

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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DENNIS R. AND S. IMANI WOULLARD,	:	x
individually and on behalf of all others similarly	:	
situated,	:	
Plaintiffs,	:	Civil Action No.
	:	1:06CV1057LTS-RHW
vs.	:	
STATE FARM FIRE AND CASUALTY	:	
COMPANY,	:	
Defendant.	:	x

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**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

Defendant State Farm Fire and Casualty Company (“State Farm”) submits this Supplemental Memorandum of Law in Support of its motion for entry of an order preliminarily approving a proposed class action settlement (the “Settlement”)<sup>1</sup> of this action, in response to this Court’s order of February 9, 2006 [34].

As a prelude to State Farm’s response to the Court’s stated concerns, we believe it is appropriate to review the standards governing preliminary approval of a class action settlement.<sup>2</sup> At the preliminary approval stage, a court is called upon to review the settlement and make an initial, preliminary determination whether it is fair, reasonable,

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<sup>1</sup> Capitalized terms not otherwise defined in this Supplemental Memorandum are as defined in the Agreement of Compromise and Settlement (“Agreement” or “Settlement Agreement”), which was filed as Exhibit A [26-2 & 26-3] to the Memorandum in Support of Plaintiffs’ Motion for Order Conditionally Certifying a Rule 23(b)(1)(A) and (b)(2) Class Action and Preliminarily Approving the Settlement [26-1].

<sup>2</sup> The standards for preliminary approval, and the reasons why State Farm believes those standards are met in the instance case, are discussed at greater length in State Farm’s previously filed Memorandum of Law in Support of Motion for Preliminary Approval of Proposed Class Action Settlement [22].

and adequate. *See Manual for Complex Litigation (Fourth)* § 21.632 (2004) (“*Manual*”). Although the review at this stage is more limited than the in-depth review that will occur as part of the final fairness hearing, the Fifth Circuit has identified the following factors to be considered when evaluating a proposed class action settlement: (1) whether the settlement was the product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members. *See Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). When evaluating these factors at the preliminary approval stage, a court should determine whether a proposed settlement appears to fall within the range of possible approval. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827-28 (E.D.N.C. 1994).

For the reasons set forth in its prior memorandum [22], State Farm believes that the proposed Settlement meets all the criteria for preliminary approval. In this supplemental memorandum, State Farm has attempted to address the questions raised in this Court’s order of February 9, 2007.<sup>3</sup> For ease of reference, the questions posed by the Court are reproduced in italics.

I. Numerosity, Typicality and Adequacy of Representation

The proposed Settlement Agreement provides that “Plaintiffs will seek, and State Farm will not oppose, certification of the Settlement Class by the Court pursuant to Federal Rule of Civil Procedure 23(a), 23(b)(1)(A) and 23(b)(2), for purpose of

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<sup>3</sup> In its February 9 order, the Court noted that it had raised other procedural concerns in its January 26, 2007, order [31]. However, it indicated that the concerns addressed in its February 8 order should be addressed first. [February 9 Order at 4.] This Supplemental Memorandum, therefore, is focused on the issues identified by the Court in its February 9 order.

settlement only.” (Agreement ¶ 3.1). The requirements of Rule 23(a), therefore, should be addressed by proposed Class Counsel. However, State Farm can provide the following information regarding numerosity.

- a) *“How many State Farm policyholders (and how many potential claims) will be included in the proposed class?”* [February 9 Order at 1.]

State Farm has reviewed its records and determined that approximately 36,000 policies meet the criteria set forth in the class definition. It is impossible to determine how many claims will be included in the proposed class, because we do not know how many class members will opt out.

- b) *“How many of these potential class members hold each of the eleven types of policies the parties propose to include in the settlement class?”* [February 9 Order at 1.]

The approximate number of each type of policy within the class definitions is as follows:

Residential Policies:

Homeowners Policy (FP 7955)	25,400
Rental Dwelling Policy (FP 8103.3)	6,500
Renters Policy (FP 7954)	1,800
Condominium Unit Owners Policy (FP 7956)	260
Apartment Policy (FP 6107)	200
Rental Condo. Unit Owners Policy (FP 6131)	110
Condominium/Association Policy (FP 6109)	30

Commercial/Non-Residential

Business Policy (FP 6103)	1,500
Church Policy (FP 6105)	200
Contractors Policy (FP 6100)	150
Farm/Ranch Policy (FP 8102)	10

- c) *“How much the coverage for these claims totals for each type of policy?”* [February 9 Order at 1.]

With all due respect, State Farm does not believe it is meaningful to evaluate the proposed settlement against the coverage limits of the above policies for several reasons. First, the vast majority of policyholders did not sustain a total loss. Second, State Farm has already paid hundreds of millions of dollars to policyholders in Mississippi, many of whom also received payments pursuant to the National Flood Insurance Program. As a result, the coverage limits do not represent the upper range of recovery for class members, even if we were to put aside issues of whether the loss was caused by wind or flood.

Not only are the coverage limits untethered to the possible range of recovery, class action settlements should not be judged “in comparison with the possible recovery in the best of all possible worlds.” *Olden v. LaFarge Corp.*, 2007 WL 290378, at \*8 (E.D. Mich. Jan. 29, 2007); *see also Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at \*6 (N.D. Cal. Jan. 26, 2007) (“Settlements by their very nature are not intended to provide full compensation for the claimed losses and consequently cannot be calculated with the same precision as actual damages”). Further, such aggregate coverage information is proprietary to State Farm and its disclosure in a public forum such as this could result in competitive injury to State Farm. Given what we believe is its limited significance to the proposed class action settlement, State Farm respectfully asks that it not be required to provide this information at this time. If the Court continues to believe that the information is useful to its evaluation of the class action settlement, State Farm asks that it be permitted to provide the information *in camera* and under seal.

## II. Burden of Proof in Arbitration Proceedings

*“I am interested in knowing the parties’ position with respect to the allocation of the burden of proof in those cases where both wind and water contribute to a claimant’s damages, and I am interested in how the parties propose to deal with cases in which wind damage and water damage cannot be segregated based on the evidence now available.”* (February 9 Order at 2.)

The proposed Settlement Agreement contains two provisions addressing the burden of proof. First, the Agreement provides that “[t]he arbitrator’s decision shall be

based on the evidence presented and governed by Mississippi law as set forth by the decisions of the Mississippi Supreme Court.<sup>4</sup> For each coverage, the arbitrator shall separately allocate the amount of damage caused by wind and the amount caused by water.” (Agreement ¶ 8.14.12.) The Agreement also provides that “[f]or purpose of this settlement Agreement, State Farm shall not deny any Settlement Class Member’s structural damage claim, unless it can show by a preponderance of the evidence that the damage denied was caused by an excluded peril under the Subject Insurance Policy.” (Agreement ¶ 8.6.)

Allocation of the burden of proof has been one of the more hotly contested issues in this litigation. It is one of the issues raised in the *Tuepker*<sup>5</sup> appeal and in *Broussard*,<sup>6</sup> which may also be appealed by State Farm. It is this uncertainty, as well as other uncertainties regarding both the law and the facts, that led the parties to reach a compromise settlement.<sup>7</sup> Like all other provisions of the Settlement Agreement, the

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<sup>4</sup> This language seemed appropriate to the parties given that the claims arise under state law and, therefore, decisions of the Mississippi Supreme Court on issues of substantive law are controlling. *See Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 199 (5th Cir. 2006). Even in the absence of a dispositive decision from the Mississippi Supreme Court, predictions about how that court might rule must consider decisions of the Mississippi Supreme Court in analogous cases, the rationales and analyses underlying rulings by the Mississippi Supreme Court on related issues, and dicta from the Mississippi Supreme Court. *See id.*

<sup>5</sup> *Tuepker v. State Farm Fire & Cas. Co.*, No. 1:05-cv-00559-LTS-RHW. [*Tuepker* 30.]

<sup>6</sup> *Broussard v. State Farm Fire & Cas. Co.*, No. 1:06-cv-00006-LTS-RHW. [*Broussard* 106.]

<sup>7</sup> Courts have repeatedly recognized that, in evaluating class action settlements, courts should not reach conclusions regarding the ultimate outcome of the litigation but, instead, should recognize that any settlement represents a compromise by parties who are both exposed to risk and uncertainty by continued litigation. *See, e.g., Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982) (“Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual

language quoted above resulted from extensive negotiations. Given the current status of the appeals and the uncertainty of their outcome, this was the only language that both sides could agree upon.

At the same time, it was a goal of the settlement to provide a process that would not be overly burdened by legal formalities. The arbitration process is intended to be a simpler process, and the parties anticipate that the arbitrator will use his common sense and judgment to make the fairest allocation between wind and water he can make based upon the evidence presented at the arbitration. If the parties were to be burdened with the same expectations and evidentiary burdens they would have at trial, then the parties would be foregoing their right to an Article III judge, jury and appeal, without any significant advantage over trial. Avoiding the risk, uncertainty and expense of trial is one of the primary benefits of the settlement, for both the class members and State Farm.

### III. The Mississippi Katrina Guideline Tool (MKRGT)

*“The MKRGT is a key component of the proposed settlement. The grid established by the MKRGT, if it is ultimately approved, will in all likelihood, become the de facto standard for all similar insurance settlements that the Court may ultimately sanction. Thus, it is of utmost importance that the figures used in this grid be fair and reasonable in light of the competing interests of the parties and the comparative benefits the parties will derive from establishing and following the proposed settlement procedure. The parties should be prepared to explain to the Court how the figures on this grid were calculated, and the parties should be prepared to offer evidence that will support a finding that the proposed figures are fair and reasonable.”* [February 9 Order at 2.]

The MKRGT was proposed initially by State Farm after an extensive internal process to develop the damage categories and percentage guidelines.<sup>8</sup> The damage

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settlements.”); *Reynolds v. Nat’l Football League*, 584 F.2d 280, 287 (8th Cir. 1978) (“No settlement agreement arrived at between antagonists can provide the best possible world to all members of a relatively large class.”); *In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at \*9 (S.D.N.Y. Sept. 27, 2006) (in evaluating a class action settlement, a court should “consider[] not only the risk inherent in the distance between the parties’ respective positions on the merits and the gravity of . . . risk . . . , but the immediacy of a settlement payment versus the potential for a later recovery at trial.”).

<sup>8</sup> It was not the parties’ intent that the MKRGT establish standards to be used in settlements with other insurance companies or in individual lawsuits and we do not know

categories were originally four categories, based on the severity of the loss, irrespective of cause or coverage: Minor Damage, Moderate Damage, Severe Damage, Total Loss. When dealing with catastrophes, insurance companies routinely classify claims by severity. In the ordinary course of business, State Farm classifies claims into three damage categories based on severity; however, such classifications are typically made early in the claims process based upon limited information. In the Mississippi Katrina Resolution Process proposed in the settlement, damage classifications will be made after the class member has submitted a claim and more information will be available to properly classify his or her claim. As a result, it seemed reasonable to define the damage classifications in terms of percentage of loss. Given that additional information will be available, the damage categories were further refined to include a fourth category for total loss in the MKRGT.

In order to arrive at the percentage guidelines it initially proposed, State Farm made several assumptions. First, it assumed that settlement offers would be made without regard to the effect of the anti-concurrent causation clause. Second, it focused its attention on claims where the wind versus water causation issue was most problematic; that is, the area within the three coastal counties. At the same time, it was important that the class action settlement not become a vehicle for making flood payments to policyholders because to do so would violate the terms of the policies and be inconsistent with the National Flood Insurance Program. Third, State Farm noted that, by definition, the class was limited to people who had not pursued litigation and, therefore, included people who have not expressed dissatisfaction with the original amounts paid to them. With these parameters in mind, State Farm reviewed claims made by policyholders

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if that will be the case. *See, e.g., Glass*, 2007 WL 221862, at \*5-6 (N.D. Cal. Jan. 26, 2007) (observing that direct comparison of two class action settlements arising out of “separate actions that were separately litigated and separately settled . . . [was] unwarranted”).

within the three coastal counties, who had not pursued litigation, and evaluated the average amounts paid to such policyholders. Using those averages as a starting point, the percentages provided for in the guideline tool are generally higher than the average of amounts paid to policyholders and they demonstrate State Farm's desire to reach a reasonable compromise of these claims. At the same time, recognizing that each policyholder's claim is different, the percentages stated in the MKRGT are guidelines only. The negotiated Settlement Agreement allows a State Farm reviewer to use a higher or lower percentage in making a Settlement Offer, given the specific circumstances of the claim.

During the course of negotiations, the parties recognized that slab cases were the most problematic. First, they are significant claims because the policyholders are asserting a total loss. Second, the absence of any structure on the site makes the determination of causation more complicated. As a result of negotiations, a fifth damage category was added to the guideline tool for slab claims. The percentage to be paid to slab claims was vigorously negotiated, with both Plaintiffs' Counsel and the Attorney General. The percentage stated in the MKRGT is higher than originally offered by State Farm and is the percentage insisted upon by those on the other side of the table.

#### IV. Guaranteed Minimum Payments

*"The MKRGT provides a guaranteed minimum payment for only one of the five claims categories established for the grid."* [February 9 Order at 2.]

- a) *"The parties have represented to the Court that this guarantee will enable a claimant in a "slab case" to collect 50% of his coverage. I do not understand how this calculation has been made, and I want the parties to be prepared to explain this calculation to me."* [February 9 Order at 2.]

The "50%" estimate refers to the fact that under the MKRGT, slab claimants will receive a minimum of 50% of their Coverage A policy limits (inclusive of prior payments).<sup>9</sup> The tool provides that they will receive a minimum of 35% of Coverage A

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<sup>9</sup> The 50% is subject to offsets for amounts previously paid under the State Farm policy and also considers payments issued under a flood policy. The amount offered,

for damage to structure and a minimum of 10% of Coverage A for loss of use (which includes additional living expenses), for a total of 45% of Coverage A. (Agreement, Exh. 1 [26-2 at 43].) In addition, they will receive a minimum of 6.67% of their Coverage B limits (*id.*), which should bring most slab claimants to 50% of their Coverage A limits.

- b) *“I am also struck by the disparity in the numbers inside the grid for people who have only a slab and pilings, who are guaranteed a 35% payment for their structures coverage, compared with other claimants who also sustained a total loss but who receive no guarantee at all. I believe that the ultimate key to the success of the proposed settlement procedure will be the minimum guarantees State Farm is willing to offer the class members to induce them to participate in the settlement process. In the absence of substantial guarantees that are reasonably related to the level of damage to the insured property, I see little inducement for the class members to forego their potential extra-contractual claims and the procedural rights they have in the process of litigation. Thus, I would like to hear from the parties on this issue.”* [February 9 Order at 2-3.]

When the Guideline Tool was first proposed to Plaintiffs’ Counsel in the negotiations, there was a single category for “Total Damage or Constructive Total Damage” and it was defined to include claims where the damage was greater than 60 percent (as it is currently defined). In other words, this category included claims where a home has been rendered uninhabitable and would have to be substantially rebuilt, even though some portion of the structure remains. Where the structure remains, there is significant physical evidence from which to determine what damage was caused by wind and what was caused by water. Consequently, there was neither need nor justification for the type of guarantees that were later agreed to with respect to slab claims.

As originally proposed, the “Total Damage” category also included slab claims. However, as the negotiations progressed, the parties recognized that slab claims could not be treated on the same basis as “Total Damage” claims where a portion of the structure

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along with amounts previously paid, will not exceed the applicable policy limit. (Agreement ¶ 8.7 & Exh. 1.) The Court’s concern in this regard is addressed *infra* at section V.

remains. With slab claims, the absence of a structure complicates the causation issue because there is little or no physical evidence from the structure itself to consider. Accordingly, in response to demands made by both the Plaintiffs' Counsel and the Attorney General, a separate classification for Foundation/Pier Only claims (defined as an absence of structure on the site) was created. The minimum percentage for that category was the result of protracted negotiations, in recognition of the proof problems confronting both sides in slab cases. Because of the inherent causation difficulties presented by the slab claims, especially in light of the unsettled legal issues noted above, the parties agreed on a minimum as a negotiated compromise between the positions taken by the parties.

It is not possible to provide for minimums on all claims, nor are they really needed for those losses outside of the surge area or in cases where some part of the structure remains, because in such cases, proof of cause of loss is more readily available. For example, someone whose loss was caused entirely by wind should have received everything he was entitled to when his claim was first paid by State Farm. Likewise, someone with flood insurance may have been wholly compensated for a loss due solely to flood. State Farm believes that the proposed settlement creates a process that is fair, while still being flexible.

Significantly, while an opt-out right is not required under Rule 23(b)(1) or (b)(2), the Settlement Agreement provides that "Plaintiffs will request that notice and an opportunity to request exclusion from the Settlement Class be provided to persons within the Settlement Class definition. State Farm will not oppose such request." (Agreement ¶ 3.3.) Pursuant to this provision, Plaintiffs sought certification of an opt-out class. The opt-out right was one of the important benefits of this class action settlement because any potential class member can opt out and fully preserve his or her right to pursue litigation.

Therefore, if any class members do not wish to participate in the settlement because they feel that the potential compensation is inadequate, they can opt out of the class.

V. Offset for Flood Insurance and Other Insurance Collected

*“If the claims that fall within the proposed settlement class are similar to the claims in litigation, there will be both class members who had no flood insurance and class members who have collected flood insurance. For the class members who have collected flood insurance, State Farm will be entitled to take a credit for the amount collected against the total value of the insured property, in accordance with my prior ruling in Tejedor v. State Farm, Civil Action No. 1:05cv679. The proposed settlement agreement appears to me to go further than this and allow a dollar for dollar offset of State Farm’s limits of coverage by the amounts the claimants have collected from other insurance policies. I want to hear from the parties concerning this provision, and I am interested in the parties’ views of the fairness of this provision in cases where the claimants property was under-insured, i.e., in cases where the value of the insured property may equal or exceed the combined limits of all insurance policies covering the property.”* [February 9 Order at 3.]

As noted in the quoted comments, the Court has already determined that a flood deduction is appropriate. A class member should not be able to argue to one insurer that his or her loss was caused by flood and then argue to another insurer that the loss was caused by wind. Nor is it proper for a class member to be paid twice for the same loss. Any amounts for loss that a class member has admitted were caused by flood should, therefore, be deducted. The question, as expressed by the Court, is: “Deducted from what?”

In attempting to answer this question, it must first be understood that “total loss,” when describing the policyholder’s insurable interest, does not refer to the market value of the property. It does not include the value of the land on which the structure sits, nor does it represent the resale value of the property. Instead, it refers to the cost to rebuild the structure, subject to policy limits, *as increased by inflation coverages*. In addition, policyholders generally do not, and reasonably should not, purchase open peril insurance with a view towards splitting a loss with their flood policy. The same policy that provides insurance for wind damage also covers loss due to fire, where the policyholder may sustain a total loss under circumstances that would make additional coverage under

his flood policy irrelevant. The proposed settlement recognizes, therefore, that a policyholder has a responsibility to keep his or her property insured for an appropriate amount and that failure to do so is a risk that should be borne by the policyholder.

With these considerations in mind, and as part of the compromise struck by the negotiating parties, the Settlement Agreement uses the coverage limits of the policy to limit recovery and as the amount against which flood payments will be offset. (Agreement ¶ 8.7.) While the Settlement Agreement does not provide for any aggregate maximum payment, it was reasonable for State Farm to seek some outer boundary on class member recovery, a boundary that was susceptible to reasonably precise determination.<sup>10</sup> Here, in order to provide some measure of that certainty and also to make the settlement easier to administer, “Maximum Payment” was defined in a way that avoids disputes and the need for expert evidence regarding the reasonable cost to rebuild a structure.<sup>11</sup>

State Farm believes that the negotiated Maximum Payment definition is reasonable in light of these concerns. Nor should this be an issue for most class members. It is estimated that the vast majority of class members did not have flood insurance, so they would not be affected by the offset provisions. Likewise, given the inflation increases included in most policies (which are incorporated into the definition of Coverage A),<sup>12</sup> Coverage A limits should not significantly understate the cost of

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<sup>10</sup> See *Jaroslawicz v. Engelhard Corp.*, 1991 U.S. Dist. LEXIS 8643, at \*4 (D.N.J. June 21, 1991) (“Part of the incentive for any defendant to settle is to put a limit on damages to be paid.”).

<sup>11</sup> Cf. *In re Veritas Software Corp. Sec. Litig.*, 2005 U.S. Dist. LEXIS 30880, at \*30 (N.D. Cal. Nov. 15, 2005) (holding that cap on recovery included in settlement agreement to avoid complex, time-consuming and expensive calculations was fair and reasonable).

<sup>12</sup> In the proposed Settlement Agreement, “Coverage A Limits” is defined as “the limits for Coverage A Dwelling (under the homeowners program) or Coverage A Building (under the commercial program) shown on the declarations page of a Subject

rebuilding in most cases. While it is possible to envision hypothetical cases that might not reflect these considerations, they would be anomalies in the real world.

Finally, this compromise of claims that has been negotiated at arms' length,<sup>13</sup> comes at a time of uncertainty for all concerned. This Court's prior rulings are on appeal; they may be upheld, they may be reversed, or they may be modified in some fashion not foreseen by anyone. The parties have determined that it is fair and reasonable to place some absolute limits on recovery in order to resolve the litigation at this time and get money into the hands of class members. The class members avoid the risk inherent in State Farm's prevailing in its appeal, and State Farm avoids the risk of additional liability that might come if it loses on appeal. If there are potential class members who believe that their property was significantly underinsured and who do not want to be bound by the Maximum Payment provision, they can opt out of the class.

#### VI. Re-evaluation of Claims

*“The parties have represented to the Court that one of the greatest advantages that will accrue to the members of the class is State Farm’s re-evaluation of claims. The proposed settlement contains a commitment by State Farm to have a new adjustor re-evaluate the evidence concerning a claim, but that commitment will provide no benefit to the class member in cases where State Farm’s new adjustor concurs with the judgment of the first adjustor. Indeed, if the two adjustors are looking at the same evidence, and if they are applying the same standards to evaluate the claim, they should reach roughly the same conclusion in almost every case. I am interested in hearing from the parties on this issue, and I am particularly interested in whether State Farm is willing to make any commitment that would result in an increase in the amount it is willing to offer a*

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Insurance Policy, together with inflation coverage, if applicable to the policy.” (Agreement ¶ 2.8 (emphasis added).) For example, State Farm Homeowners Policy (FP-7955) provides that “[t]he limits of liability shown in the Declarations for Coverage A, Coverage B . . . will be increased at the same rate as the increase in the Inflation Coverage Index shown in the Declarations.” (First Am. Class Action Compl., Exh. A. at 7, [23-2 at 9].)

<sup>13</sup> A proposed class action settlement is considered presumptively fair where, as here, there is no evidence of collusion and the parties, through capable counsel, have engaged in arms' length negotiations. See *S. Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991).

*claimant in those instances where there is no new evidence to be taken into consideration. Over a year has now elapsed since these claims were originally adjusted, and I expect that the submission of new evidence will be the exception from the norm. I am interested in knowing what result the parties expect when these cases are re-evaluated without the submission of new or additional evidence.” [February 9 Order at 3-4.]*

Initially, it must be remembered that, except for opt-ins, the class consists of people who have never filed suit challenging the payments that they received from State Farm. Nonetheless, State Farm anticipates that, even in the absence of new evidence submitted by the claimant, most class members will receive some additional payment under the class action settlement. There are several provisions in the Settlement Agreement that address this issue.

First, the fact that State Farm is having a “fresh pair of eyes” evaluate the claim (Agreement ¶ 8.13) is a significant benefit to the class and it is a benefit that was insisted upon by Plaintiffs’ Counsel. There is a certain amount of subjectivity in the claims review process, so that review by a new person, in itself, may very well produce a different outcome.

Second, State Farm will be paying guaranteed minimums on slab claims. (Agreement, Exh. 1.)

Third, State Farm is committed to paying a minimum aggregate amount of \$50,000,000 to the class. (Agreement ¶¶ 1.14, 8.15.)

Fourth, to address concerns about the anti-concurrent cause provision of the policies, the Agreement provides that State Farm will not assert as grounds for total denial of a claim that water contributed to the loss if wind damage occurred. (Agreement ¶ 8.5.)

Fifth, in developing the percentages in the guideline tool, State Farm indulged various assumptions favorable to class members, with the expectation of paying something additional to most class members.

Sixth, State Farm bears all the administrative costs of the settlement, including arbitration costs. (Agreement ¶¶ 8.14.1, 8.14.13.) As a result, State Farm has an incentive to make Settlement Offers that are sufficiently attractive to class members that the costs of arbitration can be avoided.

Finally, State Farm is constrained by guidelines set forth in the Settlement Agreement that govern how it evaluates individual class members' claims in making a settlement offer. State Farm does not agree that its handling of Katrina claims was incorrect, but in order to address concerns that have arisen, the Agreement provides that, in addition to the criteria stated above, State Farm must consider all engineering reports, copies of which will be provided to the arbitrator (Agreement ¶¶ 8.4.3, 8.14.7) and that various pre-storm, storm, and post-storm conditions will be considered (Agreement ¶ 8.4.3). Some of the information to be considered simply may have been unavailable when claims were initially adjusted. This latter provision is consistent with the Insurance Commissioner's directive that insurance companies consider the totality of the evidence, not just engineering reports.

## VII. Simplicity

*"The proposed settlement procedure is very complex. The benefit of establishing an alternative dispute resolution process, whether by mediation in the Court's existing program, arbitration under the parties' proposed settlement, or an alternative procedure established by the Court, is that it will reduce the transactional costs and the time necessary to resolve a disputed claim. To the extent such a procedure works, it is of substantial benefit to all the parties who participate in the process. But these benefits are in inverse proportion to the complexity of the procedure. I am interested in hearing from the parties on how any proposed procedure can be streamlined and simplified to best accomplish the purposes for which this procedure is being established."* [February 9 Order at 4.]

State Farm is receptive to any suggestions for how the proposed Mississippi Katrina Resolution Process in the Settlement Agreement can be streamlined, but the parties attempted to make the process as simple *for class members* as possible. The Settlement Agreement may seem complicated, because there are many issues that must be addressed in a class action settlement agreement. And, while there may be many

things that State Farm, the Notice Administrator and the Special Master are required to do by the Settlement Agreement; as to the class members, every effort was made to keep the process as simple as possible. Towards this end, the Settlement Agreement provides for the following:

- In order to initiate a settlement claim, a class member need only return a postcard with his contact information, with the box checked indicating that he wants to participate in the process. (Agreement ¶ 8.8, Exh. 2 [26-2 at 45].) The simple postcard registration was proposed by Plaintiffs' Counsel, but State Farm agreed that it was a good idea.
- Upon receipt of the postcard, State Farm will prepare the claim forms for class members, completing as much information for the class member as possible. (Agreement ¶ 8.10, Exh. 3 [26-2 at 47] & 7 [26-3 at 37].) This feature is different than most class action settlements where the burden to complete and return claim forms is placed wholly on the claimants.
- While the claim form provides a place for class members to provide additional information or make a settlement demand, they are not required to do so. If they have not received flood insurance or applied for grants or loans, all they have to do is check the accuracy of their personal information, sign the claim form and return it. (Agreement, Exh. 3 [26-2 at 47-52].)
- While the settlement documents are comprehensive, they are comparable to other class action settlement agreements and less complicated than many. Any agreement that proposes to settle claims on behalf of an entire class must address a lot of issues and contingencies.
- In order to simplify the process for class members, the parties drafted a notice that will be mailed to class members, written in plain English. The

notice begins with a short description of the document, followed by a one-page summary of the class member's options and deadlines, followed by an index, and followed by the full notice written in question and answer format. (Agreement, Exh. 7 [26-3 at 31-43.]) The parties obtained the advice of Poorman-Douglas Corporation, which has experience in developing these types of communications and making them easy for lay people to understand. (Decl. of Cameron Azari [22-2].)

- In order to make participation in the Mississippi Katrina Resolution Process even easier for class members, the mailed notice includes a "Step by Step Guide to the Mississippi Katrina Resolution Process." (Agreement, Exh. 7, [26-3 at 44-46].) When finally formatted, this document will be on a single page (an example is attached hereto as Exhibit A).<sup>14</sup> It is intended to act as a supplement to the notice, equivalent to a "quick start" guide that might accompany an instruction manual a consumer receives with a computer or electronic appliance.
- In order to minimize the burden on class members in completing the very simple claim form, they will receive a check for \$200 to defray their time and expense. (Agreement ¶ 8.10.)<sup>15</sup> This type of accommodation for class members is typically not included in class action settlements.

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<sup>14</sup> When finalized, the Step-by-Step Guide will give the dates of any actual deadlines established by the Court, rather than time frames such as "Notice + 60 days."

<sup>15</sup> This \$200 payment to class members does not count toward the \$50 million aggregate minimum that State Farm has committed to pay to class members. The only payments that count toward the aggregate minimum are payments to class members by State Farm as a result of State Farm's acceptance of class members Settlement Demands, class members' acceptance of State Farm's Settlement Offers, or payments to class members pursuant to arbitration decisions. (Agreement ¶ 8.15.)

- All administrative expenses of the settlement are paid for by State Farm. (Agreement ¶¶ 5.8, 8.14.1, 8.14.13.) Class members are responsible only for their personal expenses (such as the fees of a private attorney, if they elect not to utilize the services of proposed class counsel). (Agreement ¶ 8.14.13.)
- The intent of the parties was to keep the arbitration process as simple as possible. To request arbitration, a class member only needs to send a simple request to the Notice Administrator. (Agreement ¶¶ 8.14.4, 8.15.5.) Memoranda provided by the parties to the arbitrator are limited to three pages. (Agreement ¶ 8.14.7.) And, while the arbitrator can extend the time for the arbitration, the parties are encouraged to make presentations such that the arbitration can be completed in two hours. (Agreement ¶ 8.14.10.) A class member can have an attorney at the arbitration, but he or she is not required to have one. If a class member is not represented by an attorney, then State Farm cannot have an attorney at the arbitration. (Agreement ¶ 8.14.9.)
- Both sides give up their right to appeal, except as to procedural matters. (Agreement ¶ 8.14.11.) Again, this provision was intended to keep the process simple. A right of appeal, which arguably could act more to the advantage of State Farm than class members, would add another step to the process and could delay payments to class members.
- The Notice Administrator's primary function will be to assist class members by answering their questions, assisting them with completing forms, and advising them of deadlines. Prior class action settlement experience indicates that it is best if class members are given a single contact point to go to initially; that is, a single toll-free number, a single

web site, a single address. This helps assure that they return forms and documents to the appropriate person in a timely fashion. The Notice Administrator then acts as “communication central.”

- There will be many questions that the Notice Administrator will be able to answer (e.g., questions about deadlines or updating contact information). However, the Notice Administrator can also put class members in touch with Class Counsel if they need legal assistance or in touch with State Farm if they have questions about their claim that only State Farm can answer. (Agreement, Exh. 7 [26-3 at 46].)
- In addition to the mailed notice, there will be a voice recorded unit maintained with answers to frequently asked questions. Class members will be able to listen to pre-recorded answers or to speak to live operators. Answers to frequently asked questions will also be posted on the settlement website. (Agreement ¶ 5.5; Decl. of Cameron Azari, ¶¶ 10-11 [22-2 at 4-5].)

#### VIII. Exclusivity

*“I realize that the proposed settlement is intended to cover a specific group of claimants and potential claimants. The class defined in the proposed settlement does not affect cases in litigation, except for a provision allowing a litigant to opt-in to the procedure.”* [February 9 Order at 4.]

- a) *“The proposed class also excludes policyholders who have resolved their claims by mediation and signed releases in favor of State Farm. The Court received a number of comments from individuals who have negotiated a settlement through mediation and who believe the payments they accepted were not fairly calculated or may have been calculated under an inappropriate legal standard. This is a very difficult issue for me, because the Court wants to support finality in the settlement process, particularly the mediation process established by the Insurance Commissioner, without leaving the perception among the settling claimants that they have unfairly suffered financially or legally because they chose to participate in the mediation process early on. I want to hear from the parties on how best to balance these interests in the context of the proposed settlement.”* [February 9 Order at 4.]

With all due respect, State Farm does not believe that it is appropriate to include in the class action people who have previously released their claims after requesting mediation. It would be unfair to require State Farm to open the class action up to persons with whom it has previously reached a negotiated settlement. All settlements reflect compromises and the settlements at issue were reached during a mediation program implemented by the Commissioner of Insurance and this Court. The law recognizes a release as a valid defense to the claims that might be asserted by a potential plaintiff and where, as here, the releases were uncoerced and resulted from negotiation, they must be given effect. *See Houser v. Brent Towing Co.*, 610 So. 2d 363, 365-66 (Miss. 1992); *McCorkle v. Hughes*, 244 So. 2d 386, 388-89 (Miss. 1971).

- b) *“I am also interested in any ideas the parties may have that would make the proposed procedure attractive to those State Farm policy holders who are presently in litigation.”* [February 9 Order at 4.]

This settlement is designed to provide benefits to the vast majority of people who have not filed lawsuits and are in need of a claims process in which they can receive fast and fair reassessment and, if appropriate, payment of their claims. By definition, a class action settlement can only address the claims of a class, which must be properly defined and, therefore, limited.

The parties intentionally did not include in the Settlement Class those people who are already represented by counsel and have filed claims. Such persons do not appear to be in need of the claims process provided for in the settlement. In addition, people who have already made the decision to pursue individual litigation are unlikely to want to be bound by a classwide resolution and, had they been included in the class, they would have objected vociferously. In addition, resolution of the claims of people in litigation is complicated by attorneys fees and litigation expenses. In order, however, to make the

settlement as inclusive as possible, we provided a mechanism for persons in litigation to opt into the class if they so desire.<sup>16</sup>

Whether the settlement can be made more attractive to people who are not bound by it, with all respect, is not the issue before the court. The relevant question, with all deference, is whether the settlement is fair and adequate to those people within the class definition. Recent settlement demands that State Farm has received in some of its cases causes it to believe that litigants may have unrealistic expectations. The relief that the proposed class action settlement will afford class members should not be denied based upon the expectations of, or, with respect, concerns about, persons who are not even members of the class and who retain all of their legal remedies.

While State Farm appreciates the Court's desire for a global resolution of Katrina claims, it respectfully submits that persons who, by definition, are not members of the class, lack standing to object to the proposed settlement. *See Glass v. UBS Fin's Servs., Inc.*, 2007 WL 221862, at \*8 (N.D. Cal. Jan. 26, 2007). In this case, in order to have standing to object to the proposed settlement, persons whose claims are currently in litigation would have to opt-in to the class action. Until they do so, they have no legal right to complain about the terms of the proposed class action settlement.

A similar situation was confronted by the court in *Olden v. Lafarge Corp.*, 2007 WL 290378 (E.D. Mich. Jan. 29, 2007), where the objectors tried to make their opt-outs contingent upon the court's ruling upon their objections. As the court explained:

[O]pting out of a [class action] settlement and choosing to object logically are mutually exclusive options: if one actually opts out, she has no standing to object to the settlement as she will not be bound by it. . . .

. . . [A] party ought not be able to spoil a settlement by interposing objections and then leave the litigation. Neither does it seem fair and reasonable to allow a party to condition his opt out upon the court's acceptance or rejection of the objections to the settlement. If an absent

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<sup>16</sup> State Farm has indicated that it would be prepared to negotiate attorneys fees with individual litigants in order to encourage opt-ins.

class member (or even a class representative) desires to affect the settlement by filing objections, then the objector must abide the result and be bound by the consequences. If the settlement is unpalatable, the class member may opt out and avoid the binding effect of the settlement judgment. To allow the class member to have it both ways, however, would countenance the practice of influencing litigation – or attempting to do so – in which the class member really has no stake. That result is unacceptable.

*Id.* at \*6 (citations omitted). If any persons with claims in litigation do decide to opt into the Settlement Class, they will have a full opportunity to be heard at the fairness hearing. At this stage, persons who are not even members of the class should not be allowed to derail the proposed class action settlement.

### **CONCLUSION**

For the reasons set forth above, as well as the reasons provided in State Farm's prior memorandum in support of preliminary approval, State Farm respectfully requests that the Court grant preliminary approval to the proposed class action settlement.

DATED: February 22, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. SCOTT WELCH, III, one of the attorneys for STATE FARM FIRE AND CASUALTY COMPANY, hereby certify that I have this day filed the above and foregoing memorandum with the Clerk of the Court via the Court's ECF System, which served copies upon the following counsel:

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SO CERTIFIED, this 22<sup>nd</sup> day of February, 2007.

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