

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

JEAN HECKMANN, ERIC)
LaFOLLETTE, and CAMILLE)
LaFOLLETTE, individually and on)
behalf of others similarly situated,)
)
Plaintiffs,)
)
-vs-)
)
LIBERTY MUTUAL FIRE)
INSURANCE COMPANY,)
)
Defendant.)

Case No.: 2:14-CV-04147-NKL

**PLAINTIFFS’ SUGGESTIONS IN SUPPORT OF
PLAINTIFFS’ UNOPPOSED MOTION FOR FINAL APPROVAL
OF CLASS SETTLEMENT, AWARD OF ATTORNEY COSTS
AND EXPENSES AND APPROVAL OF REPRESENTATIVE
PLAINTIFFS’ INCENTIVE AWARDS**

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I. INTRODUCTION

Plaintiffs, Jean Heckmann, Eric LaFollette, and Camille LaFollette (“Plaintiffs” or “Representative Plaintiffs”) hereby submit the following Suggestions in Support of Plaintiffs’ Unopposed Motion for Final Approval of Class Settlement, Award of Attorney Costs and Expenses and Approval of Representative Plaintiffs’ Incentive Awards.¹ Under Rule 23, final approval of a class action settlement is appropriate if the settlement is fair, reasonable, and adequate. The current Settlement clearly meets this standard by providing significant monetary relief for the class without the delay and risks associated with continued litigation. The settlement Class meets the requirements for certification, and the Settlement is patently fair under the prevailing law in this circuit. Moreover, Class Counsel is seeking no fee in this matter and has agreed to seek reimbursement of costs and expenses that are less than the amount actually incurred pursuing this case on behalf of the Class. The proposed Settlement was reached following over three years of contested litigation through arms-length bargaining that included the involvement of William Turley who has served as mediator and Special Master in this case.

II. BACKGROUND AND PROCEDURAL HISTORY

This statewide class action arises from Liberty’s alleged improper application of deductibles to actual cash value (“ACV”) payments made to its insureds under policy Form HO 03 (Edition 04 91) for physical loss or damage to their dwellings or other structures – Coverage A and/or B – located in the state of Missouri. Specifically, Plaintiffs have alleged that Liberty’s practice of applying deductibles to ACV payments constitutes a breach of contract.

¹ Prior to the Fairness Hearing, the parties will submit a proposed Final Order and Judgment to the Court which will be identical to the draft previously submitted as part of the preliminary approval filings [Doc. 288-1 at p. 51] except for changes to reflect the circumstances at the time of the Hearing and to fill-in information that was previously left blank.

This action was originally filed by Eric and Camille LaFollette, individually and on behalf of others similarly situated, in the Circuit Court of Cole County, Missouri, on April 8, 2014. Liberty removed the case to this Court on June 4, 2014. [Doc. 1]. The lawsuit asserts a claim for breach of contract on behalf of insureds who had a deductible applied to their ACV payments under policy Form HO 03 (Edition 04 91) and endorsements (the “Policy”). Plaintiffs allege that the terms of Liberty’s Policy preclude application of deductibles to ACV payments. Throughout this matter, Liberty has maintained that it properly applies deductibles pursuant to the terms of its Policy.

For over three years, the parties and their counsel have vigorously litigated this case, engaged in extensive discovery, undertaken voluminous motion practice, and participated in multiple mediation sessions. Morton Declaration, Ex. 1 at ¶¶ 4 – 17. Plaintiffs have reviewed thousands of pages of documents, incurred extensive expenses associated with obtaining and analyzing large amounts of claim related data through experts, and taken numerous depositions of Liberty employees. *Id.* at ¶¶ 7 – 9. On August 1, 2016, the Court certified a Class under Federal Rule of Civil Procedure 23(b)(3) and appointed Class Counsel to represent the Class. [Doc. 177]. The Eighth Circuit Court of Appeals declined to entertain an appeal of the Court’s order granting class certification under Federal Rule of Civil Procedure 23(f). Following class certification, the Court approved Plaintiffs’ plan to provide notice of the litigation to the Class. [Doc. 227]. Pursuant to the Court’s Order approving notice, Plaintiffs’ provided mailed notice to all potential Class Members.

On March 16, 2017, the Court entered its Order addressing the parties’ cross motions for summary judgment concerning interpretation of the Policy language at issue. [Doc. 232]. In its Order, the Court: (1) granted summary judgement in favor of class members with claims arising

under the base policy and Homeprotector Plus Endorsement, and for damages associated with these claims; and (2) granted summary judgment in favor of Liberty with regard to individuals whose claims arose under the Wind/Hail Endorsement. Following the Court's rulings on the parties' cross motions for summary judgment, William Turley was appointed as Special Master to identify members of the class and determine the amount of deductible applied to each class member's claim(s). [Doc. 255]. Mr. Turley completed his assigned duties as Special Master and submitted his Second Amended Report ("Report") on November 28, 2017. [Doc. 276]. Liberty filed an objection to Mr. Turley's Report [Doc. 272] and sought decertification of the class on November 13, 2017. [Doc. 271].

Prior to any ruling on Liberty's objection to the Special Master's Report or Motion to Decertify, the parties began discussing potential settlement in this matter. Morton Declaration, Ex. 1 at ¶ 17. Both parties had discussions with Mr. Turley independently concerning potential settlement and participated in a conference call with Mr. Turley to discuss the terms of a potential settlement. *Id.* With the assistance of Mr. Turley, the parties were ultimately able to reach a settlement in this matter. *Id.* At all times, negotiation was hard-fought and conducted at arms-length. *Id.* As set forth in more detail herein and in the Stipulation, the proposed Settlement provides a \$400,000 settlement fund for payment of eligible class member claims, costs and other expenses incurred by Plaintiffs' counsel which includes the costs of notice and administration, and incentive fees for the proposed Representative Plaintiffs.

The parties entered into the Stipulation of Settlement and requested preliminary approval of the proposed Settlement on March 23, 2018. [Doc. 287 and 288]. On April 10, 2018, the Court preliminarily: (1) approved the proposed Settlement; (2) certified the settlement Class; (3)

appointed Class Counsel; (4) appointed the Representative Plaintiffs; and (5) approved the form of notice to the Class. [Doc. 292].

Class Counsel has concluded, after a thorough investigation of the factual and legal issues in this case, as well as the risks, expense, and delay of continued litigation and appeals, that the proposed Settlement is fair, reasonable and adequate, and in the best interest of the Class. Morton Declaration, Ex. 1 at ¶ 21.

III. THE SETTLEMENT TERMS

A. Benefits Available to Eligible Class Members.

As set forth in the Stipulation, Liberty's total payment obligation is \$400,000 (the "Class Settlement Fund"). [Doc. 288-1 at p. 7, ¶ 24(a)]. None of the Class Settlement Fund will revert to Liberty. *Id.* The Settlement Fund is the total amount Liberty is required to pay under the terms of the proposed Settlement and will serve to satisfy: (1) payment of timely claims submitted by eligible Class Members; (2) payment of Court-approved attorneys' litigation costs and other expenses (including notice and claims administration expenses); and (3) payment of Court-approved incentive awards to the Representative Plaintiffs. [Doc. 288-1 at p. 7, ¶ 24(b)].

No less than \$150,000 will be available for cash payments to eligible Class Members who submit timely claims for payment under the terms of the proposed Settlement. *Id.* As provided in the Stipulation, Class Counsel is seeking a total of \$10,000 in Court-approved incentive fees for the Representative Plaintiffs (\$5,000 for Jean Heckmann and \$5,000 for the LaFollettes). *Id.* Class Counsel is seeking no attorneys' fees in this matter. Pursuant to the terms of the proposed Settlement, Class Counsel is seeking \$240,000 as partial reimbursement of the litigation costs and expenses they have incurred in this matter. *Id.* As discussed herein,

Class Counsels' cost and expense request is substantially less than the amount they have and will continue to incur in this matter.

Eligible Class Members who submit valid and timely Claim Forms will qualify for payments of up to 100% or 10% of the amount of the deductible applied to their claim. Payments to eligible Class Members will depend on the cause of loss and Policy documents in place at the time of their loss. Eligible Class Members whose losses were caused by a peril other than wind or hail, or whose Policy did not include a Wind/Hail Endorsement can receive up to 100% of the amount of deductible applied to their claim. [Doc. 288-1 at p. 11, ¶ 38(b)]. Eligible Class Members whose losses were caused by wind or hail, and whose Policy included a Wind/Hail Endorsement can receive up to 10% of the amount of deductible applied to their claim. [Doc. 288-1 at p. 11, ¶ 38(a)]. If the total aggregate amount of eligible claims exceeds the portion of the Class Settlement Fund allocated for Class Member payments, all eligible claims will be reduced pro rata. [Doc. 288-1 at p. 11, ¶ 38(c)].

Based upon the findings of the Special Master, Class Counsel estimates that if all eligible Class Members submit a valid Claim Form and are paid, their pro rata share of the Class Settlement Fund allocated for Class Member payments will be approximately 34% of the total amount they can recover under the Settlement. For example, if every eligible Class Member submits a valid Claim Form, a Class Member in the 100% claim payment category who had a \$1,000 deductible will receive a pro rata payment of \$340. This estimate represents the minimum amount the Class Member will receive under the Settlement.

The reason for the difference in claim payments arises from the Court's previous ruling on the parties' cross motions for summary judgment. Specifically, the amount Class Members are eligible to receive is tied to whether they had a loss caused by wind or hail and had the

Wind/Hail Endorsement. Because the Court granted summary judgment against Class Members who had losses arising under the Wind/Hail Endorsement, the Settlement provides these individuals the ability to recover up to 10% of the amount of deductible applied to their claim. On the other hand, Class Members that do not fall in this category and were granted summary judgment by the Court are eligible to recover up to 100% of the amount of their deductible. The creation of these two categories of payments acknowledges the strength and weaknesses in Class Members' claims based on the Court's previous interpretation of the Policy and fairly accounts for the distribution of the Class Settlement Fund.

B. The Settlement Class and Released Claims.

The definition of the settlement Class is set forth in the Court's Order Preliminarily Approving Class Settlement. [Doc. 292 at p. 2, ¶ 2]. Plaintiffs request that the settlement Class be finally approved and certified for purposes of the Settlement.² As more fully described in the Stipulation, settlement Class Members generally agree to release the Defendant from all known and unknown claims which were or could have been asserted arising from or in any way related to application of a deductible to an ACV payment in connection with a Covered Loss in consideration for the benefits to the settlement Class from the Settlement. [Doc. 288-1 at p. 6, ¶ 19]. The Stipulation more fully sets forth the definition of Released Claims.

C. The Class Notice and Settlement Administration.

Pursuant to the Court's Order Preliminarily Approving Class Settlement, Garden City Group (the "Administrator") was preliminarily appointed to assist in notice and administration of

² Plaintiffs seek final certification of the settlement Class. To be certified under Rule 23, a putative class must satisfy each of the four requirements of Rule 23(a): numerosity, commonality, typicality and adequacy. *See* Fed. R. Civ. P. 23. Additionally, a class must satisfy the requirements of one of the three provisions of Rule 23(b). *Id.* Here, Plaintiffs seek certification of the settlement Class under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Given the extensive briefing previously submitted addressing class certification and the Court's Order [Doc. 177] certifying an almost identical class to the settlement Class, this matter is clearly certifiable for settlement purposes.

the settlement. [Doc. 292 at p. 3, ¶ 7]. The Administrator has complied with the terms of the Stipulation and the Court’s Preliminary Approval Order. Because the deadline for the submission of objections, opt-outs, and Claim Forms has not passed, Plaintiffs will file a supplement to these Suggestions attaching the Administrator’s affidavit detailing its compliance with the Stipulation and Court’s Preliminary Approval Order related to execution of the notice plan and reporting on objections, opt-outs and Claim Forms received.

IV. ARGUMENT AND AUTHORITY

A. Final Approval of the Settlement is Appropriate Because the Settlement is Fair, Reasonable and Adequate.

Settlement is a strongly favored method for resolving litigation. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990) (“The law strongly favors settlements. Courts should hospitably receive them... As a practical matter, a remedy that everyone agrees to is a lot more likely to succeed than one to which the defendants must be dragged kicking and screaming.”). On a motion for final approval of a class action settlement, and after conducting a fairness hearing, the Court’s inquiry is whether the settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

Approval of a class action settlement “is committed to the sound discretion of the trial judge.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (citations omitted). In assessing “the overall adequacy of the settlement...[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement.” *Id.* at 124 (internal quotation marks and citations omitted). “The policy favoring settlement “is particularly strong in the class action context.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *6 (D. Minn. Feb. 27, 2013) (citations omitted). There is generally a presumption of fairness when a proposed class settlement was negotiated at

arms-length, with sufficient discovery, by counsel with similar experience in such matters and there are few objectors. *Id.* (citation omitted).

In the Eighth Circuit, the fairness of a settlement is evaluated according to four primary factors: “(1) the merits of the plaintiff’s case, weighed against the terms of the settlement; (2) the defendant’s financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement.” *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). Each of these factors weigh in favor of granting final approval.

The court begins with the guiding principle that “a class action settlement is a private contract negotiated between the parties.” *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005). While it should reach “well-reasoned conclusions,” a district court “need not make a detailed investigation consonant with trying the case.” *Id.* at 932 – 33 (citations omitted). Moreover, “judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.” *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 – 49 (8th Cir. 1999).

1. The Potential Success on the Merits Weighed Against the Settlement Amount Favors Approval.

As summarized above, the benefits provided to the Class are significant and provide Class Members an opportunity to recover monetary relief without the risks associated with continued litigation. The value of the proposed Settlement falls well within the range of a reasonable settlement. The determination of a “reasonable” settlement is not susceptible to a mathematical equation yielding a particularized sum. *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) (“[I]n any case there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the

concomitant risks and costs necessarily inherent in taking any litigation to completion.”). As such,

The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved... In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 & 455 n.2 (2d Cir. 1974) (citations omitted) (abrogated on other grounds by *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)).

The Settlement provides for two categories of potential payments to eligible Class Members. The categories of potential payments were created to reflect the strengths and weaknesses of Class Members’ claims included in the proposed Settlement given the Court’s ruling on the parties’ cross motions for summary judgment. Specifically, the payment categories acknowledge that Class Members with losses caused by wind or hail who also had the Wind/Hail Endorsement had summary judgment granted against them, and Class Members with losses caused by some other peril or who did not have the Wind/Hail Endorsement were granted summary judgment. Payments to eligible Class Members fall within one of the following categories:

1. Those whose losses were caused by a peril other than wind or hail, or whose insurance policy did not include a Wind/Hail Endorsement can receive up to 100% of the amount of deductible applied to their claim [Doc. 288-1 at p. 11, ¶ 38(b)]; or
2. Those whose losses were caused by wind or hail, and whose insurance policy included a Wind/Hail Endorsement can receive up to 10% of the amount of deductible applied to their claim. [Doc. 288-1 at p. 11, ¶ 38(a)].

Pursuant to the terms of the Stipulation, no less than \$150,000 from the Class Settlement Fund is available for payment to eligible Class Members who submit timely Claim Forms. [Doc.

288-1 at p. 7, ¶ 24(b)]. If the total aggregate amount of eligible claims exceeds the portion of the Class Settlement Fund allocated for Class Member payments, all eligible claims will be reduced pro rata. [Doc. 288-1 at p. 11, ¶ 38(c)]. The proposed settlement guarantees substantial benefits to the Class.

The Settlement also avoids the need for continued protracted and costly litigation and associated risks. Although Plaintiffs believe their case is strong, they must acknowledge that substantial risks remain including resolution of damage issues pending before this Court, Defendant's pending motion to decertify the class, and ultimately Eighth Circuit appeals addressing class certification, the merits of Plaintiffs' claims and class damages. These issues increase both the length and complexity of the proceedings, and increase the chance that the Plaintiffs, and the litigation class, may ultimately lose and recover nothing. These concerns militate in favor of settlement. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 326 (N.D. Ga. 1993) (noting that "it has been held proper to take the bird in the hand instead of a prospective flock in the bush") (citation omitted); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 701 (E.D. Mo. 2002) (same). In light of the foregoing, this factor clearly favors final approval.

2. The Defendant's Financial Condition Does Not Impact the Settlement.

Defendant's overall financial condition and ability to pay is not a relevant consideration in this settlement, because the threat of a judgment in this case would not move Defendant toward any critical financial threshold. "This factor seems most appropriate in either limited fund class actions...or when the defendant faces large verdicts in multiple cases. Where a defendant has resources to pay a larger judgment, courts often accord this factor little weight." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 301-02 (E.D. Pa. 2003); *see also In re*

General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 818 (3d Cir. 1995) (attributing no significance to this factor). Because Defendant is financially stable, “[t]his is neutral to settlement.” *O’Keefe*, 214 F.R.D. at 302.

3. Complexity and Further Expense Support Final Approval.

“It is the surety of settlement that makes it a favored policy in dispute resolution as compared to unknown dangers and unforeseen hazards of litigation.” *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, MDL 1559 4:03-MD-015, 2004 WL 3671053, at *11 (W.D. Mo. Apr. 20, 2004) (citing *In re BankAmerica Corp. Secs. Litig.* 210 F.R.D. 694, 701 (E.D. Mo. 2002) (recognizing it is often “proper to take the bird in hand instead of a prospective flock in the bush.”). By reaching a negotiated settlement, Plaintiffs have avoided significant risk and delay, and ensured recovery to the Settlement Class. As discussed above, significant risks exist in this case related to resolution of contested class member damages, Defendant’s pending motion to decertify the class, and appeals to the Eighth Circuit addressing class certification, the merits of Plaintiffs’ claims and class damages. In addition to placing significant risk on the potential for any ultimate recovery by the settlement Class, continued litigation of such matters will substantially increase the expenses incurred which will reduce any recovery for the Class. Not surprisingly, courts look upon such factors as weighing heavily in favor of settlement. *See In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) (complexity and expense of further litigation “weigh[s] in favor of approval.”); *Claxton v. Kum & Go, L.C.*, 6:14-CV-03385-MDH, 2015 WL 3648776, at *6 (W.D. Mo. June 11, 2015) (“The complexity and expense of class action litigation is well-recognized” and “various procedural and substantive defenses ..., the expense of proving class members' claims, the certainty that resolution under [a] settlement will foreclose any subsequent appeals, and the fear

that, unsettled, the ‘ultimate resolution of the action ... could well extend into the distant future,’ all weigh in favor of the settlement's approval.”) (quoting *In re Zurn Pex*, 2013 WL 716088, at *7). The complexity and expense of continued litigation in this matter support final approval.

4. The Lack of Opposition to the Settlement Favors Final Approval.

In addition to the above referenced factors, on final approval the court weighs the reaction of the class to the proposed settlement. See *Grunin*, 513 F.2d at 123; *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (“a settlement may be approved over a significant percentage of objections from the class members.”) (citation omitted); *Wiles v. Sw. Bell Tele. Co.*, No. 09-4236-CV-C-NKL, 2011 WL 2416291, at *4 (W.D. Mo. June 9, 2011) (“Having no objectors demonstrates strong support for the value and benefits delivered by the settlement. This factor weighs heavily in favor of approval of the settlement.”). To date, no objections have been filed in this matter. Because Plaintiffs are filing these Suggestions prior to the deadline for objections, they will provide the Court with supplemental briefing and an affidavit from the Administrator once the deadline for objections has passed. The current lack of any objection to the proposed Settlement supports final approval.

5. The Settlement is the Result of Arms-Length Negotiations.

In addition to the four factors discussed above, courts look to whether the settlement was the result of arms-length negotiations between class counsel and defendant’s counsel. In reaching the proposed Settlement, the parties engaged in substantial, arms-length negotiation spanning several weeks with the participation of Special Master William Turley. Morton Declaration, Ex. 1 at ¶ 17. The Settlement was negotiated between experienced counsel with a firm understanding of the strengths and weaknesses of the claims and defenses asserted. Before reaching the proposed Settlement, the parties vigorously litigated this matter for over three years.

Plaintiffs reviewed thousands of pages of documents and conducted discovery into all issues related to liability and damages. *Id.* at ¶¶ 7 – 9. Plaintiffs conducted multiple depositions of Liberty’s witnesses, including depositions of Liberty’s expert witnesses. *Id.* at ¶ 9. Moreover, Plaintiffs consulted extensively with their own experts, defended their depositions, and analyzed voluminous sets of data related to homeowners claims. *Id.* at ¶¶ 7 – 8. As the Court is aware, the parties also undertook extensive briefing, including the filing of cross motions for summary judgment and Plaintiffs’ request for class certification. As has been the case throughout this litigation, the parties’ settlement negotiations were hard fought and there is no reason to doubt the fairness of the Settlement.

B. Reimbursement of Incurred Expenses Should be Granted.

“Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement.” *Yarrington v. Solvay Pharmaceuticals, Inc.*, 697 F. Supp. 2d 1057, 1067 (D. Minn. 2010) (citations omitted). The requested costs must be relevant to the litigation and reasonable in amount. *Id.* The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the costs are the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (allowing recovery of “out-of-pocket expenses that ‘would normally be charged to a fee paying client’”).

To date, reasonable and necessary expenses have been advanced by Class Counsel to prosecute this litigation in the amount of \$362,810.95 and future notice and administration expenses are estimated at an additional \$45,000. Morton Declaration, Ex. 1 at ¶ 25. Although current and future costs and expenses exceed \$400,000, Class Counsel have agreed to only seek

reimbursement of \$240,000 at this time.³ Moreover, Class Counsel is seeking no attorneys' fees in this matter.

The majority of expenses Class Counsel has incurred in this matter are for payments to experts for manipulating, organizing, analyzing and handling extensive amounts of data related to potential Class Member losses. *Id.* at ¶ 23. As the Court may recall, the production of data related to the Class and utilization of such data for class certification and damage calculations were hotly contested issues in this case and ultimately led to the appointment of Mr. Turley as the Special Master. *Id.* at ¶¶ 7 – 8. Moreover, much of these costs and expenses were incurred prior to the Court's ruling on the parties' cross motions for summary judgement which significantly reduced the estimated size of the litigated class and damage model. *Id.* at ¶ 23. In addition to expert fees, Class Counsel also incurred additional expenses related to the services of the Special Master, deposition costs, transportation, hotels and meals, among others. *Id.* at ¶¶ 22 and 25. These are the type of expenses routinely charged to hourly clients and, therefore, the full requested amount of \$240,000 should be reimbursed. *See Yarrington*, 697 F. Supp. 2d at 1067 (approving request where “the costs incurred included filing fees; expenses associated with the research, preparation, filing, and responding to the pleadings in this matter; costs associated with copying, uploading, and analyzing documents; fees and expenses for experts; and mediation fees... All of these costs and expenses were advanced by Settlement Class Counsel with no guarantee they would ultimately be recovered, and most were ‘hard’ costs paid out of pocket to third-party vendors, court reporters, and experts.”); *West v. PSS World Med., Inc.*, 4:13-CV-574-CDP, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) (costs including mediation

³ Class Counsel may file a supplemental application for payment of unsatisfied litigation costs and expenses if any amount of money remains in the Class Settlement Fund after payment of all eligible Class Member claims, Representative Plaintiffs incentive fees, and any amounts awarded for costs and expenses pursuant to Class Counsels' request herein. [Doc. 288-1 at p. 7, ¶ 24(c)].

expenditures, travel, expert fees, and depositions reasonable). Given the foregoing, Class Counsels' requested partial reimbursement for costs and expenses should be granted.

C. The Proposed Incentive Awards to the Representative Plaintiffs are Reasonable and Warrant Approval.

Plaintiffs have also moved the Court to approve incentive awards to the Representative Plaintiffs. Incentive awards are typical in class actions. *Newberg on Class Actions* § 11:38 (4th ed. 2008). Plaintiffs seek the following incentive awards for the Representative Plaintiffs: \$5,000 to Jean Heckmann individually and \$5,000 to Eric and Camille LaFollette jointly. Each of these class representatives gave depositions and participated extensively in written discovery. The incentive awards will be paid from the Class Settlement Fund. The requested incentive awards are reasonable and within the range approved by other district courts in the Eighth Circuit. *See, e.g., Yarrington*, 697 F. Supp. 2d at 1069 (awarding \$5,000 to each of four class representatives); *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 677 – 78 (S.D. Iowa 2009) (awarding \$10,000 to each of the named plaintiffs); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (awarding two lead plaintiffs \$15,000 incentive awards from a common-fund settlement). Accordingly, the Court should approve the proposed incentive awards to the Representative Plaintiffs.

V. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court: (1) approve the proposed settlement as fair, reasonable, and adequate, (2) certify the Class for settlement purposes, (3) approve incentive awards to the Representative Plaintiffs in the amounts requested, (4) award Class Counsel \$240,000 in reimbursement for incurred litigation costs and expenses, (5) appoint Plaintiffs as class representatives, and (6) appoint Derrick Morton, Douglas Terry, David Steelman and Thomas Hearne as Class Counsel.

Respectfully Submitted,

NELSON, TERRY, MORTON
DeWITT & PARUOLO

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CERTIFICATE OF SERVICE

I hereby certify that on this date, July 27, 2018, the foregoing was served on the following through the Court's ECF system:

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**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

JEAN HECKMANN, ERIC)
LaFOLLETTE and CAMILLE)
LaFOLLETTE, individually and on)
behalf of others similarly situated,)

Plaintiffs,)

-vs-)

Case No.: 2:14-CV-04147-NKL

LIBERTY MUTUAL FIRE)
INSURANCE COMPANY,)

Defendant.)

DECLARATION OF DERRICK L. MORTON

I, Derrick L. Morton, declare as follows:

1. I am an attorney licensed to practice before all courts in the State of Oklahoma, have been admitted to practice before this Court *pro hac vice*, and am a partner in the law firm of Nelson, Terry, Morton, DeWitt & Paruolo, PLLC. Along with David Steelman, Thomas Hearne and Douglas Terry, I serve as Class Counsel in the above-captioned litigation. I make this declaration in support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Award of Attorney Costs and Expenses, and Approval of Representative Plaintiffs' Incentive Awards.

2. I have actively participated in all aspects of this litigation, including the negotiation of the settlement, and am fully familiar with the proceedings in the matter in which the parties seek resolution. The statements made herein are based upon my personal knowledge and information available to me to the best of my recollection.

3. Class Counsel in this matter have extensive experience prosecuting class actions and have handled numerous class actions against insurance companies. The firm resumes and qualifications of each of Class Counsel were presented to the Court on May 3, 2016, as Exhibits 7, 8 & 9 [Doc. 156-7 – 156-9] to Plaintiffs’ Suggestions in Support of Motion for Class Certification, Appointment of Class Representatives, and Appointment of Class Counsel. [Doc. 156].

Summary of the Litigation

4. On April 8, 2014, Eric and Camille LaFollette, filed this case as a putative class action in the Circuit Court of Cole County, Missouri asserting a claim for breach of contract on behalf of themselves and other insureds who had a deductible applied to their ACV payments under policy Form HO 03 (Edition 04 91) and endorsements (the “Policy”). Plaintiffs alleged that the terms of Defendant’s Policy precluded application of deductibles to ACV payments. [Doc. 1-1 at p. 4]

5. Defendant removed the case to this Court on June 4, 2014. [Doc. 1].

6. On October 15, 17 and 20, Defendant filed Offers to Confess Judgment to Plaintiffs individually [Doc. 37, 39 & 42] and Plaintiffs filed a Motion to Strike the Offers of Judgment. [Doc. 44]. Ultimately Defendant filed a Motion to Dismiss Plaintiffs’ case for lack of subject matter jurisdiction based upon their offers to confess. [Doc. 55]. Following submission of briefing on these matters, the Court denied Defendant’s Motion to Dismiss and struck its offers to confess on January 9, 2015. [Doc. 70].

7. The parties engaged in extensive written discovery over the course of the litigation which led to the production of thousands of pages of documents by Defendant that were reviewed and utilized by Class Counsel. Much of the written discovery related to data kept

by Defendant concerning potential Class Member claims. Various disputes arose related to the production of such data and the Court ultimately appointed William Turley to serve as Special Master to resolve the discovery disputes. [Doc. 90].

8. Ultimately, extensive amounts of data related to the claims of potential Class Members was produced by Defendant. Plaintiffs retained Dr. James Gibson to organize, analyze, manipulate and interpret the data produced and serve as an expert related to identification of the Class and calculation of damages utilizing the data produced. Due to the volume of the data provided and the novelty of the issues involved, Dr. Gibson was required to expend extensive time and efforts reaching his conclusions related to the data. Plaintiffs also utilized attorney Mort Welch to review a sample of claim information and provide opinions concerning identification of the Class. Both Dr. Gibson and Mr. Welch provided expert reports that were utilized in support of Plaintiffs' Motion for Class Certification.

9. In addition to written discovery, the parties also took 13 depositions, including experts and Representative Plaintiffs, throughout the course of the litigation. Because Defendant is not headquartered in Missouri, most of the depositions of its employees were taken in various cities around the country and required Class Counsel to incur extensive travel related expenses.

10. On June 30, 2015, Defendant filed a Motion for Summary Judgment related to the individual claims of Plaintiffs. [Doc. 99]. Extensive efforts were put into briefing this matter with Plaintiffs filing their Opposition on July 24, 2015, [Doc. 106] and Defendant filing its Reply on August 10, 2015. [Doc. 109]. The Court denied Defendant's Motion for Summary Judgment on October 19, 2015. [Doc. 115]. On November 19, 2015, Defendant filed a Motion to Amend/Correct the Court's Summary Judgment Order. [Doc. 120]. Plaintiffs filed their Opposition on December 7, 2015, [Doc. 122] and Defendant filed its Reply on December 22,

2015. [Doc. 126]. On January 20, 2016, the Court denied Defendant's Motion to Amend/Correct. [Doc. 130].

11. On May 3, 2016, Plaintiffs filed their Motion for Class Certification and Suggestions in Support. [Doc. 155 & 156]. Defendant filed its Opposition to Class Certification on June 2, 2016, [Doc. 160] and Plaintiffs filed their Reply on June 16, 2016. [Doc. 163]. On July 20, 2016, the Court held a telephonic hearing concerning Plaintiffs' Motion for Class Certification, [Doc. 173] and certified the class on August 1, 2016. [Doc. 177].

12. On August 16, 2016, Defendant filed its Petition for Permission to Appeal Class Certification with the Eighth Circuit. [Doc. 181]. Following full briefing by the parties, the Eighth Circuit denied Defendant's Petition for Permission to Appeal on September 16, 2016.

13. On December 21, 2016, the Court approved Plaintiffs' plan to provide notice of the litigation to the Class. [Doc. 227]. Pursuant to the Court's Order approving notice, Plaintiffs' provided mailed notice to all potential Class Members.

14. On October 31, 2016, the parties filed cross motions for summary judgment related to interpretation of the subject Policy language. [Doc. 194 & 198]. Both parties filed their Oppositions to the summary judgment motions [Doc. 214 & 215] and Replies. [Doc. 221 & 222]. On March 16, 2017, the Court entered its Order addressing the parties' cross motions for summary judgment concerning interpretation of the Policy language at issue. [Doc. 232]. In its Order, the Court: (1) granted summary judgement in favor of class members with claims arising under the base policy and Homeprotector Plus Endorsement, and for damages associated with these claims; and (2) granted summary judgement in favor of Liberty with regard to individuals whose claims arose under the Wind/Hail Endorsement.

15. On May 8, 2017, the Court appointed William Turley to serve as Special Master to “gather and review evidence, and make proposed factual findings to the Court, concerning the identities of the class members, the deductibles associated with the class members, prejudgment interest on the deductibles associated with the class members (calculated as simple interest, as agreed by the Parties), and related issues.” [Doc. 255]. On November 8, 2017, the Special Master filed his Report [Doc. 267] and his Amended Report on November 28, 2017. [Doc. 276].

16. On November 13, 2017, Defendant filed its Motion to Decertify the Class [Doc. 270] and Objections to the Special Master’s Report. [Doc. 272].

17. Beginning in November 2017, the parties began discussions concerning possible settlement. The negotiations were hard fought and conducted at arms-length at all times. Class Counsel and Defendant’s Counsel sought the assistance of Special Master William Turley to assist with the negotiations. In addition to serving as Special Master on two separate occasions, Mr. Turley had also previously served as mediator in the parties’ previous failed attempts to resolve this matter. Given Mr. Turley’s involvement in the case, he was fully aware of the unique factual and legal issues presented. Both parties spoke to Mr. Turley independently concerning potential settlement and ultimately conducted a conference call between Mr. Turley and counsel for the parties. With the assistance of Mr. Turley, the parties were able to reach an agreement-in-principle to settle this matter on November 27, 2017. Following their agreement-in-principle, the parties spent additional months negotiating the specific terms of the settlement and drafting the supporting settlement documents, executing the Stipulation on March 23, 2018.

18. On March 23, 2018, Plaintiffs filed their Unopposed Motion for Preliminary Approval of Class Settlement, [Doc. 287] and accompanying Suggestions in Support. [Doc. 288]. On April 10, 2018, the Court granted the Preliminary Approval Motion and, among other

things, preliminarily certified the settlement Class for settlement purposes and preliminarily approved the Settlement. [Doc. 292]. By the same Order, the Court approved the form and manner of notice to the settlement Class.

Reaction of the Settlement Class to Date

19. Pursuant to the Court's Preliminary Approval Order and the Stipulation, notice was mailed to all potential settlement Class Members advising them of the terms of the settlement and their right to exclude themselves from the Settlement. The notice also advised recipients that settlement Class Members have the right to object to any aspect of the Settlement or Class Counsels' request for costs and expenses. Pursuant to the notice plan approved by the Court, a website containing various settlement related information and a detailed notice was also established along with a toll-free telephone line to answer questions concerning the settlement. As of the date of this Declaration, not one objection to any aspect of the Settlement has been filed, and only one request for exclusion from the settlement Class has been received.¹

20. The Representative Plaintiffs also support the Settlement. All the Representative Plaintiffs approved the Settlement and believe it should be finally approved.

Class Counsel Endorses the Settlement

21. An important factor in approving a proposed settlement is the opinion of experienced counsel. Here, Class Counsel fully support and endorse the Settlement. Class Counsel believe the Settlement is fair, reasonable, and adequate and should be approved. More than anyone, Class Counsel are aware of the risks and uncertainties that accompany proceeding with this litigation. The Settlement also avoids the risk of recovering less than the settlement amount, or no recovery, after more than three years of intense, expensive litigation and provides

¹ The deadline for submitting objections or requests for exclusion from the settlement Class has not passed. If any objections are received after the date of this Declaration, Class Counsel will address them in a separate submission filed with the Court.

the settlement Class with a guaranteed cash recovery. Here, the possibility of either no recovery at all or a limited recovery was very real. Therefore, Class Counsel submit that the Settlement should be finally approved.

Litigation Costs and Expenses

22. In prosecuting and resolving this litigation, Class Counsel have advanced \$362,810.95 in costs and expenses to date. Pursuant to the terms of the Stipulation, Class Counsel is also responsible for payment of the notice and administration costs which are currently estimated at approximately \$45,000. Thus, the total estimated out-of-pocket costs and expenses that Class Counsel will ultimately incur in this matter total \$407,810.95. To ensure that eligible Class Members receive meaningful benefits under the Settlement, Class Counsel have agreed to seek no fee in this matter and seek reimbursement of only \$240,000 in costs and expenses at this time.² Class Counsel litigated this case on a wholly contingent basis, without recovering any of the costs and expenses advanced in connection with this case thus far. The costs and expenses that Class Counsel advanced on behalf of the settlement Class were reasonable and necessary and include routine expenses – e.g., deposition costs, copying, court fees, postage and shipping, phone charges, travel and transportation, as well as expenses for experts and the Special Master, which, in Class Counsels' experience, are typical of complex class actions such as this one. All these costs and expenses were reasonable and necessary and were critical to the prosecution and resolution of this litigation.

23. As indicated in the chart below, a substantial portion of the costs and expenses advanced by Class Counsel were for the services of experts. As discussed above in paragraphs 7

² Pursuant to the terms of the Stipulation, Class Counsel may file a supplemental application for payment of unsatisfied litigation costs and expenses if any amount of money remains in the Class Settlement Fund after payment of all eligible Class Member claims, Representative Plaintiff incentive fees, and any amounts awarded for costs and expenses pursuant to this request. [Doc. 288-1 at p. 7, ¶ 24(c)]. Such a request by Class Counsel will not reduce the amount of any payments to Class Members.

and 8, this case required time consuming and extensive manipulation and analysis of large quantities of data received from Defendant through discovery. This analysis was undertaken prior to the Court's ruling on the parties' cross motions for summary judgment which dramatically reduced the size of the class and the class damage model. The efforts undertaken by Plaintiffs' experts, and costs associated with those efforts, were reasonable and necessary to allow Plaintiffs to pursue this matter as a class action.


24. In the notice mailed to potential settlement Class Members, Class Counsel stated they would seek reimbursement of costs and expenses in an amount not to exceed \$240,000 with the potential to file a supplemental application for payment of unsatisfied costs and expenses from any money remaining in the Class Settlement Fund.

25. A chart demonstrating the costs and expenses incurred by Class Counsel is set forth below. Notice and administration costs associated with settlement have not been incurred by Class Counsel at this time, but will be paid by Class Counsel at the conclusion of the administration process. Estimated notice and administration costs are set forth separately at the bottom of the chart.

Expense Report

Expense Description	Total Category Expense
Administrative Expenses (Conference Calls, Mail, FedEx, Reproduction Exp.)	\$7,870.78
Transportation, Hotels & Meals	\$31,603.42
Expert Fees and Costs	\$244,099.59
Court Costs and PACER	\$691.80
Special Master and Mediation	\$46,712.60
Deposition Transcripts and Videos	\$17,906.02
Class Notice Costs Following Certification	\$13,926.74
TOTAL INCURRED TO DATE:	\$362,810.95
Settlement Notice and Administration (Estimated)	\$45,000.00
ESTIMATED TOTAL:	\$407,810.95

Dated: July 27, 2018



Derrick L. Morton