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IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

NICHOLAS A. JONDRO, NEAL KAHRE, AND POSTAL PROPERTIES - WESTPORT INDUSTRIAL, LLC, individually and on behalf of all others similarly situated, Plaintiffs, v. COUNTRY MUTUAL INSURANCE COMPANY®, Defendant.	Case No. 2022-LA-0000228

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND SCHEDULING A FINAL APPROVAL HEARING

I. INTRODUCTION

The settlement agreement reached between Plaintiffs Nicholas A. Jondro, Neal Kahre, and Postal Properties - Westport Industrial, LLC (collectively, "Plaintiffs"), on behalf of themselves and the proposed Settlement Class, and Defendant COUNTRY Mutual Insurance Company® ("CMIC" or "Defendant"), is attached as Exhibit 1 ("Settlement" or "SA") to the Declaration of Erik D. Peterson (the "Peterson Declaration"), filed concurrently with this Memorandum.[1]

Plaintiffs respectfully submit this unopposed[2] motion seeking the Court's preliminary

[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Settlement. The Peterson Declaration is attached as Ex. A to the Unopposed Motion for Preliminary Approval of Class Action Settlement. Also attached as Ex. B is the Declaration of Robert J. Hanauer.

[2] However, CMIC does not join in, approve of, or admit Plaintiffs' allegations or averments of fact or law contained in this memorandum, or any accompanying motion, memoranda or submissions. As Paragraph 1.5 of the Settlement makes clear, CMIC denies each and every allegation of

approval of this Settlement under 735 ILCS 5/2-806 so that notice of the Settlement can be disseminated to the Class and the Final Approval Hearing scheduled. At the Final Approval Hearing, the Court will have before it additional submissions in support of the Settlement, as well as any objections that may be filed, and will be asked to determine whether, in accordance with 735 ILCS 5/2-806, the Settlement "is fair, reasonable, and in the best interest of all who will be affected by it, including absent class members." *Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033 (2019).[3]

The proposed Settlement here is made on behalf of a class of Arizona, Illinois, Missouri, Ohio, Tennessee, and Wisconsin policyholders of Defendant. For Class Members who timely submit valid Claim Forms, and for whom there remains some Nonmaterial Depreciation still withheld from an actual cash value ("ACV") claim payment (or who did not receive an ACV claim payment because depreciation caused the estimated ACV to drop below the applicable deductible), their proposed settlement payments will be equal to 80-100% of the net estimated Nonmaterial Depreciation that was withheld and not subsequently paid, plus an additional amount to account for interest.

Class Members who timely submit valid Claim Forms, and for whom all Nonmaterial Depreciation that was previously withheld from ACV claim payments was subsequently paid in full, will receive a one-time interest payment based on a sliding scale with payments increasing dependent on the amount of Nonmaterial Depreciation withheld.

As discussed below, the proposed Settlement was reached through arm's-length

liability, wrongdoing and damages, and believes it has substantial factual and legal defenses to all claims and class allegations asserted in this case.

[3] Unless otherwise noted, all internal citations and footnotes are omitted and all emphasis is added.

negotiations overseen by United States Magistrate Judge (Ret.) Byron G. Cudmore and will result in a significant recovery for the Settlement Class. Accordingly, for the reasons set forth herein, Plaintiffs submit that the Settlement warrants the Court's preliminary approval and respectfully request that the Court enter the proposed Preliminary Approval Order attached as Exhibit A to the Settlement Agreement.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Law Concerning Labor Depreciation

This action involves allegations that Defendant breached the terms of its standard-form property insurance policies with Plaintiffs and other class members by wrongfully depreciating labor costs when adjusting property loss claims in violation of the law. *See, e.g., Walker v. Auto-Owners Ins. Co.*, 517 P.3d 617, 622-23 (Ariz. 2022) ("[I]f a policy adopts the RCLD methodology for determining actual cash value, as the [Plaintiffs'] policy did here, the insurer is precluded from depreciating labor when determining the actual cash value of the covered loss."); *Sproull v. State Farm Fire & Cas. Co*., 184 N.E.3d 203, 221 (Ill. 2021) (concluding that "depreciation may not be applied to the intangible labor component" when using the replacement cost less depreciation methodology); *Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286, 303 (Mo. Ct. App. 2022) (reasoning that, "[i]n the absence of an express policy provision that allows for it, labor does not fall within that which can be depreciated when an insured is entitled to an ACV payment," and thus holding that "labor may not be depreciated under an insurance policy that does not define ACV or depreciation to expressly include labor depreciation"); *Cranfield v. State Farm Fire & Cas. Co.*, 798 F. App'x 929, 930 (6th Cir. 2020) ("[A]n Ohio insurer may not deduct the cost of labor depreciation pursuant to an actual cash value insurance policy that does not expressly provide for such deductions." (citing *Perry v. Allstate Indem. Co*., 953 F.3d 417, 423-24 (6th Cir. 2020));

Lammert v. Auto-Owners (Mut.) Ins. Co., 572 S.W.3d 170, 179 (Tenn. 2019) ("[L]abor may not be depreciated when the insurance company calculates the actual cash value of a property using the replacement cost less depreciation method.").

B. This Lawsuit

On November 4, 2022, Plaintiffs Nicholas A. Jondro and Neal Kahre commenced this action. *See* Compl. Plaintiffs amended their Complaint on February 26, 2024 to add Plaintiff Postal Properties - Westport Industrial, LLC. *See* Am. Compl. Plaintiffs alleged that CMIC improperly depreciated the estimated cost of labor and other nonmaterial costs necessary to complete repairs to insured property when it calculated and issued ACV Payments to Plaintiffs and other class members for structural losses under its property insurance policies. *See generally id*. CMIC uses the same adjusters, claims practices, and procedures for adjusting property insurance claims in Arizona, Illinois, Missouri, Ohio, Tennessee, and Wisconsin. *See id*. at ¶¶ 13-14. Defendant calculated and issued ACV Payments in a uniform manner in the six states at issue. *Id*. Plaintiffs asserted a claim for breach of contract on behalf of themselves and a class of policyholders who received ACV Payments from CMIC for loss or damage to structures located in Arizona, Illinois, Missouri, Ohio, Tennessee, or Wisconsin. *Id*. at ¶¶ 45-46, 57-67.

C. Settlement Negotiations

The parties conducted settlement negotiations and attended a mediation conducted by Judge Cudmore where they made substantial progress toward reaching an agreement on class relief. Peterson Decl., ¶ 12. The parties continued to negotiate a settlement to resolve the claims after mediating, including regular communications with Judge Cudmore. *See id*.

Prior to participating in the mediations and reaching the proposed Settlement, the parties engaged in informal discovery, including but not limited to production by Defendant of certain

internal and third-party claims and estimating data and documents. *See id.* at ¶ 13. After all parties were comfortable with the claims data, the parties reached a settlement in principle for relief to the class of Arizona, Illinois, Missouri, Ohio, Tennessee, and Wisconsin policyholders. *Id*. at ¶¶ 13-14. The settlement in principle did not include any agreements on attorneys' fees, litigation costs, or service awards. *See id*.

Consistent with the ethical standards for class action settlements, only after relief to the proposed class was agreed to, did the parties begin to negotiate the service awards, attorneys' fees, and costs. *Id.* at ¶ 15. Following agreement on relief to the class and after obtaining further claim data reports and making damages modeling of the aggregate values to be made available to the putative class, as well as considering likely common fund percentages, the parties reached an agreement on service awards, attorneys' fees, and litigation costs and began drafting the settlement agreement. *See id.* The proposed amounts of attorneys' fees, costs, and service awards were negotiated "over and above" payments beyond the proposed relief to the class—*i.e.*, the payment of attorneys' fees, costs, and service awards will not reduce the amounts to be awarded to the Class. *Id*. Because the attorneys' fees, costs, and service awards will be paid separately by CMIC and will not reduce the recovery to the Class or be subsidized by the same, CMIC was incentivized to negotiate and pay for as little fees and litigation expenses as possible. *Id*.

The Peterson Declaration, filed concurrently with this Memorandum, confirms the history of settlement negotiations for this lawsuit and the timing and structure of the parties' settlement negotiations. *Id*. at ¶¶ 12-24. The Peterson Declaration also addresses the considerations that led to the compromise in exchange for the proposed release. *Id*. at ¶¶ 25-34.[4]

[4] See also the Declaration of Robert J. Hanauer, filed concurrently herewith in further support of preliminary approval.

III. SUMMARY OF SETTLEMENT TERMS

A. The Class

The "Settlement Class" is defined as:

> All Persons insured under a CMIC Commercial Property Policy, who made a first party insurance claim for Structural Loss to a dwelling, building, or other structure located in the States of Arizona, Illinois, Missouri, Ohio, Tennessee, or Wisconsin under that CMIC Commercial Property Policy: (a) with a date of loss during the Class Period; and (b) that either (i) resulted in an ACV Payment during the Class Period on such Structural Loss claim from which Non-Material Depreciation was withheld from the policyholder, or (ii) for claims where an Xactimate Insights Report is available, would have resulted in an ACV Payment during the Class Period on such Structural Loss claim but for the withholding of Non-Material Depreciation causing the Actual Cash Value of the claim to drop below the Deductible.

SA ¶ 2.60.

The Settlement Class excludes: (a) policyholders or other persons asserting an insurance claim arising under any of the following CMIC policy forms: (i) "Agriplus Insurance Policy," form number 0621-024IP or 0621-027IP; (ii) "Farm Insurance Policy," form number 0621-031IP or 0621-028IP; (iii) "General Packet Policy" (Personal Lines Property System Policy), form number 21224AZ (01-11/21); (iv) "Home Insurance Policy," form number 0621-038IP or 0621-041P; (v) any policy with "Amendatory Endorsement – Matching and Actual Cash Value," form number ABP 10 92 10 21; (vi) any policy with "Amendatory Endorsement – Matching and Actual Cash Value," form number ABP 10 49 10 21; and/or (vii) any other policy issued or renewed by CMIC that expressly permits the "depreciation" of "labor" (whether within the text of the policy form or in any applicable schedule, endorsement, or rider), including without limitation any policy that expressly provides (whether within the text of the policy form or in any applicable schedule, endorsement, or rider) that the rate of depreciation shall be the same for both labor and materials; (b) policyholders or other persons who received one or more ACV payments that exhausted the

applicable limits of insurance; (c) policyholders or other persons whose insurance claim was denied without an ACV payment, or on which an ACV payment was not made, for any reason other than that the ACV payment is not made solely because the withholding of Nonmaterial Depreciation caused the ACV to drop below the Deductible; (d) policyholders or other persons whose insurance claim was withdrawn or abandoned by the policyholder for any reason without an ACV payment; (e) policyholders or other persons whose insurance claim (or any portion thereof) was denied due to lack of coverage; (f) policyholders or other persons whose insurance claim was only paid on a RCV basis; (g) policyholders or other persons whose insurance claim resulted in no payment because the RCV was less than the Deductible; (h) policyholders or other persons whose insurance claim has been addressed by a judicial decision issued prior to the Effective Date of Settlement; (i) policyholders or other persons whose claim is the subject of a prior settlement agreement executed prior to the Effective Date of Settlement; (j) CMIC, CMIC's affiliates, and their respective employees, officers, and directors; (k) members of the judiciary and their staff to whom this action is assigned and their immediate families; and (l) Class Counsel. SA ¶¶ 2.60.1-2.60.12.

"Class Period" means, for Covered Claims in Arizona, Illinois, Ohio, Tennessee, or Wisconsin, a date of loss from July 21, 2019 through January 14, 2022. For Covered Claims in Missouri, a date of loss from December 21, 2012 through December 21, 2022. SA ¶ 2.16.

B. Class Members' Recovery Under The Settlement

Under the proposed Settlement, CMIC shall pay the following amounts to two categories of Class Members:

> **Class Members With Still Withheld Nonmaterial Depreciation.** Subject to the terms, conditions, coverage limits, and deductibles of policies, and subject to specific provisions in the Settlement, Settlement Payments to Class Members who timely file valid and completed Claim Forms by the Claims Deadline:

- For Covered Claims related to a dwelling, building, or other structure located in Illinois, Ohio, or Tennessee for which all Nonmaterial Depreciation that was withheld from ACV Payments was not subsequently paid, 100% of the net estimated Nonmaterial Depreciation that was withheld from the ACV payment on the Covered Claim and not subsequently paid, plus interest, in accordance with the terms of the Settlement;

- For Covered Claims related to a dwelling, building, or other structure located in Missouri for which all Nonmaterial Depreciation that was withheld from ACV Payments was not subsequently paid, 90% of the net estimated Nonmaterial Depreciation that was withheld from the ACV payment on the Covered Claim and not subsequently paid, plus interest, in accordance with the terms of the Settlement; and

- For Covered Claims related to a dwelling, building, or other structure located in Arizona or Wisconsin for which all Nonmaterial Depreciation that was withheld from ACV Payments was not subsequently paid, 80% of the net estimated Nonmaterial Depreciation that was withheld from the ACV payment on the Covered Claim and not subsequently paid, plus interest, in accordance with the terms of the Settlement.

Class Members Without Still Withheld Nonmaterial Depreciation. Subject to the terms, conditions, coverage limits, and deductibles of policies, and subject to specific provisions in the Settlement, Class Members who timely file valid and completed Claim Forms by the Claims Deadline for whom all Nonmaterial Depreciation that was withheld from ACV Payments was subsequently paid in full, payment shall be according to a schedule that ranges from $22.50 to $500.00, depending on the amount of Nonmaterial Depreciation previously withheld by CMIC.

The specific calculations for these Settlement Payments are detailed in the Settlement.

SA ¶¶ 7.1-7.5. The attorneys' fees, costs, and service awards as may be approved by this Court will not reduce any Class Member's individual payments. *See* SA ¶¶ 4.1.2-4.1.3, 13.1, 13.5.

C. Disputes And Neutral Evaluator

Any Class Member may dispute the amount of the Settlement Payment or denial of their claim by requesting in writing a final and binding neutral resolution by the Neutral Evaluator. SA ¶¶ 7.17-7.19. All disputes received from Class Members will be provided to CMIC's counsel and Plaintiffs' counsel, and CMIC and Plaintiffs' counsel will then have thirty days to evaluate the claim and supply any additional documentation to the Administrator. *Id*. at ¶ 7.18. The Neutral

Evaluator will then issue a decision based only on the written submissions, and the decision of the Neutral Evaluator shall be final and binding. *Id*. at ¶ 7.19. CMIC will separately pay for the reasonable fees incurred by the Neutral Evaluator as provided in the Settlement Agreement. *See id*. at ¶ 4.1.5.

D. The Release Of Claims

Plaintiffs and Class Members will provide CMIC a release narrowly tailored to the subject matter of this dispute—*i.e.*, the systematic practice of withholding Nonmaterial Depreciation from ACV Payments utilizing claims estimating software. All other unrelated disputes concerning an individual claim will continue to be handled in the ordinary course. *See* SA ¶¶ 9.1-9.4.

E. Attorneys' Fees, Costs, And Service Awards

Plaintiffs' counsel will seek as attorneys' fees, costs, and expenses an amount no greater than $1,318,357.20, and Defendant has agreed not to oppose such request. SA ¶¶ 4.1.2, 13.1. Class Members' recoveries will not be reduced or enhanced by the amounts of attorneys' fees or litigation costs and expenses paid. *See id*.

Additionally, Plaintiffs will seek, and Defendant has agreed not to oppose, service awards in an amount no greater than $3,750.00 each to Plaintiffs Nicholas A. Jondro and Neal Kahre and $7,500.00 to Plaintiff Postal Properties - Westport Industrial, LLC. SA ¶¶ 4.1.3, 13.5. If approved, these service awards will not reduce the Class Members' recoveries. *See id*.

F. The Class Notice And Claims Administration

Defendant will separately pay for the Class Notices and the Settlement Administrator. *See* SA ¶ 4.1.4. All Class Members will be given direct-mailed notice of the terms of the proposed Settlement at least eighty-five days before the Final Approval Hearing. *See id*. at ¶¶ 5.2-5.3.

Prior to mailing of the Class Notice by the Settlement Administrator through the U.S.

Postal Service, the Administrator will run all Class Members' names and addresses through the National Change of Address database. *Id*. at ¶ 5.2. Notice will also be published on the internet. *Id*. at ¶ 5.6. A reminder postcard notice will be issued prior to the expiration of the deadline to submit Claim Forms. *Id*. at ¶ 5.5. Class Members may submit Claim Forms by mailing the completed form to the Administrator or uploading a copy to the settlement website. *Id*. at ¶ 6.2.

IV. THE SETTLEMENT CLASS IS CERTIFIABLE UNDER 735 ILCS 5/2-801.

The proposed Settlement comes prior to formal class certification and seeks to certify a class simultaneous with a settlement, commonly referred to as a "settlement class." The Illinois provisions governing class certification, 735 ILCS 5/2-801 *et seq*., are patterned after Federal Rule of Civil Procedure 23. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 125 (2005); *Lee v. Buth-Na-Bohaige, Inc.*, 2019 IL App (5th) 180033, ¶ 14 n.1. "Given the relationship between these two provisions, federal decisions interpreting Rule 23 are persuasive authority with regard to the question of class certification in Illinois." *Avery*, 216 Ill.2d at 125.

Under section 2-801, a class may be certified where the proponent establishes the existence of the following four prerequisites: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members; (3) adequacy of representation; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. *Id*.; *Lee*, 2019 IL App (5th) 180033, ¶ 53. "Generally, the trial court should err in favor of maintaining class actions." *Walszak v. Onyx Acceptance Corp*., 365 Ill. App. 3d 664, 673 (2d Dist. 2006); *see also Byer Clinic & Chiropractic, Ltd. v. Kapraun*, 2016 IL App (1st) 143733, ¶ 13 (same).

When analyzing a proposed settlement class under the federal corollary, the Court must first ensure that the proposed class meets the requirements of Federal Rules of Civil Procedure

23(a) and 23(b)(3), with the exception that the Court need not consider, in analyzing a proposed settlement class, whether trial would present intractable management problems. *See generally* NEWBERG ON CLASS ACTIONS § 13:12 (5th ed.) (Dec. 2021 Update) (hereafter "NEWBERG"); Wright and Miller, 7B FEDERAL PRACTICE AND PROCEDURE § 1797.2 (3d ed.) (Apr. 2020 Update) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).

While the Supreme Court reiterated that a trial court must conduct a "rigorous analysis" to confirm that the requirements of Rule 23 have been met, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), the requisite "rigorous analysis" of the record and consideration of the merits must be focused on and limited to the question of whether Rule 23's requirements have been established and, here, in the context of a proposed settlement class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 722 F.3d 838, 851-52 (6th Cir. 2013). Permissible inquiry into the merits of plaintiff's claims at the class certification stage is limited, and district courts may not turn the class certification proceedings into a dress rehearsal for a trial on the merits. *Id*. at 851-52. Illinois decisions are in accord as "the circuit court should not turn the approval hearing into a trial on the merits." *Lee*, 2019 IL App (5th) 180033, ¶ 56.

Here, as demonstrated below, even under a "rigorous analysis," the requirements for class certification are easily met for the proposed *settlement* class. This is because courts have certified labor depreciation *litigation* classes: "Courts in jurisdictions where labor depreciation has been found to be unlawful have *uniformly found that common issues predominate* in cases challenging insurers' depreciation of labor costs" and have certified *litigation* classes. *Hicks v. State Farm Fire & Cas. Co.*, 2019 WL 846044 (E.D. Ky. Feb. 21, 2019), *aff'd*, 965 F.3d 452 (6th Cir. July 10,

2020), *reh'g en banc denied* (6th Cir. Aug. 26, 2020).[5]

Furthermore, numerous courts have recently certified several depreciation *settlement* classes in the process of granting final approval of labor depreciation class settlements, including in Illinois. *See generally* Peterson Decl. Ex. 2 (identifying all labor depreciation class settlements resulting in final certification and approval between June 1, 2017 and March 15, 2024 of which Plaintiffs' counsel are aware). For example, most recently, on January 10, 2024, Judge Frank Ierulli granted final class certification of a labor depreciation class involving Arizona, Illinois, Missouri, and Wisconsin policyholders and final approval of settlement in *Walker v. Auto-Owners (Mut.) Ins. Co.*, No. 2023-LA-0000143 (Ill. Cir. Ct., Tenth Judicial Cir., Peoria Cnty. Jan. 10, 2024) (hereinafter "*Walker* Final Approval Order"). Similarly, on October 6, 2022, Judge Christopher Threlkeld granted final class certification of an Illinois labor depreciation class and final approval of settlement in *Staunton Lodge No. 177, A.F. & A.M. v. Pekin Ins. Co.*, No. 2020-L-001297 (Ill. Cir. Ct., Third Judicial Cir., Madison Cnty. Oct. 6, 2022) (hereinafter "*Pekin* Final Approval Order"). Additionally, on November 7, 2022, the U.S. District Court for the Northern District of Mississippi granted final class certification of labor depreciation settlement classes involving Illinois, Kentucky, Mississippi, Ohio, and Tennessee policyholders and final approval of settlement in the case captioned, *Cedarview Mart, LLC v. State Auto Prop. & Cas. Co.*, No. 3:20-cv-00107 (N.D. Miss. Nov. 7, 2022) (*Cedarview* Dkt. 71) (hereinafter "*Cedarview* Final Approval Order").

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

A. The Settlement Meets The Requirements Of 735 ILCS 5/2-801.

1. Numerosity

"Section 801(1) requires that the number of plaintiffs be numerous, but also that joinder of plaintiffs in one individual action be impracticable." *Phillips v. Ford Motor Co*., No. 99-L-1041, 2003 WL 23353492, at *2 (Ill. Cir. Ct., Ill. Cnty. Sept. 15, 2003). "Where there are a number of potential claimants, and the individual amount claimed by each is small, making redress on an individual level difficult, if not impossible, Illinois courts have been particularly receptive to proceeding on a class action basis." *Id*.

While "there is no magic number that clearly defines numerosity," *Smith v. Ill. Cent. R.R. Co*., 363 Ill. App. 3d 944, 954 (5th Dist. 2005), *rev. on other grounds*, 223 Ill.2d 441 (2006), where there are likely more than 40 class members, numerosity is presumptively satisfied. NEWBERG § 3:12. Based upon data review and extrapolation, the attorneys estimate that Class Notice will be issued for thousands of claims potentially at issue, and multiple class members (*e.g.*, spouses) can share a single claim. Numerosity is easily satisfied. *See, e.g., Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 767-68 (2d Dist. 2008) (holding existence of 80 to 90 potential class members "certainly supports a finding of numerosity"); *Smith*, 363 Ill. App. 3d at 955 (finding numerosity satisfied where record showed potential claimant number in the hundreds); *Phillips*, 2013 WL 23353492, at *2 ("The Court finds that there is a large number of plaintiffs, potentially thousands of individuals, that the joinder of such a large number in one action is impractical, and that individualized litigation would be a waste of scarce judicial resources …. On the other hand, addressing the common issues in one litigation would aid judicial administration.").

2. Commonality And Predominance

"To satisfy the commonality requirement, it must be shown that 'successful adjudication

of the purported class representatives' individual claims will establish a right of recovery in other class members.'" *Walczak*, 365 Ill. App. 3d at 674. "As long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met." *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill. App. 3d 51, 54 (1st Dist. 2007); *see also, e.g., Lee v. Allstate Life Ins. Co.*, 361 Ill. App. 3d 970, 975-76 (2d Dist. 2005) (holding common questions of law and fact predominated as to plaintiffs' claim against insurer for breach of contract where members of proposed nationwide class all entered into same type of Allstate insurance contract with the same or similar terms in question and all members became subject to the same alleged misconduct). "A common question may be shown when class members are aggrieved by the same or similar conduct or a pattern of conduct," as is the case here. *Phillips*, 2013 WL 23353492, at *2. "The fact that the class members' recoveries may be in varying amounts which must be determined separately does not change the fact that the common questions are predominant." *Id*.

Here, the seminal disputed issue was resolved by the Illinois Supreme Court—*i.e.*, labor costs may not be depreciated in the calculation of ACV pursuant to the replacement cost less depreciation methodology where the policy itself does not define ACV. *Sproull*, 2021 IL 126446, ¶¶ 54-55. This same issue has repeatedly been identified by federal courts as "a common question well suited to class wide resolution." *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 375 (8th Cir. 2018); *see also Hicks*, 965 F.3d at 459 ("Plaintiffs' claims share a common legal question central to the validity of each of the putative class member's claims: whether State Farm breached Plaintiffs' standard-form contracts by deducting labor depreciation from their ACV payments."); *Arnold v. State Farm Fire & Cas. Co.*, 2020 WL 6879271, at *5 (S.D. Ala. Nov. 23, 2020) ("[C]ommonality is easily satisfied" where the "overarching issue … is whether State Farm

breached its agreements with policyholders by improperly withholding labor depreciation ….”); *Mitchell v. State Farm Fire & Cas. Co.*, 327 F.R.D. 552, 561 (N.D. Miss. 2018) (“The proposed class members, all of whom purchased insurance coverage from State Farm, each have a claim concerning the issue of whether State Farm breached its policy by depreciating labor costs in calculating actual cash value payments…. [C]ommonality is met.”), *aff’d*, 954 F.3d 700 (5th Cir. 2020). Indeed, “[t]his common question, posed in the context of [Defendant’s] uniform claim handling practices, ‘will yield a common answer for the entire class that goes to the heart of whether [Defendant] will be found liable under the relevant laws.’” *Hicks*, 2019 WL 846044, at *4, *aff’d*, 965 F.3d at 458-59 (6th Cir. 2020).

Further, it is black-letter law that conceded or otherwise resolved legal issues still satisfy the predominance inquiry such that a class action remains an appropriate means of adjudicating the case. *Hicks*, 965 F.3d 458-59 (rejecting insurer’s argument that commonality cannot be satisfied where the common liability question concerning labor depreciation was already answered in plaintiffs’ favor); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006) (“Even resolved questions continue to implicate the ‘common nucleus of operative facts and issues’ with which the predominance inquiry is concerned.”); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000) (“[T]he fact that an issue has been resolved on summary judgment does not remove it from the predominance calculus.”); NEWBERG § 4:51 (“[T]he fact that an issue is conceded or otherwise resolved does not mean that it ceases to be an ‘issue’ for the purposes of predominance analysis.”). “[R]esolved issues bear on the key question that the analysis seeks to answer: whether the class is a legally coherent unit of representation by which absent class members may fairly be bound.” *In re Nassau*, 461 F.3d at 228.

Accordingly, courts repeatedly find that common issues predominate in cases challenging

insurers' withholding of labor costs as depreciation under the terms of standard-form insurance policies. *Mitchell*, 954 F.3d at 711-12 (district court did not abuse its discretion in finding predominance where overarching issue was whether insurer breached its contracts by depreciating labor costs); *Stuart*, 910 F.3d at 375-78 ("It was not an abuse of discretion for the district court to conclude that plaintiffs' [labor depreciation] claims share a common, predominating question of law" that is "well suited to classwide resolution"); *Hicks*, 2019 WL 846044, at *5-6 ("Courts in jurisdictions where labor depreciation has been found to be unlawful have uniformly found that common issues predominate in cases challenging insurers' depreciation of labor costs."); *Arnold*, 2020 WL 6879271, at *8 ("[I]n jurisdictions where labor depreciation is unlawful, as is the case here, courts have uniformly found that common questions predominate in cases challenging insurers' depreciation of labor costs."); *Farmers Union Mut. Ins. Co. v. Robertson*, 370 S.W.3d 179, 187 (Ark. 2010) (finding "[t]he requirement that the common issue[s] predominate is … satisfied" because "whether Appellant was able to depreciate labor pursuant to the contractual terms of its policies would be the same and require the same proof").

Finally, in addition to the labor withholdings themselves, Class Members' entitlement to statutory prejudgment interest also presents a common issue. Commonality is thus easily satisfied.

3. The Adequacy Of Representation

"The adequate representation requirement ensures that all class members receive proper, efficient, and appropriate protection of their interests in the prosecution of the claims." *Kapraun*, 2016 IL App (1st) 143733, ¶¶ 9, 12. Adequacy under section 2-801 is satisfied where the proposed class representatives: (1) are members of the class sought to be certified; (2) do not seek relief that is potentially antagonistic to non-represented members of the class; and (3) have the desire and ability to prosecute the claim vigorously on behalf of themselves and other class members. *Id*. at

¶ 9. Additionally, "[t]he attorney for the representative party 'must be qualified, experienced and generally able to conduct the proposed litigation.'" *CE Design Ltd. v. C&T Pizza, Inc*., 2015 IL App (1st) 131465, ¶ 16.

Here, Plaintiffs are members of the proposed class, and Plaintiffs' interests are perfectly aligned with the proposed class, as they seek to maximize everyone's recovery of compensatory damages and prejudgment interest resulting from Defendant's allegedly improper withholding of labor costs as depreciation in the calculation of ACV. *See Phillips*, 2003 WL 23353492, at *8 (finding proposed class representatives adequate where "no conflicting interests exist between Plaintiffs and the Plaintiff Classes as it is clear … that the representatives herein and Class members share common objectives and legal and factual positions"). Furthermore, Plaintiffs retained experienced counsel. Plaintiffs' attorneys are putative or certified class counsel in a majority of the labor depreciation class actions pending throughout the United States, including in *Sproull*, *supra*, and have decades of experience in insurance, class actions, and complex litigation. *See Phillips*, 2003 WL 23353492, at *8 (finding plaintiffs' counsel adequate where they "regularly engaged in major complex litigation of the size, scope, and complexity similar to this case and have successfully prosecuted many and varied class actions …. They have the experience and sophistication that the Plaintiffs and Class members lack…."). The adequacy requirement is therefore satisfied.

4. The Appropriateness Of Remedy

In deciding whether a class action is the appropriate method for the fair and efficient adjudication of the litigation, the Court "considers whether a class action can best secure economies of time, effort, and expense or accomplish the other ends of equity and justice that class actions seek to obtain." *Ramirez*, 378 Ill. App. 3d at 56. "Where the first three requirements for

class action certification have been satisfied," as is the case here, "the fourth requirement may be considered fulfilled as well." *Id*.

But even if this were not the case, the appropriateness requirement would still be satisfied as Illinois courts have repeatedly recognized that a class action is a particularly appropriate way of resolving a number of relatively small claims. *See Miner v. Gillette Co*., 87 Ill.2d 7, 18 (1981) ("[T]he object of the class action procedure is to adjudicate a large number of very small claims in one proceeding."); *Aguilar v. Safeway Ins. Co.*, 221 Ill. App. 3d 1095, 1102 (1st Dist. 1991) ("[A] class action is an appropriate way of disposing of a number of relatively small claims.").

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

Phillips, 2003 WL 23353492, at *9.

The instant case presents classic small, negative value claims, and class members have no interest in individually litigating this issue. As such, "the negative value nature of the claims in this case establishes superiority of the class action." *Mitchell*, 327 F.R.D. at 564; *see also Arnold*, 2020 WL 6879271, at *10; *Hicks*, 2019 WL 846044, at *6 (finding superiority where spreadsheet data of supplemental payments made by State Farm as part of its Kentucky labor depreciation refund program demonstrated majority of policyholders were paid less than $1,000, with a significant portion paid less than the filing fee for commencing an action in state court); *accord Phillips*, 2003 WL 23353492, at *9 (holding "a class action is an appropriate method for the fair and efficient adjudication of this controversy for all parties" because "[i]ndividual lawsuits for small amounts would be too expensive, and absent a class action, individual lawsuits run a substantial likelihood of inconsistent adjudications").

Accordingly, all the requirements of 735 ILCS 5/2-801 are satisfied. The next step is for the Court to analyze whether the proposed settlement warrants preliminary approval.

V. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. The Court Should Grant Preliminary Approval Because The Settlement Satisfies The Requirements Of 735 ILCS 5/2-806 And Illinois Supreme Court Precedent.

"There exists a strong public policy in favor of settlement and the avoidance of costly and time-consuming litigation." *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶ 41. In Illinois, any action brought as a class action must not be settled except with the approval of the Court and, unless excused for good cause shown, on notice as the Court may direct. 735 ILCS 5/2-806.

Notably, "[t]he standard for class settlement approval is not whether the parties could have done better—the standard is whether the compromise was fair, reasonable, and adequate." *Lebanon Chiropractic*, 2016 IL App (5th) 150111-U, ¶ 50. In making this determination, the Court evaluates the following factors on a case-by-case basis: (1) the strength of the plaintiffs' case balanced against the money and relief offered in the settlement; (2) the defendant's ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the class members' reaction to the settlement; (6) the opinion of competent counsel; and (7) the stage of proceedings and amount of discovery completed. *Lee*, 2019 IL App (5th) 180033, ¶ 56.

"In considering these factors, the circuit court should not turn the approval hearing into a trial on the merits." *Id*. at ¶ 54; *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co*., 2016 IL App (2d) 150236, ¶ 45 ("Given that a settlement is a compromise, a trial court is not to judge the legal and factual questions by the criteria employed in a trial on the merits. Rather, the standard used to evaluate the settlement is whether the agreement is fair, reasonable, and adequate."). To do so

would defeat the purpose of the compromise, such as avoiding the determination of hotly contested issues and dispensing with expensive and wasteful litigation. G*MAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992). Instead, the Court need only apprise itself of the facts necessary to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and … an educated estimate of the complexity, expense, and likely duration of such litigation" absent the proposed compromise. *Lee*, 2019 IL App (5th) 180033, ¶ 57.

"Where the procedural factors support approval of a class settlement, there is a presumption that the settlement is fair, reasonable, and adequate." *Lebanon Chiropractic*, 2016 IL App (5th), ¶ 42. As set forth in detail below, consideration of the foregoing factors supports preliminary approval here.

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

1. Likelihood Of Success On The Merits And The Range Of Possible Recovery

This factor analyzes whether there were risks that the class would not be certified or, if certified, potentially decertified. It also analyzes whether the class, if certified, would be able to establish liability or damages, and whether there were risks. The Court then weighs these risks against the amount and form of relief in the settlement. *See City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990).

Before considering the likelihood of establishing class-wide liability or damages, the first consideration is whether this Court would have granted class certification of a litigation class. While numerous labor depreciation litigation classes have been initially certified for contractual claims (as referenced, *supra*, Arg. § IV), no labor depreciation class action has ever gone to trial

or faced the issue of decertification. Peterson Decl., ¶ 25. In addition, there has been a recent decision wherein one federal district court denied a motion for class certification of a litigation class against State Farm in a labor depreciation case despite prior rulings finding labor depreciation prohibited under the applicable policy language. *See, e.g., Cranfield v. State Farm Fire & Cas. Co.*, 2021 WL 3376283, at *1 (N.D. Ohio Aug. 2, 2021) (denying motion for litigation class certification despite Sixth Circuit decision finding labor depreciation to be impermissible under the applicable policy language). And the Eighth Circuit rejected class certification in a Missouri labor depreciation class action. *See In re State Farm Fire & Cas. Co*., 872 F.3d 567, 577 (8th Cir. 2017). Thus, certification of a litigation class here was not a guarantee. Peterson Decl., ¶ 25.

Assuming *arguendo* that class certification could have been obtained and sustained over any appeals or decertification motions, the next hurdle would be to establish class-wide liability and class-wide damages. *Id*. at ¶ 26. Labor depreciation class actions pending throughout the United States have led to decidedly mixed results concerning liability, with the majority of class actions resulting in no recovery. *See Hicks v. State Farm Fire & Cas. Co.*, 751 F. App'x 703, 710 (6th Cir. 2018) (noting the "substantial weight of authority" is against successfully establishing liability in labor depreciation class actions); *see also GMAC*, 236 Ill. App. 3d at 496 ("GMACM's position in this lawsuit is not without authority and, thus, the risk does exist that the class will recover nothing if the case proceeds to trial. Again, the terms of the settlement must be measured within this context.").

Despite these hurdles, this lawsuit was settled after decisions in Arizona, Illinois, Missouri, Ohio, and Tennessee have held that labor costs may not be depreciated in the calculation of ACV pursuant to the replacement cost less depreciation methodology where the policy itself does not define ACV. *Walker*, 517 P.3d at 623; *Sproull*, 2021 IL 126446, ¶ 54; *Franklin*, 652 S.W.3d at

303; *Cranfield*, 798 F. App'x at 930; *Lammert*, 572 S.W.3d at 179. With these decisions in mind, Plaintiffs' counsel had a high level of confidence in establishing contractual liability for the claims at issue. Peterson Decl., ¶ 27. Defendant, however, has not conceded liability for any putative class member. *Id*. The recovery of 80-100%[6] of the value of these claims plus prejudgment interest reflects the strong value of these claims.

The proposed Settlement is extremely favorable because: (1) Class Members submitting Claim Forms will receive 80-100% of their estimated Nonmaterial Depreciation withholdings plus an additional amount to account for interest; (2) Class Members who had Nonmaterial Depreciation initially withheld from their ACV Payments, but who later recovered all outstanding Depreciation through the claims process, are eligible to receive a one-time payment based on a sliding scale in lieu of interest for the period of withholding; and (3) the release is narrowly tailored to the subject matter of the lawsuit.[7] In addition, CMIC has agreed to pay service awards, attorneys' fees, case expenses, settlement administration costs, and the reasonable costs of a Neutral Evaluator on top of Class Members' recoveries. These terms are very favorable and support preliminary approval of the Settlement.

2. CMIC's Ability To Pay

The negotiated recovery for the proposed Class was *not* reduced based upon CMIC's

[6] Settlements in which class members may receive 100% of their claimed damages are both rare and exceptional. *See, e.g., Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) ("Settlement Class Members who file timely and otherwise valid claims will receive *100%* of their claimed damages—*a percentage almost unheard of in class-action litigation*.").

[7] "The essence of a settlement is compromise and the court cannot reject a settlement solely because it does not provide a complete victory to plaintiffs." *Lebanon Chiropractic*, 2016 IL App (5th) 150111-U, ¶ 47; *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (discussing same principle; approving class settlement that provides less than full recovery by plaintiffs because "[a] $52.50 recovery in the hand is better than a $500 or $1,500 recovery that must be chased through the [] courts").

"ability to pay" because CMIC is financially secure. Peterson Decl., ¶ 33. Accordingly, this factor supports preliminary approval of the proposed Settlement.

3. The Complexity, Length, And Expense Of Further Litigation

This factor requires the Court to compare the immediate benefits and risks of the proposed settlement against the mere possibility of future relief given the uncertainties of protracted and expensive litigation. "In this respect, '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'" *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 303 (S.D. Miss. 2014). Indeed, "[i]f the Court approves the Agreement, the present lawsuit will come to an end and Class Members will realize [] immediate [] benefits as a result. If the Court denies approval, however, protracted litigation would likely ensue." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (granting final approval of class settlement).

Class actions have a well-deserved reputation for being inherently complex. *See Adams v. Jewel Cos., Inc.*, 63 Ill.2d 336, 347-48 (1976) ("The fact that a class action is complex in nature or the number of claims is substantial may be anticipated in many class actions."). Labor depreciation class actions are particularly complex and slow moving. For example, the labor depreciation lawsuit *Stuart*, *supra*, Arg. § IV, was filed on January 2, 2014 and remained pending in the Western District of Arkansas for over six years (and after an Eighth Circuit decision). Similarly, the *Hicks* litigation, *supra*, Arg. § IV, was filed on February 28, 2014 and remained pending in the Eastern District of Kentucky for over eight years.

The instant lawsuit thus could have continued for several additional years in trial and appellate courts absent settlement. Experts in the areas of claims handling and data manipulation would have been retained. Both sides retained experienced class action attorneys. Given the foregoing, and because the settlement provides significant monetary relief for class members now,

as opposed to potential relief in the future, the Court should find that this factor supports preliminary approval of the settlement. *See Schulte*, 805 F. Supp. 2d at 586 ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.").

4. The Amount Of Opposition And The Reaction Of Class Members To The Proposed Settlement, And The Opinions Of Class Counsel

While the amount of opposition and the reaction of class members to the proposed settlement are typically discussed together when evaluating a proposed class settlement,[8] neither factor can be determined upon preliminary approval (prior to the dissemination of notice). That said, at the preliminary approval stage, all the named parties and their counsel agree that the settlement is fair, adequate, and reasonable. The opinion of competent counsel supports approval of the proposed Settlement. *See Shaun Fauley*, 2016 IL App (2d) 150236, ¶ 22; *see also Korshak*, 206 Ill. App. 3d at 974 (finding the trial court properly "relied upon the opinion of competent trial counsel who approved the agreement"); *In re AT&T Mobility Wireless Data Serv. Sales Litig.*, 789 F. Supp. 2d 935, 965 (N.D. Ill. 2011) (granting final settlement approval based, in part, on the opinions of "highly competent" counsel); 2 MCLAUGHLIN ON CLASS ACTIONS § 6:16 (18th ed. Oct. 2021 Update) (hereinafter "MCLAUGHLIN") ("The recommendation of experienced class counsel that a proposed settlement is in the best interest of the class is entitled to great weight.").

Plaintiffs' counsel, who are putative or certified class counsel in a high percentage of the pending labor depreciation class actions throughout the United States and have decades of experience in insurance, class action, and complex litigation, strongly recommend the Settlement. *See* Peterson Decl., ¶¶ 22, 34; Hanauer Decl., ¶ 6. As one commentator explains:

> What counts in favor of the settlement is that experienced counsel—particularly counsel experienced in class action litigation—have reached it and are proposing

[8] *See GMAC*, 236 Ill. App. 3d at 497; *Korshak*, 206 Ill. App. 3d at 973.

> it…. [T]hat is, if experienced counsel reached this settlement, the court may trust that the terms are reasonable in ways that it might not had the settlement been reached by lawyers with less experience in class action litigation.

NEWBERG § 13:59.

Finally, Plaintiffs, knowing that the proposed Settlement will result in recovery of 80-100% of the still-withheld labor depreciation plus an additional amount to account for interest for eligible Class Members, and a one-time interest payment for those Class Members who already received previously withheld Nonmaterial Depreciation, are similarly pleased with the proposed Settlement.

5. Lack Of Fraud Or Collusion

A strong initial presumption of fairness attaches to a proposed settlement when it is shown to be the result of arm's length negotiations conducted by experienced plaintiffs' counsel as is the case here. *See, e.g., Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) ("[A] settlement proposal arrived at after arms-length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate."); *Hispanics United of DuPage Cnty. v. Vill. of Addison, Ill.*, 988 F. Supp. 1130, 1150 n.6 (N.D. Ill. 1997) ("A strong initial presumption of fairness attaches to the proposed settlement when it is shown to be the result of this type of a negotiating process.").

The presumption in favor of settlement is warranted here as there is no indicia of fraud or collusion. Settlement negotiations only occurred after the parties engaged in significant informal discovery. The negotiations concerning service awards, attorneys' fees and litigation expenses were conducted at arm's length and were structured to follow the highest ethical standards—*e.g.*, class relief was negotiated and agreed upon before any negotiations concerning attorneys' fees, costs, and service awards occurred.[9] *See* Peterson Decl., ¶¶ 15-17, 23.

[9] *See* NEWBERG § 13:2 ("Fees should not be negotiated between class counsel and defendant's counsel until after a settlement of the class's claims has been agreed upon.").

6. The Stage Of Proceedings And The Amount Of Discovery

The Court's consideration of the stage of proceedings and the nature and extent of discovery in evaluating the fairness of a settlement is focused on whether the parties have obtained sufficient information to evaluate the merits of competing positions. *See Korshak*, 206 Ill. App. 3d at 974 ("The stage of the proceedings at which settlement is reached is important because it indicates the extent to which the trial court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement."). While this proposed Settlement comes at a relatively early stage in these proceedings, "[t]hat a case is settled early does not establish that the class was ill-represented or that the settlement was the product of collusion." *Schulte*, 805 F. Supp. 2d at 588. As the *Schulte* court recognized:

> Early dispute resolution is salutary, and we should not encourage the unnecessary expense, delay, and uncertainty caused by lengthy litigation when the parties are prepared to compromise. Nor should we hold … that a prompt settlement necessarily suggests a failure to prosecute or defend the action with due diligence and reasonable prudence. To the contrary, an early resolution may demonstrate that the parties and their counsel are well prepared and well aware of the strength and weaknesses of their positions and of the interests to be served by an amicable end to the case.

Id. at 589.

The reasoning in *Schulte* applies with equal force here. First, the stage of these proceedings should not be considered in a vacuum as Plaintiffs' counsel are both well prepared and aware of the strengths and weaknesses of the parties' respective positions, having successfully represented the policyholder before the Illinois Supreme Court in *Sproull*, *supra*, as well as policyholders in numerous other labor depreciation putative and certified class actions in Illinois and elsewhere throughout the United States. *See, e.g., Schulte*, 805 F. Supp. 2d at 588 (granting final approval of class action settlement despite early stage of proceedings where class counsel conducted a great deal of independent research to evaluate plaintiffs' claims). Second, the parties engaged in

informal class-wide discovery, including but not limited to CMIC's production of certain claims data and documents, prior to finalizing the proposed Settlement. *See, e.g.*, Peterson Decl., ¶ 13. Third, and equally important, "the focus of this litigation appears to be more on the legal than factual issues, and there is no indication that formal discovery would have assisted the parties in devising the Proposed Settlement Agreement." *In re AT&T Mobility Wireless Data Serv. Sales Litig.*, 270 F.R.D. 330, 350 (N.D. Ill. 2010) (granting preliminary approval of proposed class action settlement despite lack of formal discovery).

In sum, Plaintiffs' counsel "had all the information necessary to evaluate the merits of the parties' legal positions and the probable course of future litigation" such that they could effectively represent the proposed Class. *Korshak*, 206 Ill. App. 3d at 974; *see also Schulte*, 805 F. Supp. 2d at 588 (granting final approval of class action settlement despite no formal discovery conducted where parties conducted months of arm's-length negotiations and class counsel engaged in substantial informal discovery). "This is not the sort of case where the [early stage of the proceedings or] absence of formal discovery suggests collusion or that the class counsel otherwise failed to get the best agreement possible for their class." *Id*. Accordingly, this factor weighs in favor of preliminary approval.

C. Plaintiffs' Forthcoming Motion Requesting Attorneys' Fees, Costs, And Service Awards Falls Within The Range Of Reasonableness Sufficient To Allow Preliminary Approval And Notice To The Class.

The Settlement provides that Plaintiffs' counsel will seek as attorneys' fees, costs and litigation expenses an amount no greater than $1,318,357.20, and Defendant has agreed not to oppose such request. Class Members' recoveries will *not* be reduced by the amount of attorneys' fees, costs, and litigation expenses paid. Plaintiffs Nicholas A. Jondro and Neal Kahre will seek service awards in the amount of $3,750 each and Plaintiff Postal Properties - Westport Industrial,

LLC will seek a service award in the amount of $7,500, which if approved, will *not* reduce the Class Members' recoveries.

Under the Settlement Agreement, and pursuant to 735 ILCS 5/2-803 and 5/2-806, Class Members will receive notice that fees, costs, and litigation expenses will be sought, and will be provided information about how they can object, assuming the Court preliminarily approves the Settlement. Plaintiffs' counsel will then file a motion for fees and expenses pursuant to both the Settlement and 735 ILCS 5/2-806. In turn, this Court will then award the attorneys' fees, costs, and service awards, if any, that it determines appropriate assuming the Settlement is finally approved.

Although attorneys' fees and costs are analyzed only at the final approval stage, Plaintiffs' counsel will properly seek fees based upon a percentage of the amounts made available to the class on a "claims made" basis. At that time, Plaintiffs' counsel will demonstrate that they are seeking a reasonable percentage of the amounts to be made available to the class. *See, e.g., Landsmark & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 884 (3d Cir. 2016) (citing *Boeing v. Van Gemert*, 444 U.S. 472, 480-81 (1980)). The percentage methodology is the preferred methodology in federal and state courts for calculating fees. *See Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 925 (1st Dist. 1995) ("Percentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources which occurred here as a result of plaintiffs' request for attorneys' fees.").[10]

Assuming preliminary approval of the settlement is granted, Plaintiffs' counsel will show

[10] *See also Brundridge v. Glendale Fed. Bank, F.S.B.*, 168 Ill.2d 235, 243-44 (1995) ("One of the major flaws of the lodestar doctrine is that it creates a disincentive for early settlement of disputes. An attorney who believes that fees will be based on the number of hours devoted to the litigation may be hesitant to settle the matter at an early stage in the proceeding.").

upon final approval that the attorneys' fees sought here are fully consistent with comparable cases. Specifically, the requested fees are consistent with several final class action approval orders from state and federal courts in similar labor depreciation class action settlements. *See* Peterson Decl. Ex. 2 (identifying all "claims made" labor depreciation class settlements resulting in final approval between June 1, 2017 and January 10, 2024 of which Plaintiff's counsel are aware with range of percentages for fees and costs awards between 17.08% to 28.6%).

Further, Plaintiffs' counsel will also show that the percentage to be sought here is generally below that approved by federal and state courts. In Illinois, such awards commonly fall between a lower end of 20% and an upper end of 50%. *See, e.g., Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608, at *28 (Ill. Cir. Ct., Madison Cnty. Mar. 21, 2003) (collecting Illinois state and federal cases approving class counsel fee awards within 20-50% of common fund), *rev. on other grounds*, 219 Ill.2d 182 (2005); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1252 (N.D. Ill. 1993) (determining court's independent "research of the case law supports the conclusion that fee awards typically range from 20% to 50% of the fund"). Plaintiffs' counsel will demonstrate when submitting their anticipated motion concerning fees and litigation expenses (assuming preliminary approval) that their request will be closer toward the lower end, rather than the higher end of these benchmarks. *See generally Clark v. Gannett Co., Inc.*, 2018 IL App (1st) 172041 (leaving undisturbed trial court's award of $5,382,000 to class counsel for attorneys' fees and expenses, representing a fee of 39% of the total settlement); *Ryan*, 274 Ill.3d at 922 (affirming fee award of $33^{1/3}$% of the common fund as a whole).

Here, pursuant to the parties' agreement, Defendant has agreed not to oppose Plaintiffs' request for an amount no greater than $1,318,357.20 in attorneys' fees and litigation expenses. Plaintiffs' counsel estimates the aggregate value of the relief made available to the class for

payment on a claims made basis is at least $6,365,357, inclusive of the costs for settlement administration (estimated to be at least $100,000), plus the proposed service awards ($15,000 total) and attorneys' fees and expenses ($1,318,357.20). Thus, the attorneys' fees sought are no more than 20.7% of the aggregate value of the proposed settlement amounts made available to the putative class (*i.e.*, $1,318,357.20 / $6,365,357).[11] *See* Peterson Decl., ¶ 24. This is within the range of reasonableness for fee awards in Illinois. *Clark*, 2018 IL App (1st) 172041; *Ryan* 274 Ill.3d at 922.

Because the attorneys' fees will not reduce any Class Member's recovery and the attorneys' fees are to be paid "*over and above* the settlement costs and benefits with no reduction of class benefits," agreements between Plaintiffs' and defense counsel as to the amount of fees "are *encouraged*, particularly where the attorneys' fees are negotiated separately and only after all the terms have been agreed to between the parties." *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *28-30 (M.D. Tenn. Aug. 11, 1999); *Bailey v. AK Steel Corp.*, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008) ("[C]ourts are especially amenable to awarding negotiated attorneys'

[11] Both the U.S. Supreme Court and Illinois state courts hold that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Ryan*, 274 Ill.3d at 922 (same); *see also* MCLAUGHLIN § 6:24 ("Most Circuits to address the question hold that in a common fund case … attorneys' fees should be calculated as a percentage of the total funds made available through counsel's efforts, whether claimed or not." (citing cases)). Further, precedent supports applying the selected percentage to the total benefit to the class before separately deducting litigation costs and expenses from the fund. *See, e.g., In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 976 (8th Cir. 2018) ("[T]he district court acted within its discretion when it included notice and administrative expenses in its calculation of the total benefit to the class."); *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 282-85 (6th Cir. 2016) (holding percentage-of-fund approach properly focuses on the total benefit made available to class; "[w]hen conducting a percentage of the fund analysis, … [a]ttorney's fees are the numerator and the denominator is the dollar amount of the Total Benefit to the class (which includes the 'benefit to class members,' the attorney's fees and may include costs of administration)"); MCLAUGHLIN § 6:24.

fees and expenses in a reasonable amount where that amount is *in addition to and separate from* the defendant's settlement with the class."). Indeed, courts have held that these "over and above" fee requests are entitled to a "presumption of reasonableness." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322-33 (W.D. Tex. 2007); *see also Cole v. Collier*, 2018 WL 2766028, at *13 (S.D. Tex. June 8, 2018) ("When the amount of fees is agreed upon, is separate and apart from the class settlement, and has been negotiated after the other terms have been agreed, the attorneys' fee is presumed to be reasonable."). In any event, at this stage of the proceedings, there is no basis to preclude preliminary approval because of the fee request to be made in the future, a request that will not impact individual recoveries.

Finally, the payment of service awards to the representative plaintiffs is "not atypical in class action cases and serve[s] to encourage the filing of class action suits." *GMAC*, 236 Ill. App. 3d at 497 (favorably citing *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616 (W.D. Pa. 1973) for award of $17,500 to class representative). The $3,750 and $7,500 service awards sought here for the Class Representatives are consistent with those approved in other labor depreciation class actions, including in Illinois. *See, e.g., Pekin* Final Approval Order at ¶ 14 (approving $10,000 to class representative in Illinois labor depreciation class action); *Cedarview* Final Approval Order at ¶ 26 (awarding $7,500 service award in labor depreciation class action); *Walker* Final Approval Order at ¶ 13 (awarding service awards in the amount of $7,500 to each representative plaintiff in labor depreciation class action); Final Order and Judgment at ¶ 40, *Mitchell v. State Farm Fire & Cas. Co.*, No. 17-00170-MPM-RP (N.D. Miss. Feb. 25, 2021) (*Mitchell* Dkt. 249) (awarding $15,000 service award to class representative in labor depreciation class action).

Further, the proposed Class Representatives, Nicholas A. Jondro, Neal Kahre, and Postal Properties - Westport Industrial, LLC, obtained a settlement valued at several millions of dollars,

exclusive of interest payments, attorneys' fees, and costs for the class. Their willingness to serve as Class Representatives, to stay updated on the case, and to provide necessary information and records, was critical to the litigation. Since this Court will fully analyze the appropriateness and amount of service awards at the final approval hearing in the future, the proposed service awards in the Settlement do not provide grounds for delaying the grant of preliminary approval.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court preliminarily approve the Settlement. In order to comply with the notice requirements, as well as to allow sufficient time after notice for class members to decide whether to opt out of the class or object to the settlement, Plaintiffs further request that the Court schedule a Final Approval Hearing no sooner than 120 days from the date of preliminary approval. *See* SA ¶ 3.1.3.

April 18, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed and served via the Court's electronic filing system, which will send electronic notices of same to all counsel of record on this the 18th day of April 2024.

/s/Robert J. Hanauer