460.

Plaintiffs must demonstrate predominance and superiority under Rule 23(b)(3) by a preponderance of the evidence fits Rule 23(b)(3). *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 784 (9th Cir. 2021). "Establishing predominance, therefore, goes beyond determining whether the evidence would be admissible in an individual action" and "[i]nstead, a 'rigorous analysis' of predominance requires 'judging the persuasiveness of the evidence presented' for and against certification.' " *Id.* at 785-86 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). And in ruling on a motion for class certification "[c]ourts must resolve all factual and legal disputes relevant to class certification,

even if doing so overlaps with the merits." *Id*. at 784 (citing *Wal-Mart*, 564 U.S. at 351).

### B. Rule 23(a)(1): Numerosity

Numerosity exists when "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). Here, State Farm does not contest numerosity or Plaintiffs' allegation that there are over 34,000 insurance claims that could fall within the proposed class definition. And during oral argument, Plaintiffs' counsel identified over 58,000 people in the class definition as revised by the Court and explained below. This is sufficient to show numerosity, which can be shown using reasonable estimates. *See In re Badger Mountain Irrigation. Dist. Sec. Litig.*, 143 F.R.D. 693, 696 (W.D. Wash. 1992).

### C. Rule 23(a)(2): Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50 (citation and quotation omitted). To satisfy commonality, the claims must depend on a common contention "that is capable of classwide resolution." *Id*. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (quotation and citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the

generation of common answers." *Id*. (quotation and citation omitted).

**1. Plaintiff's proof of commonality**

The primary common contention that can be resolved on a classwide basis is whether State Farm is permitted to settle total loss claims with a typical negotiation discount. Resolution of this question will be common to the class of persons paid a value determined in an Autosource Report with the negotiation discount applied. If the Court finds the negotiation discount either permissible or not, then all of the class members' claims will be resolved on a classwide basis. This is also true of Plaintiffs' claims premised on the theory that the negotiation discount is not "verifiable" as required by Section 391(4)(b). Based on the Court's review of the Autosource Report examples filed to date, it appears that the disclosures and descriptions of the typical negotiation is uniform, and its verifiability (or lack thereof) can be resolved on a classwide basis.

The only problem with regard to the above-identified commonality is the proposed class definition, which includes insureds who were not paid the amount determined in an Autosource Report with the typical negotiation discount applied. This includes Ngethpharat, who disputed an initial Autosource Report that included the negotiation discount, and was then paid an amount determined by a second Autosource Report that lacked a negotiation discount. While Plaintiffs suggest the two-dealer quote was "invalid" (Mot. at 16), they provide no explanation of why it violates Section 391 or how this could be proved with common evidence as to a class of similarly-situated individuals. Plaintiffs try to gloss over this by suggesting that Ngethpharat's total settlement was still less than what she would have received on the

first Autosource Report if the negotiation deduction was not taken. But this appears legally irrelevant since Ngethpharat was paid using a different valuation methodology that Plaintiffs have failed to demonstrate is impermissible. And State Farm correctly argues that Plaintiffs have not shown how damages could be correctly calculated for Ngethpharat using a refund of the negotiation discount that was never applied to the payment she received. (Def. Opp. at 14.)

This lack of commonality as to Ngethpharat and those who also "escalated" their valuations is not fatal to Plaintiffs' class certification request. "[W]hen a class definition is not acceptable, judicial discretion can be utilized to save the lawsuit from dismissal." 3 Newberg on Class Actions § 7:27 (5th ed.); *see Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 594 (E.D. Cal. 2008), *adhered to*, 287 F.R.D. 615 (E.D. Cal. 2012) ("[C]ourts retain the discretion to alter an inadequate class definition."). Rather than deny class certification, the Court finds it appropriate to revise the class definition to include only those paid the value determined in an Autosource Report with the negotiation discount applied. This excludes Ngethpharat and 455 other similarly-situated insureds (*see* Plaintiff's Presentation at Oral Argument (Dkt. No. 133 at 2)), but maintains what is otherwise a class of over 58,000 individuals, (*see id.*). By so narrowing the class, the Court ensures that the legality of the negotiation discount can be resolved on a classwide basis. While Ngethpharat cannot then serve as a class representative, she may still pursue her individual claims. The Court therefore revises the class definition as follows:

> 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 whose claim was settled and paid using the amount determined by 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 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.

The Court also notes that State Farm was presented with an opportunity to discuss this revised definition during oral argument.

**2. State Farm's arguments against commonality**

State Farm claims that there are three flaws as to commonality, which the Court addresses below. State Farm also attacks the issue of damages in the context of commonality and predominance under Rule 23(b)(3). The Court separately addresses those concerns in the context of its predominance analysis in Section F(2).

**a. Agreed Value**

State Farm argues that Plaintiffs cannot prove liability with common evidence because each claim will

need to be examined to determine whether the insured "agreed" to the value. (Def. Opp. at 8-10 (Dkt. No. 83).) State Farm argues Section 391 "expressly allows an insurer and insured to reach an 'agreed value' based on any methodology" and that this necessitates mini-trials on whether each insured's reached an agreement as to value. (Id. at 8-10.)

To understand this argument, the Court reviews the relevant portion of Section 391, which states:

> 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. Subsections (4) through (6) of this section establish standards of practice for the settlement of total loss vehicle claims. If 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) through (3) of this section, the agreement must be documented in the claim file. The insurer 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. The key question is what the nature of the agreement as to the "value or methodology" must be to satisfy this exception to following the settlement methodologies listed in Section 391(1)-(3). The third sentence explains that the "agreed value or methodology" must be "reached between the claimant and the insurer using an evaluation that varies from the methods described in subsections (1) through (3)." Reading this in the context of the regulations and for

plain meaning, the Court construes this to require that the agreement expressly acknowledge that the value arrived at or methodology used otherwise does not comply with the settlement methodologies of Section 391(1)-(3). In the context of this case, the relevant question is whether the insured expressly agreed to the typical negotiation discount applied to the comparable cars used to determine the ACV in the Autosource Report. This agreement must also be documented in the claim file. WAC 284-30-391. To satisfy this safe harbor, State Farm bears the burden of showing that the claim file contains an express agreement by the insured to the Autosource Report's use of a typical negotiation discount. And because this safe harbor acts as an affirmative defense, State Farm bears the burden of showing that there is evidence of consent in the class and that this issue could impact commonality. *See True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 932 (9th Cir. 2018) (noting that the defendant bears the burden of providing evidence of predominance-defeating consent to a TCPA claim).

State Farm has failed to convince the Court that the "agreed value" safe harbor threatens commonality. State Farm's primary witness states in his declaration that any agreed value must be documented in the claim file (Graff Decl. ¶¶ 23-24), but he testified that the claim file would only document an agreement to accept payment, not an agreement to use a non-compliant valuation methodology (Graff Dep. 81, 84-85). This cuts against State Farm's ability to satisfy the safe harbor, which requires the claim file to show an express agreement as to the use the typical negotiation discount. State Farm also fails to provide any evidence of any class member who has agreed to the typical negotiation discount. This is fatal to State

Farm's argument, which requires some evidence of consent to defeat class certification. *See True Health*, 896 F.3d at 932. The only evidence State Farm points to is the "File History Notes" from the plaintiff in the related *Jama* matter, which say:

> "RCF [Received Call From] Anna from the Law offices of Daniel Whitmore the NI's [Named Insured's] attorney's office stating the NI [Named Insured] wants to settle out the claim . . . Value Accepted (Y/N): Y."

(Graff Decl. ¶ 23.) But these call notes just show that Jama wanted to be paid on the claim, not that he agreed to the use of the negotiation discount. And even if State Farm had produced some evidence sufficient to satisfy the safe harbor, it would not appear to require an in-depth analysis because State Farm is required to document the express agreement in each claim file. There would be no need for an extensive inquiry as to each claim.

State Farm also relies on Lynch's survey to argue that there is proof that State Farm reached an agreed value with most members of the proposed class. This argument is flawed because the survey did not ask whether the insured: (a) had a typical negotiation discount applied to the valuation, (b) knew that a typical negotiation discount had been applied, or (c) agreed to the use of the typical negotiation discount to reach the ACV of their total loss car. Instead, the survey just asked whether the insured was satisfied with the final settlement or whether the insured "disagreed" with the "dollar value" of the settlement. (Dkt. No. 85-2 at 9-10.) The survey does not demonstrate proof of consent that might threaten commonality. *See True Health*, 896 F.3d at 932.

**b. ACV Determination**

State Farm also argues that commonality cannot be shown because the ACV for each class member's vehicle will need to be individually determined. The Court is unconvinced.

First, State Farm ignores the fact that Plaintiffs do not quibble with the ACV determination in the Autosource Reports except as to the amount deducted for the negotiation discount and related sales tax. In other words, the Autosource-determined ACV is not at issue except for the amount of the typical negotiation discount that was taken. To combat this shortcoming, State Farm relies on *Lundquist v. First Nat'l Ins. Co. of Am.*, No. C18-5301RJB, 2020 WL 6158984, at *2 (W.D. Wash. Oct. 21, 2020). But *Lundquist* is factually distinguishable. The claims there required a determination of whether the correct comparable vehicles and condition adjustments were used, which required plaintiffs to "prove that the dollar amount of a 'comparable vehicle' was inappropriate." *Id.* Here, Plaintiffs challenge only the legality of the deduction of the typical negotiation discount, not whether the comparable cars or condition adjustments were "inappropriate." The Court agrees with Plaintiffs that the analysis of the legality of the deduction does not require a claim-by-claim review. The Court rejects State Farm's argument, which assumes too much from what Plaintiffs have set out to prove.

**c. Weighting**

State Farm argues that even if Section 391 does not allow the negotiation deduction, Section 392 does because it allows insurers to use weighting to adjust value of comparable vehicles including for negotiation discounts. This argument lacks merit. The first

problem is that State Farm asks the Court to label the negotiation discount a form of "weighting" despite the fact that it is used as a deduction to the ACV of comparable cars. As State Farm's own expert, Laurentius Marais, opines, "the 'adjustments' referred to in WAC Sec. 284-30-391 intrinsically involve addition and subtraction . . . , while the "weighting" referred to in WAC Sec. 284-30-392 intrinsically involves multiplication." (Expert Report of M. Laurentius Marais ¶ 13 (Dkt. No. 85-1).) Here, the typical negotiation discount is simply a deduction applied to the advertised price of each comparable car and does not involve weighting of the comparable cars. While the precise amount of the negotiation discount deducted from each comparable car may be reached through multiplication, the discount itself functions purely as a deduction or subtraction just as the other adjustments do in Section 391. The Court is not convinced that the typical negotiation discount is a form of weighting of the "identified vehicles to arrive at an average" value of the comparable vehicles. The second problem is that State Farm essentially asks the Court to read Section 392's mention of "weighting" as a means by which to expand the limited settlement methodologies for additions and deductions listed in Section 391(1)-(3). But by its own title, Section 392 is limited to "Information that must be included in the insurer's total loss vehicle valuation report." Section 392 does not expand the kinds of deductions and additions that can be taken under Section 391(1)-(3). The Court rejects this argument in full.

**D. Rule 23(a)(3): Typicality**

To demonstrate typicality, Plaintiffs must show that the named parties' claims are typical of the class. Fed. R. Civ. P. 23(a)(3). "The test of typicality 'is whether other members have the same or similar

injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' " *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Id.* (internal citation and quotation marks omitted). "The requirement is permissive, such that "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014)). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508.

In light of the Court's revised class definition, the Court finds that Ngethpharat's claimed injury is atypical of the class because she cannot trace any injury to the negotiation discount. But the Court does find that Kelley's claimed injury is typical of the class, as he identifies that he was paid a value based on an Autosource Report that applied the negotiation discount. The Court is satisfied that Plaintiffs have shown Kelley's typicality.

**E. Rule 23(a)(4): Adequacy of Representation**

"The final hurdle interposed by Rule 23(a) is that 'the representative parties will fairly and adequately protect the interests of the class.' " *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(4)), *overruled on other grounds by Wal-Mart*, 564 U.S. 338. Adequacy of representation requires that "[f]irst, the named representatives must

appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Given Ngethpharat's atypicality, she cannot be an adequate representative of a class with whom she does not share a common injury. But Plaintiffs have otherwise demonstrated that Kelley is an adequate class representative, committed to representing the class's interests and able to prosecute the action through counsel.

As to class counsel, the Court must also assess the following requirements of Rule 23(g):

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). And class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

The Court is satisfied that attorneys Scott Nealey and Stephen Hansen are adequate class counsel who will fairly and adequately represent the interest of the

class. Both Nealey and Hansen explain the work they have done to identify or investigate potential claims and their experience in handling class actions and other complex cases involving similar kinds of claims. (*See* Ex. 15 to Hansen Decl. (Dkt. No. 75-15)); Joint Declaration of Stephen Hansen and Scott Nealy (Dkt. No. 130-1)); Fed. R. Civ. P. 23(g)(1)(A)(i) and (ii). Nealy and Hansen have demonstrated throughout the course of this case their knowledge of the applicable law and the subject matter of this case. *See* Fed. R. Civ. P. 23(g)(1)(A)(iii). And they both aver that their two firms have the resources available to commit to representing the class, and have already made expenditures in this regard. *See* Fed. R. Civ. P. 23(g)(1)(A)(iv); (Joint Decl. ¶¶ 4-5 (Dkt. No. 130-1)). The Court therefore finds both Nealy and Hansen and their respective law firms to be adequate class counsel.

### E. Rule 23(b)(3): Predominance

Plaintiffs asks the Court to certify the class under the predominance and superiority requirements of Rule 23(b)(3). The Court assesses both issues, along with the question of damages.

#### 1. Common questions of law and fact

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products*, *Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods*, *Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each

member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof" *Id*. (citation and quotation omitted). "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).

Plaintiffs have demonstrated the predominance of classwide issues over individual ones. The primary common question is whether the typical negotiation deduction included in the Autosource Report is legally permissible. As the Court has already explained in its discussion of commonality, resolution of this question can be made on a classwide basis using common evidence because it involves a legal determination whose impact will be felt equally by members of the class, all of whom received total loss valuations that included a negotiation deduction. Plaintiffs have demonstrated that each class member's claim can be resolved using classwide proof, which suffices to show predominance.

State Farm makes five arguments against predominance, none of which has merit. The Court has already considered the first three arguments—whether individual issues persist because of the "agreed value" safe harbor, whether the Court must determine the ACV of class member's vehicle, and the permissibility of the negotiation discount as a form of weighting. These same arguments fail in the context of predominance, as none of them requires individual determinations to predominate over those common to the class. The Court also rejects State Farm's argument that the question of whether individual class members suffered an injury will predominate. (Opp. at 16-17.) As refined, the class definition includes only those who received payment based on an Autosource Report with

the negotiation discount. If Plaintiffs succeed in proving liability, then each class member will have suffered the same injury compensable by refunding the improperly-applied negotiation discount. The Court finds no concerns as to the class members' individual injury and standing. *See TransUnion LLC v. Ramirez*, __ U.S. __, No. 20-297, 2021 WL 2599472, at *10 (U.S. June 25, 2021) (noting that "[e]very class member must have Article III standing in order to recover individual damages"). Nor has State Farm identified any evidence, let alone the claimed "significant evidence," that the class "includes a large percentage of uninjured class members who . . . reached an 'agreed value.' " (Opp. at 17.) This theoretical argument does not defeat predominance.

Lastly, the Court rejects State Farm's argument that the issue of causation under the CPA is an individual issue that will predominate, making class certification improper. State Farm argues "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." (Opp. at 18 (Dkt. No. 83).) State Farm is correct that causation is an element of Plaintiffs' CPA claim. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793 (1986) ("A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff.") But here, Plaintiffs challenge the application of the typical negotiation discount as a per se CPA violation. This stands in contrast to *Kelley v. Microsoft Corp.*, 2011 WL 13353905 (W.D. Wash. May 24, 2011), on which State Farm relies, where the question of causation depended on the "motivation of each consumer." *Id.* at *3. Here, the insured's motivation is irrelevant given the per se

nature of the claimed violation. What matters is whether the negotiation discount is permitted.

**2. Damages and the Damages Model**

State Farm argues that Plaintiffs have not shown that there is common proof of damages or a viable damages model consistent with their theory of liability. The Court disagrees.

Under Rule 23(b), the Plaintiffs must show that "damages are capable of measurement on a classwide basis" and that the proposed damages model is consistent with the theory of liability. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Plaintiffs pursue both breach of contract and CPA claims, and the Court reviews the recoverable damages under both claims. As to their breach of contract claim, Plaintiffs are entitled to the benefit of the bargain: "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155 (2002) (citation and quotation omitted). This includes the benefit of having the insurer comply with insurance regulations, because when applicable regulations provide a specific procedure for settling claims they become "a part of and should be read into the insurance policy." *See Touchette v. NW Mut. Ins. Co.*, 80 Wn.2d 327, 332 (1972). As to the CPA, a plaintiff may bring a private CPA action against their insurers for breach of the duty of good faith or for violations of Washington insurance regulations. *Peoples v. United Servs. Auto. Ass'n*, 194 Wn.2d 771, 778 (2019). The failure by an insurer to follow WAC requirements in settling an

insurance claim is a per se CPA violation—meaning that the practice is unfair and deceptive and occurs in the conduct of trade or commerce. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 495-96 (1999), *aff'd*, 142 Wn.2d 784 (2001). And "the deprivation of contracted-for insurance benefits is an injury to 'business or property' regardless of the type of benefits secured by the policy." *Peoples*, 194 Wn.2d at 779 (finding that wrongful denial of PIP benefits are compensable under the CPA). Under the CPA, damages are properly calculated by determining the amount of the wrongly withheld contracted-for insurance benefits. *See id*.

Plaintiffs propose a manageable and reasonable damages model that matches their theory of liability as to the refined class of individuals who were paid an amount based on a negotiation discount. If Plaintiffs are correct that the negotiation discount is impermissible, then the proper measure of damages is the refund of the negotiation discount and related sales tax. This is the benefit of the bargain to which the insureds were entitled given the method by which State Farm chose to settle the claims. Plaintiffs have identified common evidence in State Farm's and Audatex's possession that can be used to determine the negotiation discount for each class member. (*See* Torelli Report ¶¶ 4, 15-23 (Dkt. No. 75-1).) The process of doing that calculation appears one capable of common treatment and resolution using a common methodology.

State Farm makes several unsuccessful arguments as to why damages do not meet the commonality and predominance requirements. First, State Farm argues that an "in-depth analysis" of exactly what each class member was "actually underpaid" is required. (Dkt. No. 83 at 19.) This, State Farm argues,

would require an analysis of each class member's vehicle to determine what the difference between the ACV and what State Farm paid. This argument fails to grapple with the reality that Plaintiffs do not quibble over the ACV as determined by the Autosource Report—just the negotiation discount and the related sales tax.

Second, State Farm argues that representative evidence cannot be used to determine classwide damages. (Def. Opp. at 21-23.) The Court need not reach this issue because Plaintiffs have shown how damages can be properly calculated on an individual claim basis rather than on an aggregate basis. (*See* Torelli Report at ¶¶ 4, 15-23.) But given the Parties' discussion of this potential methodology, the Court briefly reviews this issue. As Torelli opines, a sample of claims can be used to determine classwide damages. (*See id.* ¶ 24.) He adds further detail to this proposed methodology with the Reply brief, explaining how he can "generate a relatively accurate individual damages figure for each class member to be used in a distribution phase" using Audatex's price bands and data from State Farm. (Torelli Supplemental Report ¶ 21 (Dkt. No. 88).) State Farm levies two unsuccessful attacks to this approach. First, State Farm argues that aggregate damages would be inappropriate if the methodology allows class members who did not actually receive a negotiation discount to recover. But by limiting the class to those who received a settlement with the negotiation discount applied, the Court finds no potential problem of providing recovery to those who suffer no damages. Second, State Farm invokes the recent *Olean* decision to argue that use of statistical sampling and aggregate damages will violate the Rules Enabling Act by expanding its liability to individuals who have not been harmed. But *Olean* was concerned

with the use of representative sampling to prove liability, not damages. The Court made that distinction quite clear:

> Moreover, even if class members suffered individualized damages that diverged from the average overcharge calculated by Plaintiffs' expert, "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514. Indeed, we have consistently distinguished the existence of injury from the calculation of damages. See *Vaquero*, 824 F.3d at 1155; *Serene*, 934 F.3d at 943. Consequently, individualized damages calculations do not, alone, defeat predominance—although, as we discuss below, the presence of class members who suffered no injury at all may defeat predominance.

*Olean*, 993 F.3d at 790. Here, sampling is proposed only to calculate damages, not to prove liability. And State Farm will still be permitted to challenge individual claims with any available affirmative defense, such as the "agreed value" safe harbor State Farm has identified. The Court does not find any issue with the potential use of sampling in this case.

### 3. Class Treatment is Superior and Manageable

"In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir.), *as amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001). The four factors are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

Plaintiffs have shown sufficient superiority here. First, this case involves relatively small deductions to total loss settlements on damaged cars where the likelihood of recovery is likely outweighed by the costs of individual litigation. As the Ninth Circuit has explained, "[w]here damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action." *Zinser*, 253 F.3d at 1190; *see* Fed. R. Civ. P. 23(b)(3)(A). Second, neither party has identified any other cases (other than *Jama*) involving these kinds of claims against State Farm. *See* Fed. R. Civ. P. 23(b)(3)(B). Third, there is good reason to focus the claims in this forum because it applies Washington law to Washington residents who have the same policies from State Farm and who encountered this same common practice of applying the negotiation discount. *See* Fed. R. Civ. P. 23(b)(3)(C). Fourth, notwithstanding State Farm's arguments discussed below, there are no obvious difficulties in managing this on a class basis. *See* Fed. R. Civ. P. 23(b)(3)(D).

State Farm argues that this case is not manageable because it will require determining whether

anyone in the class submitted evidence supporting a different valuation and was paid on that amount. State Farm argues this will require great labor to determine who is in the class and is not "administratively feasible." (Dkt. No. 83 at 29.) But Plaintiffs have provided sufficient evidence that this determination is relatively straightforward and is administratively manageable based on the claim files and data available for review. State Farm also argues that appraisal is a far superior process to determining ACV. But this is a red herring. Plaintiffs do not dispute the ACV determined by State Farm other than as to the negotiation discount. Thus, the appraisal process would not necessarily resolve the dispute. And State Farm has not shown that the use of an appraisal for each class member would be superior, particularly where the costs would likely eclipse the modest amount at issue for each insured's claim.

**G. Surreply**

State Farm asks the Court to strike: (1) portions of Plaintiffs' Reply (Dkt. No. 97), (2) Torelli's Supplemental Expert Report and Declaration filed with the Reply, including attachments 1 through 4 (Dkt. No. 88); and (3) the Supplemental Declaration of Darrell M. Harber, including attachments A through E (Dkt. No. 92). The Court GRANTS in part and DENIES in part the request.

First, State Farm asks the Court to strike the portions of Plaintiffs' Reply and Torelli's supplemental report that contain new arguments and evidence about a 150-claim file sample that were raised for the first time in reply. The Court agrees that these arguments and evidence were improperly raised for the first time in reply. *See Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006). It is

true the Court ordered the production of the 150-claim file sample after Plaintiffs moved for class certification. (Order on Motion to Compel (Dkt. No. 76).) But Plaintiffs did not ask for an extension of the class certification deadline or for leave to amend their Motion once they received the Order or the sample. Instead, Plaintiffs claimed in their Motion that "the evidence that has already been gathered" showing class certification is proper. (Dkt. No. 74 at 3.) The Court thus STRIKES the argument based on the sample, and Torelli's materials submitted with the reply. (Dkt. No. 88, 97.) The Court does not, however, find it proper to strike Torelli's further statements about calculating classwide damages using a potential, future sample of class claims. These statements merely expand on his initial report to respond to State Farm's opposition briefing and is not improper.

Second, State Farm asks the Court to strike Darrell Harber's supplemental declaration and exhibits and Plaintiffs' reliance on it in the Reply. The Court has not considered these arguments and evidence and DENIES the request as MOOT.

Third, State Farm also asks the Court to strike Harber's and Torelli's declarations/reports as improper supplemental reports filed after the expert deadline. Given the Court's ruling above, the Court DENIES this request as MOOT. And the Court does not find Torelli's further statements about the sampling methodology for calculating classwide damages to an improper supplementation that must be stricken and DENIES the motion as to this request.

## CONCLUSION

Plaintiffs have provided sufficient evidence to establish by a preponderance that class certification is

appropriate and proper under Rule 23(a) and Rule 23(b)(3). The Court certifies the following class:

> 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 whose claim was settled and paid using the amount determined by 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 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.

The Court also appoints James Kelley as class representative and Stephen Hansen of the Law Offices of Stephen M. Hansen, P.S. and Scott P. Nealy of the Law Office of Scott P. Nealy as class counsel. But Plaintiff Anysa Ngethpharat may only pursue her claims individually and not on behalf of anyone similarly situated—which is now reflected in the caption.

The Court also GRANTS in part and DENIES in part State Farm's surreply/motion to strike. The Court STRIKES in part the supplemental report of

Torelli and the Reply's citation to it concerning the 150-claim sample. The Court does not strike the additional information Torelli provides about calculating classwide damages using a future sample. The Court DENIES as MOOT State Farm's request to strike the supplemental Harber declaration and the Reply's citation to it. And the Court DENIES as MOOT the request to strike Harber's declaration and Torelli's supplemental reports as to the 150-claim sample, and DENIES the request to strike Torelli's supplemental report as to classwide damages based on a sampling methodology.

The clerk is ordered to provide copies of this order to all counsel.

Dated July 1, 2021.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States Senior District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| FAYSAL JAMA,<br>Plaintiff,<br>v.<br>STATE FARM FIRE AND CASUALTY COMPANY,<br>Defendant. | CASE NO. C20-652 MJP<br>ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION<br>July 1, 2021 |

This matter comes before the Court on Plaintiff's Motion for Class Certification. (Dkt. No. 44.) Having reviewed the Motion, the Opposition (Dkt. No. 53), the Reply (Dkt. No. 58), the Surreply (Dkt. No. 71), Plaintiff's additional briefing on Rule 23(g) (Dkt. No. 102), Defendant's Notices of Supplemental Authority (Dkt. Nos. 57, 108), and all supporting materials, and having held oral argument on the Motion on June 22, 2021, the Court GRANTS in part the Motion.

### BACKGROUND

This case involves Defendant State Farm Fire and Casualty Company's claims settlement process used to determine the actual cash value (ACV) of an insured's total loss vehicle. Plaintiff Faysal Jama attacks State Farm's practice of applying a "typical negotiation discount" and condition deductions to the comparable cars used to determine the ACV of an insured's total loss vehicle. These discounts appear in reports prepared by a third-party Audatex, which are

referred to as "Autosource Reports." Plaintiff alleges that valuations based on Autosource Reports with the typical negotiation discount and condition deductions violate Washington's insurance regulations. Plaintiff pursues claims for: (1) breach of contract, (2) insurer bad faith, (3) breach of the duty of good faith and fair dealing, (4) violation of the Washington Consumer Protection Act, and (5) declaratory judgment. (Complaint ¶¶ 6.1-6.29 (Dkt. No. 1-3).)

**A. Regulatory Framework**

The parties agree that a "necessary predicate" to Plaintiff's claims is State Farm's alleged violation of WAC 284-30-391 ("Section 391"). (Def. Opp. at 8 (Dkt. No. 53 at 14).) The Court has already analyzed the regulatory framework of Section 391 in ruling on State Farm's Motion to Dismiss. (Order on Motion to Dismiss (Dkt. No. 29).) The Court reviews several pertinent aspects of that analysis to help frame the legal issues presented in the Motion.

Section 391 establishes the methods by which an insurer "must adjust and settle vehicle total losses" and the standards of practice for the settlement of total loss vehicle claims. WAC 284-30-391. The settlement methodology and standards of practice work in tandem and impose intertwined, but independent requirements on the insurer. Section 391 states that "[u]nless 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 284-30-391 (emphasis added). But the insurer need follow just one of these three methods. At issue in this case is Section 391's "cash settlement" methodology. This provision permits the insurer to "settle a total loss claim by offering a cash settlement based on the actual cash value of a comparable motor

vehicle, less any applicable deductible provided for in the policy." WAC 284-30-391(2). Section 391(2) includes two key provisions to determine actual cash value of a comparable motor vehicle. First, to determine the actual cash value, "only a vehicle identified as a comparable motor vehicle may be used." WAC 284-30-391(2)(a). Second, the insurer must "determine the actual cash value of the loss vehicle by using any one or more of the following methods": (1) comparable motor vehicle; (2) licensed dealer quotes; (3) advertised data comparison; or (4) computerized sources. WAC 284-30-391(2)(b)(i)-(iv).

Section 391 also "establish[es] standards of practice for the settlement of total loss vehicle claims" which the "insurer must" follow. WAC 284-30-391(4). Relevant here is Section 391(4)(b), which says that the insurer must "[b]ase all offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability."

In ruling on the Motion to Dismiss, the Court concluded that "[t]o give full effect to the language of Section 391(2), the Court finds that the 'actual cash value' determination must comply with the methodologies set forth in Section 391(2)." (MTD Order at 10.) "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 also held that Section 391(4) provides the exclusive list of deductions that can be taken from the actual cash value determination. (*Id.* at 12-13.) To comply with Section 391(4), any deduction must also be itemized and verifiable. (*Id.* at 13-14.) In so holding, the

Court defined the terms "itemized" and "verifiable" as follows: "Merriman Webster defines the term 'itemized' as 'to set down in detail or by particulars; list' and defines 'verifiable' as to be able to 'establish the truth, accuracy or reality of.' " (*Id.* at 13 (citation and quotation omitted).)

### B. Facts Relevant to the Named Plaintiff

The Court reviews the facts related to the settlement of Plaintiff's total loss claim to understand whether he may represent a class of similarly situated individuals.

Plaintiff was an insured of State Farm when State Farm deemed his 2009 Honda Civic Hybrid sedan a total loss in May 2019. (*See* Declaration of Faysal Jama, ¶ 2 and Ex. A.) To evaluate the amount of the total loss, State Farm obtained an Autosource Report to value Plaintiff's loss vehicle. (*Id.* Ex. B.) The Autosource Report used four different comparable vehicles, making adjustments to account for differences with the Plaintiff's vehicle, including mileage and options. (*Id.*) The value of these comparable vehicles was then used to establish the "actual cash value" of Plaintiff's vehicle. (*Id.*) The value of each comparable vehicle was then reduced another further 9% as a "typical negotiation discount," a deduction buried in the fine print. (*Id.*) The Autosource Report then took an addition $155 deduction for the apparent atypical condition of Plaintiff's car, though neither Audatex nor State Farm inspected the condition of the comparable vehicles. (*Id.*; Deposition of Neal Lowell at 148:22-150:6 (Dkt. No. 45).) Through a representative of Plaintiff's counsel's firm, Plaintiff requested to "settle out the claim." (Graff Decl. ¶ 23 & Ex. B (Dkt. No. 54 and 54-2 at 4).) State Farm paid the amount set out in the Autosource Report, but Plaintiff maintains that he continued to

dispute the valuation. (*See* Resp. to RFA Nos. 2-3, 5, 7 (Dkt. No. 55-19).)

### C. Facts Relevant to Class Certification

Plaintiff asserts that State Farm follows a uniform claims settlement practice through which it underpays its insureds' total loss claims by using an ACV determined in Autosource Reports that includes a typical negotiation discount and a condition deduction applied to the comparable vehicles. The evidence bears this out. The typical claims handling process starts with a car inspection performed by a State Farm "estimator" or repair facility representative which leads to the creation of a Vehicle Inspection Report. (Declaration of Douglas Graff ¶¶ 11-12 (Dkt. No. 54).) This "triggers the valuation process" which includes obtaining an "Autosource Report" created by a third-party vendor called Audatex/Solara. (*Id.* ¶¶ 11-13.) From March 25, 2014 to the present, State Farm has used Autosource Reports to provide computerized ACVs on total loss claims. (Deposition of Douglas Graff at 29:7-20 (Dkt. No. 45).) Autosource Reports are used "99-plus percent of the time" when there is a total loss claim in Washington. (*Id.* at 32:16-21.) And absent rare circumstances (when no comparable vehicles are found or when the comparable vehicle either has a "sold" price or sold by a "no-haggle" dealer), the Autosource Report will apply a typical negotiation discount to the advertised price of the comparable vehicles. (*Id.* at 45:8-46:3; Declaration of Neal Lowell ¶ 15 (Dkt. No. 56).)

Once the claims handler has reviewed and "verified" the Autosource Report as to the condition, equipment, mileage, and options, they will reach out to the customer to discuss the valuation. (Graff Decl. ¶ 17.) Claims handlers do not provide insureds the

Autosource Report as a matter of course—only if requested. (*Id.* ¶ 20.) If the insured contests the valuation, then the claims adjuster may change the valuation based on objective information from the insured and they can request an updated Autosource Report reflecting that new data. (Graff Decl. ¶¶ 20-22.) The claims file should note whether the claims adjuster specifically discussed the negotiation discount and/or if the insured was sent the Autosource Report. (Graff Dep. 163:24-164:8; Deposition of Ellie Gray at 45:15-46:24, 47:14-50:2, 54:22-55:22 (Dkt. No. 75-14).) If the insured objects to the negotiation discount, State Farm will not "back out" the discount but will instead consider a two-dealer quote report. (Graff Dep. at 168:1-169:20.) Using anything other than the Autosource Report for the valuation requires management approval and documentation in both the claims file and State Farm's computer-searchable database. (Graff Dep. at 171:3-172:20, 202:1-13, 235:7-235:14, 245:3-247:4.) If the insured and State Farm cannot agree, then the next step is appraisal. (Graff Dep. at 172:21-175:6; 236:13-237:8.)

Plaintiff points to evidence that the process for applying a condition deduction also follows a common pattern. Plaintiff notes that Audatex's system always assumes that the comparable cars are of "typical" condition without any inspection of those vehicles. (*See* Lowell Dep. at 151:12-152:2.) Audatex's assumed "typical" condition is based on historical inspections performed by insurance adjusters and appraisers. (*Id.* at 155:25-156:19, 170:15-24.) Audatex does not require these "inspectors" be licensed or certified. (*Id.*) According to Audatex, its historical data is not limited to the condition of comparable vehicles sold within ninety (90) days, as required by Section 391. (*Id.* at 160:4-18.) Audatex then breaks the various conditions

into 12 categories and assigns a percentage of the vehicle's value to each category. (*Id.* at 162:16-164:11.) The percentages have not been changed in the last 10 years and the 30(b)(6) witness for Audatex did not know how they were calculated. (*Id.*)

State Farm focuses much of its briefing on its contention that insureds often reach agreement on the value of the total loss claim, which is relevant to State Farm's theory of compliance with Section 391. According to State Farm, when an insured agrees to the value State Farm proposes, "the agreement is documented in the claim file." (Graff Decl. ¶ 23.) State Farm also sends a letter to the insured explaining the valuation and the total-loss settlement process, and it includes a release of interest/power of attorney. (*Id.* ¶ 24.) The sole example State Farm points to are call notes in Plaintiff's claim file, which state:

> "RCF [Received Call From] Anna from the Law offices of Daniel Whitmore the NI's [Named Insured's] attorney's office stating the NI [Named Insured] wants to settle out the claim . . . Value Accepted (Y/N): Y."

(Graff Decl. ¶ 23.) The parties dispute whether this shows Plaintiff agreed to the negotiation discount, and Plaintiff argues that he merely sought payment without waiving his objection to the negotiation discount. State Farm has not provided evidence from the claim files of any insureds in the proposed class that the insured specifically and expressly agreed to the use of the typical negotiation discount or the condition deduction being applied to reach the ACV.

Instead, State Farm relies heavily on a survey that its expert, John Lynch, Jr., conducted of a small sample of insureds and argues that class members

frequently agree to the ACVs presented by State Farm. Lynch designed a survey of putative class members based on Plaintiff's original proposed class definition and the proposed class definition in the related matter of *Ngethpharat v. State Farm*, C20-454 MJP. Of the list of 60,689 claims he found only 50,970 of the insureds had email addresses. (Expert Report of John Lynch, Jr. ¶ 14 (Dkt. No. 55-2).) After some testing, he ultimately sent a survey to 4,000 randomly-sampled individuals and only 10.7% completed (427) the survey. (*Id.* ¶ 22 and Ex. 5 to Lynch Report.) Through what looked like a communication directly from State Farm, Lynch's survey asked the following questions:

1. Did you call your State Farm insurance agent after your total loss accident?
2. Did you speak with a State Farm claim specialist after your total loss accident?
3. Were you satisfied or dissatisfied with the speed of the final settlement you received from State Farm?
4. Were you satisfied or dissatisfied with the amount of the final settlement you received from State Farm?
5. Did you tell State Farm that you disagreed with the dollar value of the settlement for your totaled vehicle?
6. When you made your total loss claim, did you do your own research to figure out the fair market value of your vehicle?
7. What sources did you consult to figure out the fair market value of your vehicle just prior to your accident? Select all that apply

8. When you replaced your totaled vehicle, did you negotiate the price of the replacement vehicle you purchased or leased?

(Dkt. No. 85-2 at 9-10.) The results showed that 81.7% of the people polled stated they were satisfied with the amount of the final settlement, but 20.6% stated they disagreed with the dollar value of the settlement. (Lynch Report ¶ 24.) Absent from the survey are any questions about whether the recipient agreed with the value State Farm came up with for the loss vehicle, whether the person knew about the typical negotiation discount, whether the insured agreed with the typical negotiation discount, or whether the typical negotiation discount was applied to the insured's claim. Lynch initially did not determine what portion of the respondents are current or former insureds. His supplemental declaration states that the reporting rate was slightly higher for current insureds, but that the no differences in "satisfaction or in any other survey measure" as between the two population. (Declaration of John Lynch in Opposition to Plaintiffs' Motion to Exclude ¶ 4 (Dkt. No. 86-4).)

**D. Proposed Class Definitions**

In the initial Motion, Plaintiff sought to certify the following class:

> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total loss of their insured vehicle covered under

> such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system, and (3) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.

(Mot. at 2 (Dkt. No. 44).) In response to criticism from State Farm, Plaintiff's Reply proposes two classes as follows:

> **Typical Negotiation Deduction Class:**
>
> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total loss of their insured vehicle covered under such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system which took a deduction/adjustment for "typical negotiation," and (3) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.
>
> **Condition Deduction Class:**
>
> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of

> automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total loss of their insured vehicle covered under such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system which took deductions for the condition of the loss vehicle, and (3) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.

(Reply at App'x 1 (Dkt. No. 58-1 at 2).) As clarified during oral argument, the two classes largely overlap. (*See* Presentation from Oral Argument at 16 (Dkt. No. 106).) Nearly all of the insureds in the class who had a condition deduction taken, also had the typical negotiation discount applied, too. Roughly 8% likely had only the condition deduction applied.

## ANALYSIS

### A. Class Certification Standard

Courts must undertake a "rigorous analysis" of all the Rule 23 factors to determine whether to certify a class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The plaintiff must first meet all four requirements in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *See Leyva v. Medline Indus.*, 716 F.3d 510, 512 (9th Cir. 2013); Fed. R. Civ. P. 23(a). The plaintiff must also satisfy one of the Rule 23(b) factors. Here Plaintiff seeks certification under the "predominance" standard of Rule 23(b)(3). "To

obtain certification of a class action for money damages under Rule 23(b)(3)," a putative class must also establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460.

Plaintiff must demonstrate predominance and superiority under Rule 23(b)(3) by a preponderance of the evidence fits Rule 23(b)(3). *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 784 (9th Cir. 2021). "Establishing predominance, therefore, goes beyond determining whether the evidence would be admissible in an individual action" and "[i]nstead, a 'rigorous analysis' of predominance requires 'judging the persuasiveness of the evidence presented' for and against certification.' " *Id*. at 785-86 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). And in ruling on a motion for class certification "[c]ourts must resolve all factual and legal disputes relevant to class certification, even if doing so overlaps with the merits." *Id*. at 784 (citing *Wal-Mart*, 564 U.S. at 351).

**B. Rule 23(a)(1): Numerosity**

Numerosity exists when "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). Here, State Farm admitted in its notice of removal that there are "8,004 total-loss claims and insureds that fall within Plaintiff's class definition." (Dkt. No. 1-4, ¶ 9.) This is sufficient to demonstrate numerosity and State Farm makes no challenge in opposition.

### C. Rule 23(a)(2): Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 349–50 (citation and quotation omitted). To satisfy commonality, the claims must depend on a common contention "that is capable of classwide resolution." *Id*. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (quotation and citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (quotation and citation omitted).

#### 1. Plaintiff's proof of commonality

Typical Negotiation Discount

The primary common contention that can be resolved on a classwide basis is whether State Farm is permitted to settle total loss claims with a typical negotiation discount. Resolution of this question will be common to the class of persons paid a value determined in an Autosource Report with the negotiation discount applied. If the Court finds the negotiation discount either permissible or not, then all of the class members' claims will be resolved on a classwide basis. This is also true of Plaintiff's claims premised on the theory that the negotiation discount is not "verifiable" as required by Section 391(4)(b). Based on the Court's review of the Autosource Report examples filed to date, it appears that the disclosures and descriptions of the typical negotiation is uniform, and its

verifiability (or lack thereof) can be resolved on a classwide basis.

The only problem with regard to the above-identified commonality is the proposed class definition, which includes insureds who were not necessarily paid the amount determined in an Autosource Report with the typical negotiation discount applied. Such insureds would not have injuries directly traceable to the negotiation discount and resolution of the legality of the deduction would not necessarily resolve their claims. But this is not fatal to Plaintiff's request for class certification. "[W]hen a class definition is not acceptable, judicial discretion can be utilized to save the lawsuit from dismissal." 3 Newberg on Class Actions § 7:27 (5th ed.); *see Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 594 (E.D. Cal. 2008), *adhered to*, 287 F.R.D. 615 (E.D. Cal. 2012) ("[C]ourts retain the discretion to alter an inadequate class definition."). Rather than deny class certification, the Court finds it appropriate to revise the class definition to include only those paid the value determined in an Autosource Report with the negotiation discount applied. By so narrowing the class, the Court ensures that the legality of the negotiation discount can be resolved on a classwide basis. The Court therefore revises the class definition as follows:

> **Typical Negotiation Class**
>
> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total

> loss of their insured vehicle covered under such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system which took a deduction/adjustment for "typical negotiation," (3) where such claims were settled and paid using the amount determined in the Autosource valuation which took a deduction/adjustment for "typical negotiation"; and (4) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.

Condition Deduction

Plaintiff also identifies common contentions capable of classwide resolution as to his claim that the condition deduction violates Section 391. Plaintiff points to testimony from Audatex's 30(b)(6) witness that condition deductions are unverifiable and rely on data that is temporally and geographically noncompliant with Section 391. The witness confirmed that Audatex does not inspect the condition of comparable cars used on the Autosource Report. (Lowell Dep. at 148:22-152:18.) Instead, Audatex assumes the comparable vehicles are in typical condition. (*Id.*) Audatex then calculates the condition deduction on historical data (not the specifically-identified comparable cars) that is updated "typically quarterly" and gathered within the state which is not necessarily current or from within 150 miles of the loss vehicle. (*Id.* at 153:11-154:13, 160:4-18.) Plaintiff argues that this deduction methodology applies to every condition deduction and violates Section 391 by using unverifiable data that is not within 90 days and 150 miles of the loss vehicle.

The Court agrees with Plaintiff that the permissibility of these condition deductions can be resolved on a classwide basis using common evidence. It appears that Plaintiff can establish that the condition deduction methodology violates Section 391 using evidence common to the class and that resolution of the claim will apply classwide. State Farm argues that the condition deduction is not capable of classwide proof, relying on the decision in *Lundquist v. First Nat'l Ins. Co. of Am.*, No. C18-5301RJB, 2020 WL 6158984, at *2 (W.D. Wash. Oct. 21, 2020). In *Lundquist*, the plaintiffs set out "to prove that the WACs were violated by using comparable vehicles in the adjustment of a claim that was reduced by a condition adjustment." 2020 WL 6158984, at *1. To do so, the plaintiffs had to "show that the comparable vehicles used were not comparable vehicles at all because any condition adjustment was (1) not itemized and (2) inappropriate in dollar amount." *Id*. While the Court found the failure to itemize was capable of classwide proof, it found a lack of commonality because "Plaintiffs would have to prove that each class member's condition adjustment was for an inappropriate dollar amount, and Defendants, in their responsive case, would have the right to present evidence that each individual class member received an appropriate determination of actual cash value." *Id*. at *2. But in this case, there is no need to make any individual determination of the appropriateness the dollar amount of each condition deduction. Instead, Plaintiff claims that the common methodology used to determine any condition deduction violates Section 391 and the legality of any condition deduction can be resolved uniformly as to the whole class. This does not require an individual valuation determination.

But as with Plaintiff's proposed definition of the typical negotiation deduction class, the proposed definition is overbroad and does not limit itself to those whose claims were settled and paid using a valuation that included a condition deduction. Rather than deny the motion, the Court revises the definition to preserve what appears an otherwise appropriate class definition. *See Campbell*, 253 F.R.D. at 594. The Court thus revises the class definition as follows:

> **Condition Deduction Class:**
>
> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total loss of their insured vehicle covered under such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system which took deductions for the condition of the loss vehicle, (3) where such claims were settled and paid using the amount determined in the Autosource valuation which took deductions for the condition of the loss vehicle; and (4) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.

### 2. State Farm's arguments against commonality

State Farm claims that there are three flaws as to commonality, which the Court addresses below. State Farm also attacks the issue of damages in the context of commonality and predominance under Rule 23(b)(3). The Court separately addresses those concerns in the context of its predominance analysis in Section F(2).

#### a. Agreed Value

State Farm argues that Plaintiff cannot prove liability with common evidence because each claim will need to be examined to determine whether the insured "agreed" to the value. (Def. Opp. at 8-10 (Dkt. No. 53).) State Farm argues Section 391 "expressly allows an insurer and insured to reach an 'agreed value' based on any methodology" and that this necessitates mini-trials on whether each insured's reached an agreement as to value. (*Id.* at 8-10.)

To understand this argument, the Court reviews the relevant portion of Section 391, which states:

> 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. Subsections (4) through (6) of this section establish standards of practice for the settlement of total loss vehicle claims. If 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) through (3) of this section, the agreement must be documented in the claim file. The insurer 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. The key question is what the nature of the agreement as to the "value or methodology" must be to satisfy this exception to following the settlement methodologies listed in Section 391(1)-(3). The third sentence explains that the "agreed value or methodology" must be "reached between the claimant and the insurer using an evaluation that varies from the methods described in subsections (1) through (3)." Reading this in the context of the regulations and for plain meaning, the Court construes this to require that the agreement expressly acknowledge that the value arrived at or methodology used otherwise does not comply with the settlement methodologies of Section 391(1)-(3). In the context of this case, the relevant question is whether the insured expressly agreed to the typical negotiation discount and/or condition deduction applied to the comparable cars used to determine the ACV in the Autosource Report. This agreement must also be documented in the claim file. WAC 284-30-391. To satisfy this safe harbor, State Farm bears the burden of showing that the claim file contains an express agreement by the insured to the Autosource Report's use of a typical negotiation discount and/or condition deduction. And because this safe harbor acts as an affirmative defense, State Farm bears the burden of showing that there is evidence of consent in the class and that this issue could impact commonality. *See True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 932 (9th Cir. 2018) (noting that the defendant bears the burden of providing evidence of predominance-defeating consent to a TCPA claim).

State Farm has failed to convince the Court that the "agreed value" safe harbor threatens commonality. State Farm's primary witness states in his declaration that any agreed value must be documented in the claim file (Graff Decl. ¶¶ 23-24), but he testified that the claim file would only document an agreement to accept payment, not an agreement to use a non-compliant valuation methodology (Graff Dep. 81, 84-85). This cuts against State Farm's ability to satisfy the safe harbor, which requires the claim file to show an express agreement as to the use the typical negotiation discount and/or condition deduction. State Farm also fails to provide any evidence of any class member who has agreed to either deduction. This is fatal to State Farm's argument, which requires some evidence of consent to defeat class certification. *See True Health*, 896 F.3d at 932. The only evidence State Farm points to are the "File History Notes" in Plaintiff's claim file, which say:

> "RCF [Received Call From] Anna from the Law offices of Daniel Whitmore the NI's [Named Insured's] attorney's office stating the NI [Named Insured] wants to settle out the claim . . . Value Accepted (Y/N): Y."

(Graff Decl. ¶ 23.) But these call notes just show that Plaintiff wanted to be paid on the claim, not that he agreed to the use of the typical negotiation or condition deduction. And even if State Farm had produced some evidence sufficient to satisfy the safe harbor, it would not appear to require an in-depth analysis because State Farm is required to document the express agreement in each claim file. There would be no need for an extensive inquiry as to each claim.

State Farm also relies on Lynch's survey to argue that there is proof that State Farm reached an agreed

value with most members of the proposed class. This argument is flawed because the survey did not ask whether the insured: (a) had a typical negotiation discount or condition deduction applied to the valuation, (b) knew that a typical negotiation discount or condition deduction had been applied, or (c) agreed to the use of the typical negotiation discount or condition deduction to reach the ACV of their total loss car. Instead, the survey just asked whether the insured was satisfied with the final settlement or whether the insured "disagreed" with the "dollar value" of the settlement. (Dkt. No. 55-2 at 9-10.) The survey does not demonstrate proof of consent that might threaten commonality. *See True Health*, 896 F.3d at 932.

**b. ACV Determination**

State Farm also argues that commonality cannot be shown because the ACV for each class member's vehicle will need to be individually determined. The Court is unconvinced.

First, State Farm ignores the fact that Plaintiff does not quibble with the ACV determination in the Autosource Reports except as to the amount deducted for the negotiation discount and/or condition deduction and the related sales tax. In other words, the Autosource-determined ACV is not at issue except for the amount of the typical negotiation discount and/or condition deductions. To combat this shortcoming, State Farm again relies on *Lundquist*. But *Lundquist* remains factually distinguishable. The claims there required a determination of whether the correct comparable vehicles and condition deductions were used, which required plaintiffs to "prove that the dollar amount of a 'comparable vehicle' was inappropriate." 2020 WL 6158984, at *2. Here, Plaintiff challenges only the legality of the deduction of the typical

negotiation discount and/or condition deductions, not the appropriateness of the dollar amount of the comparable vehicles. The Court agrees with Plaintiff that the analysis of the legality of these deductions does not require a claim-by-claim review. The Court rejects State Farm's argument, which assumes too much from what Plaintiff has set out to prove.

**c. Weighting**

State Farm argues that even if Section 391 does not allow the negotiation deduction, Section 392 does because it allows insurers to use weighting to adjust value of comparable vehicles including for negotiation discounts. This argument lacks merit. The first problem is that State Farm asks the Court to label the negotiation discount a form of "weighting" despite the fact that it is used as a deduction to the ACV of comparable cars. As State Farm's own expert, Laurentius Marais, opines, "the 'adjustments' referred to in WAC Sec. 284-30-391 intrinsically involve addition and subtraction . . . , while the "weighting" referred to in WAC Sec. 284-30-392 intrinsically involves multiplication." (Expert Report of M. Laurentius Marais ¶ 13 (Dkt. No. 55-1).) Here, the typical negotiation discount is simply a deduction applied to the advertised price of each comparable car and does not involve weighting of the comparable cars. While the precise amount of the negotiation discount deducted from each comparable car may be reached through multiplication, the discount itself functions purely as a deduction or subtraction just as the other adjustments do in Section 391. The Court is not convinced that the typical negotiation discount is a form of weighting of the "identified vehicles to arrive at an average" value of the comparable vehicles. The second problem is that State Farm essentially asks the Court to read Section 392's

mention of "weighting" as a means by which to expand the limited settlement methodologies for additions and deductions listed in Section 391(1)-(3). But by its own title, Section 392 is limited to "Information that must be included in the insurer's total loss vehicle valuation report." Section 392 does not expand the kinds of deductions and additions that can be taken under Section 391(1)-(3). The Court rejects this argument in full.

**D. Rule 23(a)(3): Typicality**

To demonstrate typicality, Plaintiff must show that the named parties' claims are typical of the class. Fed. R. Civ. P. 23(a)(3). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' " *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Id.* (internal citation and quotation marks omitted). "The requirement is permissive, such that "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014)). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508.

In light of the Court's revised class definition, the Court finds that Plaintiff's claimed injuries are typical of both classes, as he was paid a value based on an Autosource Report that applied the negotiation

discount and a condition deduction. The Court is satisfied with Plaintiff's typicality as to both classes.

**E. Rule 23(a)(4): Adequacy of Representation**

"The final hurdle interposed by Rule 23(a) is that 'the representative parties will fairly and adequately protect the interests of the class.' " *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(4)), *overruled on other grounds by Wal-Mart*, 564 U.S. 338. Adequacy of representation requires that "[f]irst, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). And the Court must also assess the following requirements of Rule 23(g) to determine the adequacy of class counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). And class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

The Court finds that Plaintiff is an adequate class representative committed to representing the classes's interests and able to prosecute the action through counsel. The Court is also satisfied that Mark Trivett of Badgley Mullins Turner, PLLC and Daniel Whitmore of the Law Office of Daniel R. Whitmore, PS are adequate class counsel who will fairly and adequately represent the interest of the class. Both Trivett and Whitmore explain the work they have done to identify or investigate potential claims on Plaintiff's behalf and their experience in handling class actions and other complex cases involving similar kinds of claims. (Declaration of Mark Trivett (Dkt. No. 38); Brief re: Rule 23(g) and supporting Declarations of Trivett and Daniel Whitmore (Dkt. Nos. 102-104)); Fed. R. Civ. P. 23(g)(1)(A)(i) and (ii). Trivett and Whitmore have demonstrated throughout the course of this case their knowledge of the applicable law and the subject matter of this case. *See* Fed. R. Civ. P. 23(g)(1)(A)(iii). And they both aver that their two firms have the resources available to commit to representing the class, and have already made expenditures in this regard. *See* Fed. R. Civ. P. 23(g)(1)(A)(iv); (Dkt. Nos. 102-104). The Court therefore finds both Trivett and Whitmore and their respective law firms to be adequate class counsel.

### F. Rule 23(b)(3): Predominance

Plaintiff asks the Court to certify the class under the predominance and superiority requirements of Rule 23(b)(3). The Court assesses both issues, along with the question of damages.

#### 1. Common questions of law and fact

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant

adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id*. (citation and quotation omitted). "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).

Plaintiff has demonstrated the predominance of classwide issues over individual ones. The primary common questions are whether the typical negotiation deduction and/or condition deduction included in the Autosource Report are legally permissible. As the Court has already explained in its discussion of commonality, resolution of these questions can be made on a classwide basis using common evidence because they involve legal determinations whose impact will be felt equally by members of the classes, all of whom received total loss valuations that included a negotiation deduction and/or condition deduction. Plaintiff has demonstrated that each class member's claim can be resolved using classwide proof, which suffices to show predominance.

State Farm makes five arguments against predominance, none of which has merit. The Court has already considered the first three arguments—whether individual issues persist because of the

"agreed value" safe harbor, whether the Court must determine the ACV of class member's vehicle, and the permissibility of the negotiation discount as a form of weighting. These same arguments fail in the context of predominance, as none of them requires individual determinations to predominate over those common to the class. The Court also rejects State Farm's argument that the question of whether individual class members suffered an injury will predominate. (Opp. at 16-17.) As refined by Plaintiff and the Court, the class definitions include only those who received payment based on an Autosource Report with the negotiation discount and/or condition deduction. If Plaintiff succeeds in proving liability, then each class member will have suffered the same injury compensable by refunding the improperly-applied negotiation discount and/or condition deduction. And the condition deduction class excludes those who received only an upward condition adjustment who would not otherwise have an injury. The Court finds no concerns as to the class members' individual injury and standing. *See TransUnion LLC v. Ramirez*, __ U.S. __, No. 20-297, 2021 WL 2599472, at *10 (U.S. June 25, 2021) (noting that "[e]very class member must have Article III standing in order to recover individual damages"). Nor has State Farm identified any evidence, let alone the claimed "significant evidence," that the class "includes a large percentage of uninjured class members who . . . reached an 'agreed value.' " (Opp. at 17 (Dkt. No. 53).) This theoretical argument does not defeat predominance.

Lastly, the Court rejects State Farm's argument that the issue of causation under the CPA is an individual issue that will predominate, making class certification improper. State Farm argues "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." (Opp. at 18 (Dkt. No. 53).) State Farm is correct that causation is an element of Plaintiff's CPA claim. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793 (1986) ("A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff.") But here, Plaintiff challenges the application of the typical negotiation discount and/or condition deduction as per se CPA violations. This stands in contrast to *Kelley v. Microsoft Corp.*, 2011 WL 13353905 (W.D. Wash. May 24, 2011), on which State Farm relies, where the question of causation depended on the "motivation of each consumer." *Id*. at *3. Here, the insured's motivation is irrelevant given the per se nature of the claimed violation. What matters is whether the negotiation discount and/or condition deduction are permitted.

**2. Damages and the Damages Model**

State Farm argues that Plaintiff has not shown that there is common proof of damages or a viable damages model consistent with his theory of liability. The Court disagrees.

Under Rule 23(b), plaintiff must show that "damages are capable of measurement on a classwide basis" and that the proposed damages model is consistent with the theory of liability. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Plaintiff pursues breach of contract, CPA, and breach of the duty of good faith claims. The Court reviews the recoverable damages under each claim.

As to their breach of contract claim, Plaintiff is entitled to the benefit of the bargain: "Contract damages

are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155 (2002) (citation and quotation omitted). This includes the benefit of having the insurer comply with insurance regulations, because when applicable regulations provide a specific procedure for settling claims they become "a part of and should be read into the insurance policy." *See Touchette v. NW Mut. Ins. Co.*, 80 Wn.2d 327, 332 (1972).

As to the CPA, a plaintiff may bring a private CPA action against their insurers for breach of the duty of good faith or for violations of Washington insurance regulations. *Peoples v. United Servs. Auto. Ass'n*, 194 Wn.2d 771, 778 (2019). The failure by an insurer to follow WAC requirements in settling an insurance claim is a per se CPA violation—meaning that the practice is unfair and deceptive and occurs in the conduct of trade or commerce. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 495-96 (1999), *aff'd*, 142 Wn.2d 784 (2001). And "the deprivation of contracted-for insurance benefits is an injury to 'business or property' regardless of the type of benefits secured by the policy." *Peoples*, 194 Wn.2d at 779 (finding that wrongful denial of PIP benefits are compensable under the CPA). Under the CPA, damages are properly calculated by determining the amount of the wrongly withheld contracted-for insurance benefits. *See id*.

And as to the bad faith claim, the plaintiff "must prove actual harm, and its damages are limited to the amounts it has incurred as a result of the bad faith . . .

as well as general tort damages." *Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133 (2008); *see Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 285 (1998).

Plaintiff proposes a manageable and reasonable damages model that matches his theory of liability as to the refined classes of individuals who were paid an amount based on a negotiation discount and/or a condition deduction. If Plaintiff is correct that these deductions are impermissible, then the proper measure of damages is the refund of the negotiation discount and/or condition deduction and related sales tax. This is the benefit of the bargain to which the insureds were entitled given the method by which State Farm chose to settle the claims and its duty of good faith. Plaintiff has identified common evidence in State Farm's and Audatex's possession that can be used to determine the negotiation discount and/or condition deduction for each class member. (*See* Torelli Report ¶¶ 4, 15-23, 27-32 (Dkt. No. 41).) The process of performing these calculations appears one capable of common treatment and resolution using a common methodology.

State Farm makes several unsuccessful arguments as to why damages do not meet the commonality and predominance requirements. First, State Farm argues that an "in-depth analysis" of exactly what each class member was "actually underpaid" is required. (Dkt. No. 53 at 19.) This, State Farm argues, would require an analysis of each class member's vehicle to determine what the difference between the ACV and what State Farm paid. This argument fails to grapple with the reality that Plaintiff does not quibble over the ACV as determined by the Autosource

Report—just the negotiation discount and/or condition deduction and the related sales tax.

Second, State Farm argues that representative evidence cannot be used to determine classwide damages. (Opp. at 21-23.) The Court need not reach this issue because Plaintiff has shown how damages can be properly calculated on an individual claim basis rather than on an aggregate basis. (*See* Torelli Report at ¶¶ 4, 15-23, 27-32.) But given the Parties' discussion of this potential methodology, the Court briefly reviews this issue. As Torelli opines, a sample of claims can be used to determine classwide damages. (*See id.* ¶ 24.) He adds further detail to this proposed methodology with the Reply brief, explaining how he can "generate a relatively accurate individual damages figure for each class member to be used in a distribution phase" using Audatex's price bands and data from State Farm. (Torelli Supplemental Report ¶ 21 (Dkt. No. 60).) State Farm levies two unsuccessful attacks to this approach. First, State Farm argues that aggregate damages would be inappropriate if the methodology allows class members who did not actually receive a negotiation discount to recover. But by limiting the class to those who received a settlement with the negotiation discount applied, the Court finds no potential problem of providing recovery to those who suffer no damages. Second, State Farm invokes the recent *Olean* decision to argue that use of statistical sampling and aggregate damages will violate the Rules Enabling Act by expanding its liability to individuals who have not been harmed. But *Olean* was concerned with the use of representative sampling to prove liability, not damages. The Court made that distinction quite clear:

> Moreover, even if class members suffered individualized damages that diverged from the average overcharge calculated by Plaintiffs' expert, "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514. Indeed, we have consistently distinguished the existence of injury from the calculation of damages. *See Vaquero*, 824 F.3d at 1155; *Senne*, 934 F.3d at 943. Consequently, individualized damages calculations do not, alone, defeat predominance—although, as we discuss below, the presence of class members who suffered no injury at all may defeat predominance.

*Olean*, 993 F.3d at 790. Here, sampling is proposed only to calculate damages, not to prove liability. And State Farm will still be permitted to challenge individual claims with any available affirmative defense, such as the "agreed value" safe harbor State Farm has identified. The Court does not find any issue with the potential use of sampling in this case.

### 3. Class Treatment is Superior and Manageable

"In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir.), *as amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001). The four factors are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

Plaintiff has shown sufficient superiority here. First, this case involves relatively small deductions to total loss settlements on damaged cars where the likelihood of recovery is likely outweighed by the costs of individual litigation. As the Ninth Circuit has explained, "[w]here damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action." *Zinser*, 253 F.3d at 1190; *see* Fed. R. Civ. P. 23(b)(3)(A). Second, neither party has identified any other cases (other than Ngethpharat) involving these kinds of claims against State Farm. *See* Fed. R. Civ. P. 23(b)(3)(B). Third, there is good reason to focus the claims in this forum because it applies Washington law to Washington residents who have the same policies from State Farm and who encountered this same common practice of applying the negotiation discount. *See* Fed. R. Civ. P. 23(b)(3)(C). Fourth, notwithstanding State Farm's arguments discussed below, there are no obvious difficulties in managing this on a class basis. *See* Fed. R. Civ. P. 23(b)(3)(D).

State Farm argues that this case is not manageable because it will require determining whether anyone in the class submitted evidence supporting a different valuation and was paid on that amount. State Farm argues this will require great labor to determine

who is in the class and is not "administratively feasible." (Dkt. No. 53 at 29.) But Plaintiff has provided sufficient evidence that this determination is relatively straightforward and is administratively manageable based on the claim files and data available for review. State Farm also argues that appraisal is a far superior process to determining ACV. But this is a red herring. Plaintiff does not dispute the ACV determined by State Farm other than as to the negotiation discount. Thus, the appraisal process would not necessarily resolve the dispute. And State Farm has not shown that the use of an appraisal for each class member would be superior, particularly where the costs would likely eclipse the modest amount at issue for each insured's claim.

**G. Surreply**

State Farm asks the Court to strike: (1) portions of Plaintiff's Reply (Dkt. No. 58), (2) Torelli's Supplemental Expert Report and Declaration filed with the Reply, including attachments 1 through 4 (Dkt. Nos. 59, 60); (3) the Supplemental Declaration of Darrell M. Harber, including attachments A through E (Dkt. No. 61); and (4) the Reply brief's inclusion of two revised proposed class definitions. The Court GRANTS in part and DENIES in part the request.

First, State Farm asks the Court to strike the portions of Plaintiff's Reply and Torelli's supplemental report that contain new arguments and evidence about a 150-claim file sample that were raised for the first time in reply. The Court agrees that these arguments and evidence were improperly raised for the first time in reply. *See Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006). It is true the Court ordered the production of the 150-claim file sample after Plaintiff moved for class certification.

(Order on Motion to Compel (Dkt. No. 76).) But Plaintiff did not ask for an extension of the class certification deadline or for leave to amend their Motion once they received the Order or the sample. The Court thus STRIKES the argument based on the sample, and Torelli's materials submitted with the reply. (Dkt. No. 58, 59, 60.) The Court does not, however, find it proper to strike Torelli's further statements about calculating classwide damages using a potential, future sample of class claims. These statements merely expand on his initial report to respond to State Farm's opposition briefing and is not improper.

Second, State Farm asks the Court to strike Darrell Harber's supplemental declaration and exhibits and Plaintiffs' reliance on it in the Reply. The Court has not considered these arguments and evidence and DENIES the request as MOOT.

Third, State Farm also asks the Court to strike Harber's and Torelli's declarations/reports as improper supplemental reports filed after the expert deadline. Given the Court's ruling above, the Court DENIES this request as MOOT. And the Court DENIES as MOOT the request to strike Harber's declaration and Torelli's supplemental reports as to the 150-claim sample, and DENIES the request to Strike Torelli's supplemental report as to classwide damages based on a sampling methodology.

Lastly, State Farm asks the Court to strike the new class definitions submitted with the Reply. The Court disagrees. Plaintiff made these proposed revisions to respond to various critiques in State Farm's opposition. Given that the Court enjoys wide discretion in defining the class, the Court found these proposals to be permissible and helpful. State Farm was also given an opportunity to consider the Court's

proposed class definitions and present its views during oral argument. The Court DENIES the request to strike the class definitions.

## CONCLUSION

Plaintiff has provided sufficient evidence to establish by a preponderance that class certification is appropriate and proper under Rule 23(a) and Rule 23(b)(3). The Court certifies the following classes:

**Typical Negotiation Class**

> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total loss of their insured vehicle covered under such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system which took a deduction/adjustment for "typical negotiation," (3) where such claims were settled and paid using the amount determined in the Autosource valuation which took a deduction/adjustment for "typical negotiation"; and (4) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.

**Condition Deduction Class:**

> All persons and entities within the State of Washington that have made first-party property damage claims under contracts of

> automobile insurance with State Farm that provided for payment of the actual cash value of the policyholder's vehicle (less any applicable deductible) in the event of total loss, and (1) where policyholders experienced a total loss of their insured vehicle covered under such policy, (2) where such claims for total loss were evaluated by State Farm using the Autosource valuation system which took deductions for the condition of the loss vehicle, (3) where such claims were settled and paid using the amount determined in the Autosource valuation which took deductions for the condition of the loss vehicle; and (4) where such claims were paid by State Farm to the policyholder or a lienholder without the parties agreeing to use, and using, an alternative appraisal process described in the policyholder's policy.

The Court also appoints Faysal Jama as class representative and Mark Trivett of Badgley Mullins Turner, PLLC and Daniel Whitmore of the Law Office of Daniel R. Whitmore, PS as class counsel.

The Court also GRANTS in part and DENIES in part State Farm's surreply/motion to strike. The Court STRIKES in part the supplemental report of Torelli and the Reply's citation to it concerning the 150-claim sample. The Court does not strike the additional information Torelli provides about calculating classwide damages using a future sample. The Court DENIES as MOOT State Farm's request to strike the supplemental Harber declaration and the Reply's citation to it. The Court DENIES as MOOT the request to strike Harber's declaration and Torelli's supplemental reports as to the 150-claim sample, and DENIES the request to strike Torelli's supplemental

report as to classwide damages based on a sampling methodology. And the Court DENIES State Farm's request to strike the class definitions proposed in the Reply.

The clerk is ordered to provide copies of this order to all counsel.

Dated July 1, 2021.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States Senior District Judge

## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| FAYSAL A. JAMA, on behalf of himself and all other similarly situated; et al.,<br>*Plaintiffs-Appellants*,<br>v.<br>STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; STATE FARM FIRE AND CASUALTY COMPANY,<br>*Defendants-Appellees*. | No. 22-35499<br>D.C. Nos. 2:20-cv-00454-MJP 2:20-cv-00652-MJP<br>Western District of Washington, Seattle<br>ORDER<br>October 28, 2024 |

Before: RAWLINSON and SUNG, Circuit Judges, and RAKOFF,[*] District Judge.

Judge Rawlinson has voted to grant the petition for rehearing and the petition for rehearing en banc. Judge Sung has voted to deny the petition for rehearing and the petition for rehearing en banc. Judge Rakoff has voted to deny the petition for rehearing and has recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has

[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. Entry 100) is DENIED.

## APPENDIX F

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**U.S. Const. art. III.**

**Section 1**

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**Section 2**

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned,

the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

. . . .

**28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

**Fed. R. Civ. P. 23. Class Actions**

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2),

the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii)the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and

present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of

Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).