No. 24-933

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

FAYSAL A. JAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Ninth Circuit affirmed certification of Rule 23(b)(3) classes of individuals who purchased car insurance from Petitioner State Farm and had a specific deduction applied to their otherwise properly calculated insurance payouts. State Farm did not contest on appeal that the deduction was "unlawful" and "impermissible," and plaintiffs' uncontroverted common evidence of injury and damages at summary judgment established that the deduction had been applied to *every* class member. The Ninth Circuit thus correctly observed that every class member had experienced legally cognizable injury in the form of "a lighter wallet." Pet. App. 27-28a.

The question presented is:

> Whether a district court abuses its discretion by certifying Rule 23(b)(3) damages classes where every class member suffered a concrete pocketbook injury due to an insurer taking a specific, quantifiable deduction that was "unlawful" and "impermissible" under state law.

STATEMENT OF RELATED PROCEEDINGS

Under this Court's Rule 14.1(b)(iii), the following proceeding is directly related to this case *in addition to those listed by State Farm*:

- *Ngethpharat* v. *State Farm Mut. Auto. Ins. Co.*, No. C20-454-MJP (W.D. Wash. November 9, 2020) (order denying motion to dismiss and finding that deduction for "typical negotiation" was not permitted or allowed by Wash. Admin. Code §284-30-391); Resp. App. 1a.

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OPINIONS BELOW

In addition to the opinions identified in the petition, Pet. 1, the district court rejected State Farm's motion to dismiss. This opinion, holding that State Farm's deduction failed to comply with relevant state-law insurance requirements, Resp. App. 1a, is reported at 499 F. Supp. 3d 908.

INTRODUCTION

Petitioners State Farm Mutual Automobile Auto Insurance ("State Farm Mutual") and State Farm Fire & Casualty Company ("SF F&C")—collectively, "State Farm"—sell car insurance in Washinton State. When a State Farm insured has a car accident after which State Farm determines there is a "total loss" of the insured's car, i.e., that the car is not repairable, State Farm calculates the amount that it pays using "Autosource" valuations obtained from a non-party vendor, Audatex. State Farm then may make certain adjustments to that valuation, including adjustments based on the individual condition of the loss vehicle.

At issue here is a deduction (which always *reduces* the value paid to insureds) for what is listed in the Autosource valuation's fine print as "typical negotiation." State Farm applies this "negotiation" deduction to reflect what it claims is the amount by which its insureds could typically be able to negotiate down on the price of a replacement car.

This deduction is not specific to any insured's vehicle, nor is it individually determined by State Farm or its vendor Audatex. Rather, it is simply a percentage

deduction from the actual prices of comparable vehicles that is taken off vehicles within a specific "price band." The percentage taken off by price band (e.g., 5% in Mr. Kelley's case) directly translates into a lower payment to each insured. Because the percentage does not vary by make, model, year of vehicle, age, car type, condition, local area demand, or in fact *anything other than* the price band it was offered for sale in, the amount of the percentages that State Farm deducted for each price band are found on a single sheet of paper sealed in the record at 9-ER-1822.

Respondents Mr. Kelley and Mr. Jama filed class actions against State Farm on behalf of State Farm insureds ("Insureds") in Washington State who experienced total-loss events and against whom State Farm applied its negotiation deduction. According to the complaints, Washington state law categorically prohibited State Farm from applying the deduction. At the summary judgment stage, Insureds presented undisputed evidence that the deduction resulted in every class member suffering financial injury in an average amount of $751.19.

As the court of appeals repeatedly explained, State Farm paid its Autosource valuations to every class member but then *always* took the negotiation deduction that the district court—in a holding that State Farm had not appealed—determined was "unlawful" and "impermissible." Because the deduction should have been zero as an undisputed matter of state law, the proof of injury and damages that Insureds presented at summary judgment applied to *every member* of the certified negotiation classes and there was no "injury irregularity problem". Pet. App. 22a, 6a, 9a, 11a, n.2, 13a, 15-16a, 17a, 18-19a, 21a, 22a, 26a, 27-28a.

State Farm now seeks review of the appellate court's application of Rule 23(b)(3)'s predominance standard. The decision below, however, applies that standard in a manner consistent with other courts of appeals. Upon this record, moreover, this case does not present either of State Farm's Questions Presented. As for the first question, there is no need for "highly individualized proceedings" to determine injury because here, injury was calculated by determining the amount of the undisputedly unlawful negotiation deduction applied to each class member's payout. And, as to the second question, no "members of the proposed class lack any Article III injury" as the Ninth Circuit correctly found. This Court should deny review.

STATEMENT OF THE CASE

A. State Farm's Unlawful "Negotiation" Deduction

Washington's insurance regulations mandate what an insurer "must" do to pay total loss claims in a more detailed fashion than most other states. This is to be expected; state total loss regulations vary, and the business of insurance has been expressly left to the individual states by Congress and the Executive Branch under the *McCarren-Furgason Act*, 15 USC §§ 1012.

Specifically, on total losses, Washington state law requires an insurer to pay the vehicle's "actual cash value" ("ACV") by following a set of prescribed rules which establish what "comparable vehicles" can be used to value the loss under Wash. Admin. Code §284-30-391. Resp. App. 6-16a; Pet. App. 6-8a, 17-19a, 51-53a. Once a totaled vehicle has been valued using those comparable vehicles—a process that State Farm did with the

Autosource Reports and which Respondent Insureds *do not challenge* (i.e., they accepted the comparable vehicles used to value the loss)—Washington law allows an insurer to make "appropriate deductions or additions for options, mileage, or condition," but provides that these are the "only" adjustments permitted. Resp. App. 6-16a; Pet. App. 6-8a, 17-19a, 51-53a (quoting Wash. Admin. Code §284-30-391(4)(b)).

State Farm, Petitioner here, used "Autosource" valuation reports from its third-party vendor in the first instance to value over 99% of total losses. Pet.App.7a. This valuation was sent to the State Farm adjuster for verification as to the comparable vehicles used to value the loss and for any adjustments based on the totaled vehicle's specific condition, options, and mileage. Pet. App.7a, 54-55a. These aspects of State Farm's process are not at issue here.

Relevant here, State Farm also *uniformly* applied, but did not individually determine or verify, a "typical negotiation" deduction to reduce the amount *actually paid* to every Insured. 4-ER-775-782, Pet. App. 61-63a. As the district court found, State Farm would never "back-out" this deduction when it paid the total loss using the Autosource Report; it was always taken. Pet. App. 55a.

In addition, relevant to the issues before the Ninth Circuit, but not at issue before this Court, State Farm *sometimes* applied a "condition" adjustment based on an inspection of the condition of the totaled vehicle.

B. District Court Proceedings

Respondents Faysal Jama and James Kelley were Washington Insureds of State Farm who received insurance payouts from State Farm after crashes that "totaled" their vehicles beyond repair and who were "paid" based upon an Autosource Report which took a deduction for "typical negotiation" from actual cash value. Class actions were brought in federal court, alleging among other things that State Farm's negotiation deduction violated Washington's insurance laws. Mr. Jama additionally sought certification of a class of SF F&C insureds against whom State Farm had applied a downward "condition" adjustment on the insured's loss vehicle.

State Farm moved to dismiss, arguing that it is not bound by the specific prescriptive valuation rules found in Wash. Admin. Code §284-30-391 in paying actual cash value, since (according to State Farm) "actual cash value" means "fair market value" under a general definition found in §284-30-320, dictionary definitions such as Black's Law, and in case law in other contexts. As such State Farm argued it could take the additional "typical negotiation" deduction which was not listed as being permitted by §284-30-391.

The district court rejected this argument, finding that State Farm's interpretation of the regulation "is premised on a flawed reading of Section 391 that violates the canons of statutory construction" and "asks the Court to ignore the specific detailed methodologies in Section 391(2) that must be followed to determine a comparable car's 'actual cash value.'" Resp. App. 12-13a. Given the structure and wording of the entire regulation, the district court rejected State

Farm's argument, holding that a vehicle's actual cash value could be "reduced only by the deductions listed in Section 391(4)(b)", which did not include a deduction for "typical negotiation." Resp. App. 13a-15a.

Other Courts have reached the same conclusion under Washington law. *See Zuern v. IDS Property Cas. Ins. Co.*, C19-6235, 2020 WL 2114502, at *5 (W.D. Wa. May 4, 2020) (similarly holding a "negotiation" deduction is not allowed by Washington law); *cf Stanikzy v. Progressive Direct Ins. Co.* No. 20-cv-118 BJR, 2020 WL 2800711, at *2 (W.D. Wash. May 29, 2020) ("the gravamen of this lawsuit is whether Progressive may legally make the [negotiation] adjustments at all").

After extensive discovery and further proceedings, the district court later granted Rule 23(b)(3) certification of two "negotiation" classes (against State Farm Mutual with Mr. Kelley as the representative, and against SF F&C with Mr. Jama as the representative). It also certified a "condition" class against SF F&C with Mr. Jama as the representative, consisting of those who were "paid" with State Farm having taken a downward adjustment for "condition" from the Autosource Reports' actual cash value.

As to the negotiation classes, the district court found that common issues would predominate over individual ones because "State Farm follows a uniform claims settlement practice through which it underpays its insureds' total loss claims by using an ACV determined in Autosource Reports that includes a typical negotiation discount applied to the comparable vehicles." Pet. App. 54a. This deduction directly *reduced* what State Farm paid and what each Insured received.

Moreover, as the district court found, the record contained no evidence that even a single class member "agreed to the use of the typical negotiation discount being applied to reach the ACV." Pet. App.56a, 65a. Further, State Farm would never "back-out" the deduction by paying more. Pet. App. 55a. While State Farm had multiple opportunities prior to summary judgment, and possessed its claim file records for every class member, it produced *no evidence* of any *individual issue* impacting whether members of the certified negotiation classes had injury, such as removal of the challenged deduction.

That said, to guard against the *possibility* of including non-injured insureds, the district court redefined the proposed negotiation class definitions to include only those *who were "paid" with the unlawful negotiation deduction having been taken.* In doing so, it excluded insureds who had been provided an Autosource Report that included a negotiation deduction but whose claims were not paid based on that Autosource Report. Pet. App. 61-63a.[1]

Having revised the class definitions to only include those "paid" with the negotiation deduction being taken, and because State Farm would not otherwise remove the deduction when paying the losses using the Autosource Reports, (Pet. App. 55a), the district court found that with this revised definition, *100% of those in the negotiation classes had injury and damages* and there were therefore

1. This included Respondent Ms. Ngethpharat who had ultimately been paid using a "two-dealer quote" report which did not take the typical negotiation deduction after she had objected. Pet. App. 61a. As such Ms. Ngethpharat was not appointed as a class representative and her claims thereafter proceeded only individually. Pet. App. 62a.

"no concerns as to the class members' individual injury and standing". Pet. App. 73a, 75a.

After opt-out notice was provided, the parties prepared for trial. This included analysis of State Farm's claims files by Insureds to prove the universality of injury and amounts of recoverable damages. On summary judgment, State Farm submitted no expert opinion or other evidence to contradict Insureds' proof as to value, injury and damages suffered by every Insured in the two "typical negotiation" classes. The *uncontested evidence* from Insureds' damages expert Dr. Torelli, (3-ER-419-428), taken from State Farm's own claims files showed that:

- Every member of the two negotiation classes, and Mr. Kelley and Mr. Jama individually, had amounts for "typical negotiation" deducted from the payments they received based upon valuations which otherwise complied with Wash.Admin.Code §284-30-391 in the "exact amount" of their injuries. Pet. App. 19a, 9a, 11a, n.2, 15-16a, 22a, 26a, 27a, 61-63a, 67a, 72a-73a, 75a, 76a.

- State Farm affirmatively told Insureds that the inputs used in this case by Respondants to determine *what should have been paid were accurate* and had been verified by State Farm. State Farm provided no evidence the calculations were inaccurate. Pet. App. 20a, n.6, 26a.

- There was *no evidence* that even a single member of the Class was paid something

different (or something extra) so that in *every* case the amounts underpaid though the negotiation deduction represented the actual injury and damages. Pet. App. 20a, n.7, 72-73a, 55a; 3-ER-406-7 at ¶35-38; 4-ER-734 at ¶9-12.

- While Insureds presented an "actual cash value" that *should* have been paid for every Class member (but that was reduced in every case by the negotiation deduction), *State Farm presented no evidence whatsoever of any other "actual cash value" that could have been paid*, let alone evidence that State Farm could have—consistent with Washington law and Wash.Admin.Code §284-30-391—paid something *less* than what Plaintiffs showed they were owed under the policy and Washington law. Pet. App. 20a, n.7, 73a.

Of course, the proven fact of every class member being injured (and damaged) in the precise amounts calculated at summary judgment flowed directly from the classes' definitions, which included only those "paid" with the negotiation deduction having been taken from what State Farm paid using the Autosoure Report, and State Farm's common claims practice of never removing or changing the amount of the challenged deduction. Pet. App. 19a, 9a, 11a, n.2, 15-16a, 22a, 26a, 27a, 55a.

On summary judgment, rather than contesting the evidence that all members of the certified classes were injured and the calculation of their damages, State Farm

argued that the district court should decertify the classes due to an intervening Ninth Circuit decision, *Lara v. First National Insurance Co. of America*, 25 F.4th 1134 (9th Cir. 2022).

Based upon its reading of *Lara*, the district court found that Insureds could not use State Farm's own records of their claims to prove their injury and damages but must instead "undertake [a] separate valuation process" based on something other than the Autosource reports. Pet. App. 44-45a. Because Insureds had relied upon State Farm's own records, the district court decertified the negotiation classes (as well as Mr. Jama's condition class) and granted summary judgment on Respondents' individual claims. Respondents appealed the decertification and summary judgment orders.

C. Ninth Circuit Proceedings

The Ninth Circuit reversed decertification as to the negotiation classes, holding that the classes satisfied Rule 23(b)(3)'s predominance requirement. As the court stated (Pet. App. 18-19a) (underlining added, italics in original):

> [Insureds] theory is not that State Farm failed to follow the correct procedure for making permissible adjustments, but rather that Washington law does not permit State Farm to apply a discount for typical negotiation *at all*. See Wash. Admin. Code § 284-30-391(4)(b). The district court accepted this argument, holding that Washington law permits insurers to apply only those deductions explicitly laid out in Section 391(4)(b) and no others. State Farm has not challenged that holding here.

The district court's *unchallenged* holding regarding state-law requirements was key to the Ninth Circuit's resolution of the issues in this case; it meant as the Ninth Circuit highlighted, "Washington law does not permit State Farm to apply a discount for typical negotiation *at all*," such that application of any deduction was unlawful with respect to *each* class member. Pet.App.18a; *italics in original*.

The Ninth Circuit accordingly rejected State Farm's argument that evidence of injury did not exist for all Class Members. The Ninth Circuit expressly noted that in redefining the proposed typical negotiation classes to only include those "paid" with the deduction being taken, the district court had "anticipated and solved this [no injury] problem through its definition of the negotiation class." Pet. App. 15a.

Given this factual record, and that State Farm had not appealed or challenged the ruling that the negotiation discount was "unlawful" and "unauthorized" under Washington law, the Ninth Circuit noted that "All members of the negotiation class in this case, however, received less than they were owed in the exact amount of the impermissible negotiation deduction." Pet. App. 18-19a (underlining added).

The Ninth Circuit also held that, contrary to the district court's interpretation of *Lara*, class members could, as a matter of state law, rely on the Autosource Reports which State Farm itself had verified and used to pay insureds claims to establish what they should have been paid absent the unlawful negotiation deduction. Pet. App. 20-23a, 24-26a. As the Ninth Circuit reasoned:

> Nothing in *Lara* required (as the district court appeared to believe) "[p]laintiffs [to] undertake[ ] a[ ] separate valuation process or retain[ ] an expert to opine on the value of the loss vehicles." Indeed, State Farm itself used the Autosource reports as one proper measure of actual cash value. And ample evidence provided by State Farm itself demonstrated how the Autosource reports were prepared and why they provided an accurate measure of the precrash actual cash value of drivers' cars. We see no reason why a plaintiff seeking to prove injury cannot rely on the Autosource reports themselves to establish value, minus the unlawful negotiation adjustment. And here, as noted, the class is limited to those who were paid the Autosource valuation. Accordingly, the district court's conclusion that *Lara* requires individual plaintiffs to introduce evidence of value independent of the valuation reports was error.

Pet. App. 26a (brackets in original). The Ninth Circuit thus reversed decertification of the negotiation classes because there was class-wide proof of injury.

In contrast, the Ninth Circuit affirmed the district court's decision to decertify the condition adjustment class represented by Mr. Jama against SF F&C. The Ninth Circuit reasoned that, *unlike with the "negotiation" discount*, "Washington law expressly allows insurers to make 'appropriate' condition adjustments." Pet. App. 8a.

This distinction was key: as the Ninth Circuit reasoned:

> [N]o one disputes that State Farm could have applied a lawful condition adjustment to each member of th[e] [Condition] class. Accordingly, it was not an abuse of discretion to conclude that measuring each class member's injury requires an individualized comparison of the putatively unlawful condition adjustment that State Farm actually applied and the hypothetical condition adjustment that State Farm could have lawfully applied.

Pet. App. 13a.

In contrast, predominance had been shown as to the negotiation classes' total loss payments, where the amounts not paid was shown, and where the negotiation deduction should have been zero on the Autosource valuations: "Plaintiffs established that injury [to the negotiation class members] could be calculated on a class-wide basis by adding back the putatively unlawful negotiation adjustment to determine the value each class member should have received." Pet. App. 13a.

Judge Rawlinson dissented as to the negotiation classes, indicating that she would have affirmed the district court's decertification of those classes based on her reading of *Lara*. Pet. App. 29-33a.

State Farm petitioned for *en banc* review. The Ninth Circuit denied the petition, with no judge requesting a response or calling for a vote.

SUMMARY OF ARGUMENT

Contrary to State Farm's contentions, the Ninth Circuit did not hold that there was no need for Plaintiffs to "show that a valuation method actually caused real-world harm" (Pet. at 3). To the contrary, the Ninth Circuit's different holdings regarding the negotiation deduction and condition adjustment show the exact opposite: the Ninth Circuit did not "disagree" with other Circuits, it fully and appropriately addressed, on a summary judgment record, the actual proof of class-wide injury that existed in the record. The Ninth Circuit's different conclusions as to the "unlawful" and "impermissible" negotiation deduction, and the permissible individual condition adjustment, fatally undermine State Farm's petition.

Moreover, the Ninth Circuit's reasoning is entirely consistent, rather than being "in tension," with the decisions State Farm cites (Pet. at 3-4) from the Seventh and Eighth Circuits in related contexts. These cases *highlight* the difference between *a common breach of an established legal duty resulting in loss to each insured* (which did not exist in either case but does here) and a case where an insurer makes an adjustment that may or may not be justifiable based on the facts, creating individual issues because there may or may not be injury or damages. Of course, the Ninth Circuit held precisely this:

> Plaintiffs contend that Washington law flatly prohibits *any* negotiation adjustment; and if Plaintiffs are correct about that legal issue, then each Plaintiff suffered damages equal to the amount of the negotiation adjustment that State Farm made. As explained further below,

> that difference between the condition and negotiation claims dictates a different outcome for the negotiation class.

Pet. App. at 17a. The decision of the Ninth Circuit is well reasoned and presents no conflict with decisions decided under other states' varying total loss regulations.

REASONS FOR DENYING THE PETITION

A. State Farm's Alleged Circuit Splits Are Illusory.

1. State Farm Relies on Hypothetical Facts to Conjure Conflict.

As a preliminary point, the Petition is structured on a false premise: i.e., that some members of the negotiation classes were paid *more* than "actual cash value" by State Farm and were therefore not injured. No evidence supports that premise. Even today, years into this dispute, with discovery concluded and the district court having ruled on summary judgment 35 days before the trial date, State Farm has not identified a single qualified *Kelley* or *Jama* Class Member who was *paid* with the typical negotiation deduction being taken and who received *something more than* the actual cash value they were owed under Washington law. State Farm has not even identified how *theoretically* this could have occurred.

Rather than identifying a single uninjured Class Member from its claim files, State Farm instead now poses a hypothetical. How a "hypothetical" could even be considered *at summary judgment* is never explained. Moreover, State Farm did not pose hypotheticals of "no injury" to either the district court or the Ninth Circuit.

State Farm suggests, (see Pet. at 24), a situation where the "fair market value" of a vehicle was $10,000, but the insurer randomly valued the vehicle between $1000 and $20,000 and then took a further 5% deduction. But this hypothetical has nothing to do with the record in this case.

If we were to assume that the $10,000 value was—as in this case—a value that was generated by the insurer and complied with Washinton law (such that it was the "actual cash value" reached following an approved method under Wash.Admin.Code §284-30-391), then it is a figure that an insurer *could* pay, or an insured could rely upon as what they *should* have been paid; i.e., a "but for" valuation. Here, the "but for" figure, as the Ninth Circuit found, is the Autosource report value without the deduction for negotiation taken from it for every member of the certified class. Here—unlike in State Farm's "random valuation" hypothetical—every single class member was paid *less* than the "but for" valuation.

Of course, the difference between the facts of this case and State Farm's hypothetical is that EVERYONE in the certified negotiation classes was paid what the district court and Ninth Circuit noted was an otherwise legally appropriate value under Washington law (the Autosource Report value) that was, in turn, impermissibly *reduced by the unlawful negotiation deduction* whose amount is exactly known and found in the Autosource report itself, thereby representing injury and damages. Pet. App. at 13a, 17a, 19a, 20a, n.6, 23a, 26a. There is no situation, even hypothetical, where State Farm paid Insureds in the negotiation class "more" than the actual cash value reflected in the Autosource report. There is, in the record, no *evidence* of this happening to even a single class member.

As presented, State Farm's hypothetical seeks to raise a metaphysical question of how one determines the worth of any asset? Yet, the State of Washington answered this question as to automobile total losses by enacting Wash.Admin.Code §284-30-391. This academic exercise is further unnecessary as the uncontroverted facts of this case show that the "actual cash value" that should have been paid for a total loss under Washington law was the amount determined by following the methodology in Wash.Admin.Code §284-30-391, without taking any unauthorized negotiation deductions. As the Ninth Circuit noted, State Farm did not appeal the district court's ruling regarding the unlawfulness of the negotiation deduction. Pet. App. 7-8a, 18-19a.

Yet, this non-appealed ruling was fundamental to the outcome of this case because as the Ninth Circuit concluded there is a major difference between a "permissible" adjustment, the amount of which may be individually in dispute, and an "unlawful" deduction which *can never be taken* and must therefore always be zero.

2. *Jama* and *Sampson* Result From Different Facts and State Laws, not Conflicting Analysis.

In its Petition, State Farm characterizes *Sampson* and *Jama* as "virtually identical class actions." But as the Ninth Circuit recognized, the actions are "easily distinguishable." Pet. App. 19a-20a, n.5. *Sampson* arose under Louisiana Revised Statutes § 22:1892B(5)(a)-(c), which *unlike Washington law* provides insurers broad discretion to value total losses using any "generally recognized motor vehicle industry source." *Sampson v. United Servs. Auto. Ass'n*, 83 F.4th 414, 417 (5th Cir. 2023).

This starkly contrasts with Washington's Wash.Admin. Code §284-30-391, which narrowly prescribes permissible methodologies and factors to value total loss vehicles. As a result, the possibility for individual issues to arise with respect to proper valuation is manifest under Louisiana law (where multiple possible valuations exist) but does not exist in this case under Washington law where only one valuation (here, State Farm's Autosource valuation) is available and presented in the record.

In *Sampson*, a group of plaintiffs broadly challenged valuations prepared by CCC Intelligent Solutions, Inc., ("CCC"). The plaintiffs asserted the insurance company breached its duty to determine ACV by relying on CCC valuation reports that appraised loss vehicles for less than their National Automobile Dealers Association ("NADA") values. The plaintiffs claimed that NADA values, and NADA values alone, were "proof of actual cash value." The Fifth Circuit held that plaintiff's proposed method for establishing injury "[created] an explosion of predominance issues because [the defendant had] the due process right to argue, for each individual plaintiff, that damages should be determined by a different legally permissible method that would produce lower damages than NADA (or no damages at all)." *Id.* at 420.[2]

Here, the Insureds' claims, the applicable legal rules, as well as the Court's certified Class definitions, are entirely different than those present in *Sampson, leading to a different result as the Ninth Circuit explicitly noted:*

2. Although State Farm compiles a list (Pet. At 23, n.2) of cases challenging total loss valuations, none arise under Washington law, nor does State Farm show that any involve State Farm's typical negotiation deduction.

> Here, by contrast, the unlawful conduct challenged by the negotiation class is applying one specific deduction, not using a categorically unlawful method, and so there is no need to pick among alternative calculation methods. In the absence of defendants' allegedly unlawful conduct, each class member indisputably would have been paid the amount they actually received, plus the amount of the putatively unlawful negotiation deduction.

Pet. App. 20a, n.5

The Ninth Circuit correctly reached different outcomes, not based on conflicting interpretation of important Rule 23 questions, but instead based on different core facts and different controlling regulatory frameworks.

The Ninth Circuit's analysis in *Jama* is also fully consistent with district court rulings in the Tenth and Eleventh Circuits, both of which like the Ninth Circuit in *Jama* expressly distinguished themselves from *Sampson*. In *Reynolds v. Progressive Direct Ins. Co.*, 346 F.R.D. 120, 134 (N.D. Ala. 2024), a class action arose from use of a "projected-sold adjustment" (PSA), a deduction similar to the typical negotiation deduction here used by an Audatex competitor, Mitchell International.

As in this case, plaintiffs' proposed method of calculating ACV applied uniformly to the entire class: "the very methodology used by Mitchell but without the PSA." *Id*. at 32. The Court determined that "if the factfinder accepts [plaintiff's] evidence … , then simply recalculating

the valuation using [defendant's] methodology without the PSA will accurately value each class member's vehicle." *Id.*, at 32-33 (quoting *Volino v. Progressive Cas. Ins. Co.*, 2023 U.S. Dist. LEXIS 44666, 2023 WL 2532836, at *1 (S.D.N.Y. Mar. 16, 2023)).

A district court in the Tenth Circuit reached a similar outcome in *Curran v. Progressive Direct Ins. Co.*, 345 F.R.D. 498 (D. Colo. 2023), expressly holding that the plaintiff's proposed damage model—"that Mitchell['s value], but for the PSA deduction, results in ACV, so any estimate with the PSA deduction falls short in that amount" was a "coherent theory" which satisfied Rule 23's predominance requirement. As in *Reynolds* and in the decision below, the *Curran* court expressly distinguished *Sampson* as a case where multiple potential alternative valuations were at issue. 345 F.R.D. at 509, n.8.

Again, the *Reynolds* and *Curran* damage models, like that approved here by the Ninth Circuit on summary judgment, are completely different than that proposed in *Sampson*.

The Ninth Circuit considered *Sampson* and correctly observed fundamental distinctions between it and this case:

> The problem with the class in [*Sampson*] was that there existed innumerable other "legally permissible method[s] of determining" actual cash value and those other methods could "produce lower damages than NADA (or no damages at all)," depending on the individual case. *Id.* at 420. This created an "an explosion

> of predominance issues" because there was just as strong of an argument that any of those other permissible methods should be used, and so, as to each class member, there would be a dispute over which alternative method to select and over whether that method showed each class member was injured at all. *Id*.

Pet. App. 19-20a, n.5.

State Farm's "apples to oranges" comparisons do not demonstrate any conflict or confusion from these differing results, because the underlying facts and legal claims, as well as the applicable regulations, are markedly different.

3. No Conflict Exists with State Farm's Other Authority.

State Farm's reliance on *Lewis v. GEICO*, 98 F.4th 452 (3d Cir. 2024) is similarly misplaced. Nothing in *Lewis* demonstrates a credible circuit-split, and in fact, it shows the opposite.

Like *Sampson*, *Lewis* involves the CCC system and its "condition adjustment." But in New Jersey, as in Washington, condition adjustments are sometimes *permitted* (unlike "typical negotiation" deductions in Washington). The Ninth Circuit recognized the critical distinction between deductions that are sometimes permitted (and so may raise individual questions of application) and deductions that are never permitted (and so do not) in its differing treatment of the *Jama* typical negotiation and condition classes, where the latter's decertification was upheld.

In *Lewis*, the plaintiff simply argued CCC's condition adjustments were "arbitrary and insufficiently itemized." *Id*. at 458 n.6. In addition, the *Lewis* plaintiff received $1,200 over the CCC valuation as an "adjustment to settle," an amount more than the $1,006 condition adjustment which was deducted. *Id*. at 458. The Third Circuit justifiably found that the *Lewis* plaintiff lacked standing because the record showed that even if the "isolated intermediate step within GEICO's valuation process" was inappropriate, "they ultimately avoided any financial injury." *Id*. at 460.

Notably, State Farm has not shown that it ever paid, even once, an "adjustment to settle" to make up for a "typical negotiation deduction," and *Lewis* is an example of a very different claims process by the insurer. *See* Pet. App. 55a (State Farm will never "back-out" the negotiation deduction).

Indeed, *Lewis* further applied reasoning similar to the Ninth Circuit's in affirming certification of a class of insureds who claimed that their insurer had unlawfully failed to compensate them for taxes and fees necessary to replace their totaled cars. 98 F.4th at 458. *Lewis* reasoned that it would be administratively feasible to identify which class members had not been compensated for the sales tax (which was alleged to be always owed, much like the negotiation deduction is never allowed) and that certification was therefore appropriate. This reasoning is entirely consistent with the reasoning of the Ninth Circuit in this case.

State Farm's reliance on *Bourque* v. *State Farm Mut. Auto. Ins. Co.*, 89 F.4th 525 (5th Cir. 2023) is also

off point. While *Bourque* arose from the same valuation system as here, the plaintiffs did not challenge the typical negotiation deduction itself, and it is never mentioned in the Fifth Circuit's opinion. Rather, the *Bourque* plaintiff pursued the same theory as in *Sampson*, that the Autosource valuation resulted in lower valuations than NADA valuations. Noting that the case was brought by the same counsel as in *Sampson*, the Fifth Circuit found that *Sampson* controlled, and they were bound to apply its holding, (id. at 528-29), finding that "*Bourque*'s 'arbitrary choice of a liability model' fails to meet the strictures of Rule 23." *Id*. at 529 (quoting *Sampson*, 83 F.4th at 422-23).

Finally, neither *Kartman* nor *LaBrier* conflict with the Ninth Circuit's analysis in *Jama*, both are in fact broadly in agreement.

In *Kartman*, the plaintiffs were homeowners who claimed that their insurer had used an "ad hoc method" for determining coverage for hail-damaged roofs rather than adopting a "uniform, reasonable, and objective" standard. *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 886 (7th Cir. 2011). The plaintiffs sought certification of a Fed. R. Civ. P. 23(b)(2) injunctive-relief class requiring defendants to reinspect all class members' roofs under a uniform objective standard. *Id*. The Seventh Circuit found that certification was improper because "there is no contract or tort-based duty requiring the insurer to use a particular standard for assessing hail damage." *Id*.

The same is true for *LaBrier*, in which neither the homeowner's insurance policy nor state law defined how depreciation was to be addressed in homeowners' claims. Considering certification on appeal, the Eighth Circuit

predicted that the Supreme Court of Missouri would likely endorse State Farm's use of depreciation, and that because state law did not forbid depreciating labor costs, no predominating issues existed to justify certification. *In re State Farm Fire & Cas. Co. (LaBrier)*, 872 F.3d 567 (8th Cir. 2017).[3]

The Ninth Circuit's reasoning is consistent with both cases. Neither involved an applicable regulation which, like Wash.Admin.Code §284-30-391, banned the deduction at issue or established a standard valuation methodology that the Court could apply. *Unlike here, the lack of such a standard was the key point upon which the courts based their rulings.*

These cases, in fact, highlight the difference between *a common breach of an established legal duty resulting in loss to each insured* (which did not exist in either case, but does exist in this case as to the "unlawful" negotiation deduction), and where there might or might not be injury or damages due to the lack of any common standard upon which the case can be resolved, thereby creating

3. In its Petition, State Farm mischaracterizes *LaBrier*'s holding by omitting the Eighth Circuit's predicate conclusion that the challenged valuation practice "is consistent with Missouri law." *LaBrier*, 872 F.3d at 577.

Notably, that prediction proved incorrect. *See Franklin v. Lexington Insurance Company*, 652 S.W.3d 286, 303 (Mo. Ct. App. 2022), *rehearing and transfer denied* (July 28, 2022), *transfer denied* (Oct. 4, 2022) (rejecting use of depreciation to value labor cost). In hindsight, with the benefit of *Franklin*, it appears that *LaBrier*'s claim would now satisfy Article III standing. *Fassina v. Liberty Mut. Fire Ins. Co.*, No. 22-cv-11466-DJC, 2024 U.S. Dist. LEXIS 40921, at *21 (D. Mass. Mar. 8, 2024).

individual issues (such as with the individualized condition adjustment in this case).

Contrary to State Farm's assertion, there is no conflict between *Jama* and its proffered authority. As such, State Farm has failed to satisfy Rule 10(a) and the Petition should be denied. As evident from district court rulings in the Tenth and Eleventh Circuit, the Insureds' calculation of actual cash value using State Farm's own Autosource data is coherent common proof of injury and damages which implicates no split in the circuits and so presents no controlling issue under Rule 23(b)(3).

B. The First Question Presented is not Actually Presented in this Case.

State Farm's first question presented asks whether a district court may certify a Rule 23(b)(3) damages class where the question whether a challenged practice "resulted in any real-world harm to each class member would require highly individualized proceedings." Pet. i. The Ninth Circuit, though, answered that question "no"—*partially* favorable to State Farm.

As to the *condition* adjustment challenged by Mr. Jama, that answer drove the court's decision to affirm decertification of the class. Because the Ninth Circuit held that "Washington law expressly allows insurers to make" a condition adjustment, (Pet.App.8a), the Ninth Circuit held that the need for individual inquiries regarding whether the plaintiff-specific application of the permissible adjustment injured each class member precluded certification.

But, as to the *negotiation* deduction classes, that answer had no bearing on the outcome because the court concluded that no individualized proceedings would be required, given that each class member's injury would be equal to the amount of the negotiation deduction. Under the district court's non-appealed holding that the negotiation deduction was always "unlawful" and "impermissible" under Washinton Law, (Pet.App. 19a), the negotiation deduction amount could only lawfully be ZERO.

As such, State Farm's repeated claim (e.g. Pet at 17, 3, 11) that the Ninth Circuit "held" that "allegations of an 'unlawful' valuation method were all respondents needed to obtain certification" is manifestly contrary to the record. State Farm's claim, in effect, asks this Court to review the Ninth Circuit's decision on a hypothetical set of facts contrary to the actual record and further requires this Court to assume that no decision had been made as to the legality of the negotiation deduction.

In any event, the Ninth Circuit's actual rulings (as to both the "negotiation" and "condition" adjustments) were based upon a rule which only applies to Washington insurers and which Washington is well within its rights to have enacted under the *McCarren-Ferguson Act*, 15 USC §§ 1012. Nor, as a practical matter, does it affect others in even Washington, as the Autosource system is no longer being used to settle total losses therein.

Certiorari is granted only "in cases involving principles the settlement of *which is of importance to the public as distinguished from that of the parties*, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of

appeal." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (emphasis added; internal quotations omitted). In no way is this such a case.

C. State Farm's Second Question Presented Was also not Presented in this Case.

State Farm's additional contention that the negotiation classes included "uninjured" class members is also belied by the record. The Ninth Circuit held that the summary judgment record showed standing, injury, and damages for every member of the negotiation classes. Pet. App. 27-28a. As the Ninth Circuit correctly reasoned:

> assessing the actual value of [a class member's] car is unnecessary to determine there is standing here. Plaintiffs' claim is that they were paid less than they were owed under their insurance policies with State Farm. Had the challenged negotiation adjustment not been applied, the valuation in the Autosource reports of Plaintiffs' vehicles would have been higher and they would have been paid more by State Farm. That is "a classic pocketbook injury sufficient to give [a plaintiff] standing." *Tyler v. Hennepin Cty.*, 598 U.S. 631, 636 (2023) (holding that plaintiff had Article III standing where defendant "illegally appropriated" a "surplus" of a debt plaintiff owed to defendant).

Pet. App. at 27a.[4]

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4. Having found the evidence that insureds offered at summary judgment to show injury and damages under Washington law demonstrated class-wide injury and damages (Pet.App. 24-26a), the Ninth Circuit then remanded to determine specifically as to Ms.

Given this case presents no issues as to certification of claims involving potentially "non-injured" class members, there is no reason to hold this case until resolution of *Laboratory Corp. of America v. Davis*, No. 24-304 ("LabCorp"). Pet. at 30-31.

State Farm highlights its second question, which is identical to the issue recently accepted for review by this Court in *LabCorp*. But State Farm's request and strained comparison to *LabCorp* ignores the fundamental facts of this lawsuit. In *Labcorp*, the district court certified local and nationwide classes composed of legally blind individuals who visited a LabCorp location and were unable to use LabCorp's e-check-in kiosks. *Davis v. Lab'y Corp. of Am. Holdings*, 604 F. Supp. 3d 913, 934 (C.D. Cal. 2022). On appeal, the Ninth Circuit affirmed, although it recognized that some class members *might* lack injury, and thus Article III standing. *Davis v. Lab'y Corp. of Am. Holdings*, No. 22-55873, 2024 U.S. App. LEXIS 2937, at *5 (9th Cir. Feb. 8, 2024).

In contrast to the broad certified classes in *LabCorp*, the *Kelly* and *Jama* negotiation classes are narrowly tailored to only include class members who (1) were paid actual cash value based on an Autosource report, and (2) were paid with a typical negotiation deduction taken which reduced the actual cash value amount they were

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Ngethpharat, who is not part of the certified *Kelley* negotiation class, having been excluded as she was not "paid" with the negotiation deduction having been taken, to determine if given the evidence in the record she was injured. Pet. App. 26a & n.10. The Ninth Circuit did not ignore the need to prove injury as State Farm claims, rather it carefully considered it in the context of the actual claims and evidence in this case, as shown by the mandate.

paid for their vehicle. Pet. App. 22a. Thus, as defined, there are no uninjured individuals within the *Jama* and *Kelley* negotiation classes. Even when opposing summary judgment State Farm never identified a single "uninjured" Class Member, despite possessing every Class Members' claim file. *LabCorp*'s certified question is irrelevant here.

D. State Farm Forfeited the Central Theory Behind its Petition—That the "Typical Negotiation" Discount Was Allowed Under Washington Law—by Not Raising it in the Court of Appeals.

It is well settled that when a "question was not raised in the Court of Appeals," it "is not properly before" this Court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); accord *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (the Court "will not ordinarily consider" issues "neither raised before nor considered" below); *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (the Court will not "allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed" or "passed upon" below); *United States v. Jones*, 565 U.S. 400, 413 (2012). This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.9 (2005). And under the Court's "traditional rule," where a question "was not pressed or passed upon below," that "precludes a grant of certiorari." Such questions are "forfeited." *Jones*, 565 U.S. at 413.

Before this Court, State Farm repeatedly insinuates that the Ninth Circuit and the district court allowed certification based upon only an "assumption" that the deduction in question was unlawful. Pet at 3, 4, 11, 17.

This, again, is contrary to the holdings in this case which State Farm did not cross appeal or challenge (i.e., the district court's interpretation of Washington law and its conclusions that the negotiation deduction was unlawful and impermissible in every case). Pet. App. 18-19a. And of course, because it was not part of the facts of this case, State Farm never asked the Ninth Circuit to decide this matter based upon an "assumption" (based further upon "allegations") that the deduction "somehow violates a statute, regulation, or contract" (Pet. at 3), nor based upon the assumption that the alleged violation "causes no actual injury". (Pet. at 11). State Farm has forfeited any argument for review of these hypothetical issues based upon hypothetical facts.

Instead, State Farm *sub rosa* repeatedly attempts to imply that the district court's decision that the deduction for "typical negotiation" was never allowed was somehow incorrect (e.g., Petition at 5, 7, 19). Yet, State Farm argues general principles (such as a definition in Black's Law Dictionary) and never addresses or discusses *the actual basis it lost the argument in the district court*—that the wording of Wash.Admin.Code §284-30-391 when properly considered is directly to the contrary of State Farm's argument. Tellingly, *State Farm only mentions §391 once, in passing*, without discussing the key section, §391(4)(b) which the district court correctly found prohibits the additional, unlisted deduction for "negotiation". See above at 5-6.

State Farm's Petition should also be denied as this Court lacks Article III power to "give opinion[s] advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 171 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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April 14, 2025

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APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED NOVEMBER 9, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C20-454 MJP

ANYSA NGETHPHARAT, JAMES KELLEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

CASE NO. C20-652 MJP

FAYSAL A JAMA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

Filed November 9, 2020

ORDER ON MOTIONS TO DISMISS

This matter comes before the Court on Defendant State Farm Mutual Insurance Company's and State Farm Fire and Casualty's[1] Motions to Dismiss in each of the above-captioned cases, which have been coordinated given the overlapping nature of the claims the Plaintiffs pursue. The Court has reviewed the following materials from *Ngethpharat*, C20-454: (1) Defendant's Motion to Dismiss (Dkt. No. 16): (2) Plaintiffs' Opposition (Dkt. No. 18); (3) Defendant's Reply (Dkt. No. 24); (4) Plaintiffs' Surreply (Dkt. No. 27); and (5) all supporting materials. The Court has also reviewed the following materials from *Jama*, C20-652: (1) Defendant's Motion to Dismiss (Dkt. No. 13); (2) Plaintiff's Opposition (Dkt. No. 15); (3) Defendant's Reply (Dkt. No. 16); and (4) all supporting materials. For the reasons set forth below the Court DENIES in part and GRANTS in part Defendant's Motion to Dismiss in both matters and GRANTS in part and DENIES in part Plaintiffs' Motion to Strike in *Ngethpharat*, C20-454.

BACKGROUND

Plaintiffs Anysa Ngethpharat and James Kelley (collectively "Ngethpharat Plaintiffs") have sued their insurer, State Farm, alleging it improperly applied a "typical negotiation discount" to determine the cash settlement value for their damaged cars. Plaintiff Faysal

1. The Court refers to Defendants collectively as State Farm.

Jama makes the same allegations and also contends that State Farm improperly applied a "condition adjustment" in determining the cash settlement value of his damaged car. The Ngethpharat Plaintiffs assert individual and class claims alleging that the "typical negotiation discount" violates Washington state insurance regulations and the Washington Consumer Protection Act. They also seek declaratory and injunctive relief. Plaintiff Jama brings these same individual and class claims, and also pursues claims directly under the state insurance regulations, as well as claims for common law bad faith and breach of the covenant of good faith and fair dealing.[2]

A. The Ngethpharat Plaintiffs' Factual Allegations

The Ngethpharat Plaintiffs had their vehicles badly damaged in separate accidents. Their insurer, State Farm, declared both cars total losses and made a cash payment to settle each claim. But Plaintiffs allege that State Farm violated state insurance regulations by applying a "typical negotiation discount" to reduce amount it paid for the loss. This deduction was used to lower the actual cash value of comparable vehicles State Farm used to determine the settlement amount.

Plaintiff Ngethpharat owned a 2014 Subaru Forrester insured through State Farm. (First Amended Complaint ("FAC") ¶ 1.7 (Dkt. No. 5).) After the car was badly damaged in late 2019, Ngethpharat presented her claim

2. State Farm does not challenge Plaintiff Jama's bad faith and breach of the covenant of good faith and fair dealing claims.

to State Farm, which determined the vehicle a total loss. (*Id.*) State Farm then offered Ngethpharat $13,378 as the value of her totaled car and provided her a valuation reflecting this amount. (FAC ¶ 1.8.) But State Farm did not supply the "underlying support for that offer." (*Id.*) After repeated requests from Ngethpharat, State Farm provided a report that it claimed supported the valuation. (*Id.*) The report was prepared by Autosource, which Plaintiffs allege included "an unverifiable and unclear deduction for 'typical negotiation' off the verifiable price for each of the four comparable vehicles ('comps'), resulting in the base price (what the average of the four comps show as the value) for Plaintiff's vehicle being $919.75 lower than had a 'typical negotiation' discount not been taken." (*Id.* (emphasis omitted).) The Autosource reports applied different discount rates to the price of the four comparable vehicles—two were reduced by 7% and the two more expensive comparable cars were reduced by 6%. (*Id.* ¶ 1.16.)

Plaintiff James Kelley owned a 2020 Ford Explorer that State Farm insured. (FAC ¶ 1.9.) After his car was badly damaged in January 2020, State Farm determine the car a total loss and offered Kelley $54,056 as the value of his car. (*Id.* ¶ 1.10.) State Farm did not provide any supporting materials with this valuation. (*Id.*) Upon request, State Farm then provided an Autosource report showing "an unverifiable and unclear deduction for 'typical negotiation' off the verifiable price of the comparable vehicle identified in the report, resulting in the base price for Plaintiff KELLEY's vehicle being $2,929.00 lower (5% less) than had a 'typical negotiation' discount not been taken." (*Id.*)

The Ngethpharat Plaintiffs allege that the “typical negotiation discount” is “hidden in the fine print” of the Autosource reports. (FAC ¶ 1.11.) They allege that the price listed for the comparable vehicle is not the advertised price but is instead the advertised price “adjusted to account for typical negotiation.” (*Id.*) The report itself only discloses the existence of this deduction in fine print in a footnote and does not provide any further detail as to how this deduction was calculated or determined. (*See id.*) The result, Plaintiffs allege, is that the base price used for comparable vehicles is less than the verifiable prices for comparable vehicles. (*See Id.* ¶ 1.12.) Plaintiffs also allege that the “typical negotiation” discount is not consistently applied to vehicles being held as comparable to the loss vehicle. (*Id.* ¶ 1.16.) For example, the Autosource report provided to Plaintiff Ngethpharat discounted two comparable vehicles’ advertised price by 7% while discounting two others’ advertised price by 6%. (*Id.*) And for Plaintiff Kelley, the “typical negotiation” discount was 5% off the advertised price of the comparable vehicle. (*Id.* ¶¶ 1.10-1.11.)

B. Plaintiff Jama’s Factual Allegations

Plaintiff Jama owned a 2009 Honda Civic Hybrid sedan that State Farm insured. (Complaint ¶ 5.14 (Dkt. No. 1-3).) The car was damaged in May 2019, and after he presented his claim to State Farm it deemed the car a total loss. (*Id.* ¶¶ 5.15, 5.19.) State Farm determined the actual cash value to be $6,939 and sent to Jama its valuation determination and the Autosource report that included comparable vehicle values on which it was based

the valuation. (*Id.* ¶ 5.21.) The Autosource report set the "base" price for the comparable vehicles by reducing their advertised prices by 9 percent through a purported "typical negotiation discount." (*Id.* ¶ 5.24.) The Autosource report also deducted $155 from the actual cash value of Jama's car based on the "perceived condition" of Jama's car. (*Id.* ¶ 5.27.) But as alleged, neither Autosource nor State Farm inspected Jama's car. (*Id.* ¶ 2.28.)

C. Relevant Regulatory Framework

Plaintiffs' claims turn on the allegations that State Farm violated Washington insurance regulations applicable to total loss settlements: WAC 284-30-391 ("Section 391"). Section 391 establishes the methods by which an insurer "must adjust and settle vehicle total losses" and the standards of practice for the settlement of total loss vehicle claims. These two standards work in tandem and impose intertwined, but independent requirements on the insurer.

1. Settlement and adjustment process requirements

Section 391 states: "unless an agreed value is reached, the insurer *must* adjust and settle vehicle total losses using the methods set forth in subsections (1) through (3) of this section." WAC 284-30-391 (emphasis added). But the insurer need follow just one of these three methods.

At issue in this case is Section 391's "cash settlement" methodology. This provision permits the insurer to "settle a total loss claim by offering a cash settlement based on

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

The insurance regulations include two general definitions relevant to this dispute. First, the regulations define the term "actual cash value" to mean "the fair market value of the loss vehicle immediately prior to the loss." WAC 284-30-320(1). And the regulations define "comparable motor vehicle" as "a vehicle that is the same make and model, of the same or newer model year, similar body style, with similar options and mileage as the loss vehicle and in similar overall condition, as established by current data." WAC 284-30-320(3). This definition also states that "[t]o achieve comparability, deductions or additions for options, mileage or condition may be made if they are itemized and appropriate in dollar amount." *Id.*

2. Total loss claim settlement practice requirements

Section 391 also "establish[es] standards of practice for the settlement of total loss vehicle claims" which the "insurer must" follow. WAC 284-30-391(4). Relevant here

is Section 391(4)(b), which says that the insurer must "[b]ase all offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability."

D. Alleged Violations of Section 391

The Ngethpharat Plaintiffs allege that the application of the "typical negotiation discount" violates Section 391 in nine ways. First, State Farm violated Section 391(2)(b) by applying the "typical negotiation discount" to the verifiable price of comparable vehicles in determining the actual cash value of the loss vehicle. (FAC ¶ 1.14.) Second, State Farm violated Section 391(2)(b) by failing to base the actual cash value of the loss vehicle on verifiable sales data or other data acceptable under Section 391(2)(b)(i)-(iv). (*Id.*) Third, State Farm violated Section 391(4)(b) by basing its settlement offer on a "typical negotiation discount" which is not one of the expressly permitted deductions in Section 391(4)(b). (*See id.*) Fourth, State Farm violated Section 391(4)(b) by failing to base its settlement offer on verifiable dollar amounts for vehicles currently or recently available because the "typical negotiation discount" is not verifiable. (*Id.*) Fifth, State Farm violated Section 391 by failing to base the "typical negotiation discount" on purported sales within 120 miles of the damaged car, and instead based it on regional data. (*Id.* ¶ 1.15(a).) Sixth, State Farm violated Section 391 by failing to base the "typical negotiation discount" on the purported sales prices of vehicles within 90 days

of the loss, but instead using years' worth of data with no adjustments for seasonality. (*Id.* ¶ 1.15(b).) Seventh, State Farm violated Section 391 by failing basing the "typical negotiation discount" on the "claimed difference between the asking price and reported sales prices of vehicles which is obtained by Autosource from venders who in turn obtain it from dealers and state taxing and licensing departments" which is purportedly "lower than the actual bonafide market clearing sale prices due to trade-in value being removed and/or the underreporting of price to save on sales tax." (*Id.* ¶ 1.15(c).) Eighth, State Farm violated Section 391 by using the Autosource reports, which average the discount data for all vehicles, "not vehicles of the same make, model, and/or year, and is then separated into pre-set price bands, with the average difference in the unreliable data being then rounded to reflect the claimed 'typical negotiation' discount for that price band." (*Id.* ¶ 1.15(d) (emphasis omitted).) Ninth, State Farm's violated Section 391 when it applied a "typical negotiation discount" based on Autosource data that has not been tested for its reliability or accuracy. (*Id.* ¶ 1.15(e).)

Plaintiff Jama alleges that the "uniform 'negotiation fee' of 9 percent is without any empirical foundation" and violates WAC 284-30-391 because the adjustment is not a "verifiable" dollar amount as required by the regulations. (Compl. ¶¶ 5.29-5.30.) Plaintiff Jama also alleges that the 9 percent negotiation reduction violates Section 391(2) because it is created using data that fails to meet the location and timing rules in Section 391(2)(b)(iv). (*Id.* ¶ 5.32.) And, lastly, Plaintiff Jama alleges that State Farm violated Section 391 by making a condition adjustment

to his car without inspecting the car or showing that the comparable vehicles were different in condition from his. (*Id.* ¶¶ 5.28, 5.33.)[3]

ANALYSIS

A. Legal Standard

Under Fed. R. Civ. P. 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In ruling on a motion to dismiss, the Court must construe the complaint in the light most favorable to the non-moving party and accept all well-pleaded allegations of material fact as true. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005); *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). Dismissal is appropriate only where a complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

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3. Plaintiff Jama concedes that Section 391(5) "may not specifically prohibit a negotiation discount." (Dkt. No. 15 at 14.) The Court therefore does not consider any alleged violation of Section 391(5) to support any of Plaintiff Jama's claims.

B. Breach of Contract

State Farm seeks dismissal of all Plaintiffs' breach of contract claims on the theory that Plaintiffs have not alleged any underlying violations of Section 391. None of State Farm's attacks has merit.

1. Legal standard

In Washington, courts "construe insurance policies as contracts, giving them a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Xia v. ProBuilders Spec. Ins. Co.*, 188 Wn.2d 171, 181, 400 P.3d 1234 (2017) (quotation and citation omitted). To assert a breach of contract claim, a plaintiff must allege the existence of a valid contract, a breach of the contract, and damages. *See Myers v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 823, 827-28, 218 P.3d 241 (2009). The failure by an insurer to follow WAC requirements in settling an insurance claim is a *per se* breach of contract. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 495-96, 983 P.2d 1129 (1999) *aff'd*, 142 Wn.2d 784, 16 P.3d 574 (2001).

This case requires construing the provisions of Section 391. The typical canons of statutory interpretation apply to this task. *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 881, 154 P.3d 891 (2007). When applying basic statutory construction principles, the "primary task is to determine which interpretation best reflects the intent of the legislature in enacting the prevailing wage act and to give effect

to that interpretation." *Id.* at 882. Accordingly, "[a]s in statutory interpretation, where a regulation is clear and unambiguous, words in a regulation are given their plain and ordinary meaning unless a contrary intent appears." *Id.* And "a reviewing court has a duty to give meaning to every word in a regulation." *Id.* at 884.

2. Section 391 does not permit adjustments for a "typical negotiation discount"

State Farm argues that because the regulations define "actual cash value" as "fair market value," a negotiation deduction can be applied to reflect the "realities of haggling." (*Ngethpharat* Dkt. No. 16 at 6-7; *Jama* Dkt. No. 13 at 6-7.) But State Farm's argument is premised on a flawed reading of Section 391 that violates the canons of statutory construction. Specifically, State Farm asks the Court to ignore the specific, detailed methodologies in Section 391(2) that must be followed to determine a comparable car's "actual cash value." *See* WAC 284-30-391(2)(b). Instead, State Farm suggests that because the general definition of "actual cash value" means "fair market value," it can apply a negotiation discount to determine the actual cash value of the comparable car. This reading of the statute would render superfluous all of the detailed, mandatory requirements of Section 391(2)(b) to determine the actual cash value of the loss vehicle. This violates basic principles of regulatory construction. *See Silverstreak*, 159 Wn.2d at 884; *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or

superfluous.") (citation and quotation omitted). To give full effect to the language of Section 391(2), the Court finds that the "actual cash value" determination must comply with the methodologies set forth in Section 391(2). This determines the "fair market value" of a comparable vehicle which is consistent with the general definition of "actual cash value" in Section 320.

State Farm's argument also fails to grapple with Section 391(2)(b)(ii), which expressly says that the use of advertised prices to determine actual cash value is, in fact, an appropriate methodology. And, notably, nowhere does this subsection state that negotiation deductions on top of the advertised prices are permissible.

State Farm has failed to demonstrate why the alleged violations of Section 391(2) cannot support Plaintiffs' breach of contract claims.

3. Section 391(4)(b) does not permit a negotiation discount

As to the Ngethpharat Plaintiffs State Farm argues that it has not violated the settlement procedures in Section 391(4)(b) for three reasons, none of which has merit.

First, State Farm argues Section 391(4)(b) provides a non-exclusive list of "deductions for options, mileage or condition when determining comparability" and do not exclude additional deductions. (Ngethpharat Dkt. No. 16 at 8) This requires looking at Section 391(4)(b) in full, which states:

> When settling a total loss vehicle claim using methods in subsections (1) through (3) of this section, the insurer must . . . [b]ase all offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability.

WAC 284-30-391(4)(b).

State Farm is correct that the Section 391(4)(b) does not say that these are the "only" deductions. And State Farm is correct to distinguish Plaintiff's reliance on *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 419 P.3d 400 (2018). *Durant* involved interpreting a different regulation which specifically listed certain bases for denying personal injury protection claims as the "only grounds." But State Farm's reading of Section 391(4)(b) would essentially allow insurers to come up with any deductions they see fit—so long as they were "itemized and verifiable." This would contravene the intent of the regulations and their authorizing statute requiring insurers to act in "good faith, abstain from deception, and practice honesty and equity in all insurance matters." RCW § 48.01.030. Reading Section 391(4)(b)'s deductions as exclusive gives full effect to the insurance statute and regulations. *See Silverstreak*, 159 Wn.2d at 884. The Court thus rejects State Farm's argument. *See Zuern v. IDS Property Cas. Ins. Co.*, C19-6235MLP, 2020 U.S. Dist. LEXIS 78260, 2020 WL 2114502, at *5 (May 4, 2020) ("A

plain reading of the regulation suggests that the list is exhaustive to the extent it provides the basis for deducting or adding to the value of a comparable vehicle.")

Second, State Farm argues that Section 391(4)(b)'s list of deductions only applies to assessing comparability, not determining the actual cash value of a comparable car. (Ngethpharat Dkt. No. 16 at 8.) This argument does not give full effect to all of provisions in Section 391. Comparability does, in fact, have application to determining the actual cash value. Section 391(2) mandates that a cash settlement offer use a "comparable motor vehicle" to determine "the actual cash value." WAC 284-30-391(2). And Section 391(4)(b) list the deductions that can be made to a comparable car. Reading these provisions together shows that to determine actual cash value, the insurer must use a comparable motor vehicle's actual cash value reduced only by the deductions listed in Section 391(4)(b).

Third, State Farm argues that if one defines "actual cash value" as the advertised price adjusted only by deductions for options, mileage, or condition, then you read the general definition of "actual cash value" as "fair market value" out of the WACs. This mirrors State Farm's arguments made above as to Section 391(2), and is without merit. Section 391(2)'s methodologies guide the insurer to arriving at a fair market value.

State Farm has failed to demonstrate why the alleged violations of Section 391(4)(b) cannot support Plaintiffs' breach of contract claims.

The Court also rejects State Farm's attack to Plaintiff Jama's allegations that State Farm violates Section 391(2) by applying a "typical negotiation" discount that fails to meet the regulation's proximity and temporal requirements. (Dkt. No. 13 at 9 n.6.) State Farm relegates its single-sentence argument to a footnote and provides no reasoning to justify dismissal. (*Id.*) State Farm has not demonstrated why Plaintiff Jama's allegations cannot support his breach of contract claim. (*See* Compl. ¶ 5.32.)

4. As alleged, the negotiation discount is not verifiable

State Farm argues that the "typical negotiation discount" contained in the Autosource reports is "itemized and verifiable" as required by Section 391(4)(b) because the discount can be calculated by comparing the list price to the purchase price. The Court rejects this argument.

Before addressing the merits of this argument, the Court must define the meaning of both "itemized" and "verifiable." The regulations do not define these terms, but the issue has been considered already in this District: "Merriman Webster defines the term 'itemized' as 'to set down in detail or by particulars; list' and defines 'verifiable' as to be able to 'establish the truth, accuracy or reality of.'" *Lundquist v. First Nat'l Ins. Co.*, C18-5301, Order on Order to Show Cause and on Motion to Dismiss (Dkt. No. 33) at 8, 2018 U.S. Dist. LEXIS 113509 (W.D. Wash. July 9, 2018). The Court adopts these same definitions.

State Farm fails to show that the "typical negotiation discount" is "itemized" or "verifiable." While the dollar amount of the "typical negotiation discount" is set forth in the Autosource reports, it is not detailed and lacks sufficient information to allow the insured to test its truth or accuracy. The reports do not disclose the methodology used to calculate the discount or information to understand why a particular discount was applied to any given comparator vehicle. For example, the Autosource report provided to Plaintiff Ngethpharat applied a 6% negotiation reduction for two comparable cars and a 7% negotiation reduction for two others. (FAC ¶ 1.16). The reports nowhere explain or provide information as to why the discounts were different or whether they were accurate or truthful—the insured is left to guess. The Court finds that all Plaintiffs have sufficiently alleged that the typical negotiation discount is not "itemized" or "verifiable" as required by Section 391(4)(b), which supports their breach of contract claims.

Lundquist is instructive on this point. In that case, the plaintiff alleged that the insurer violated Section 391(4)(b) by reducing comparable vehicle prices through an unverifiable "condition" reduction without "regard to an of the individual characteristics of those comparable vehicles (and without any explanation)." *Lundquist*, 2018 U.S. Dist. LEXIS 113509 at *6. The Court found sufficient the allegations that the insurer violated Section 391(4)(b) by failing to provide any information to allow the insured to determine whether the reduction was accurate. *Id.* This was so despite the insurer having listed the factors it considered in reaching the reduction amount. *Id.* State

Farm attempts to distinguish *Lundquist* by suggesting that the court found a Section 391(4)(b) violation only because the condition reductions were the same dollar amount for three different comparable vehicles and therefore arbitrary. But the Court in *Lundquist* made not such finding. Even if it had, it would not obviate the conclusion that "[t]he term "verifiable" would be rendered meaningless if it was not intended to allow the claimant an opportunity to establish whether the dollar amount was accurate by disclosure of the amount." 2018 U.S. Dist. LEXIS 113509 at *12. That is precisely what Plaintiffs allege here, and these allegations support their breach of contract claims.

5. State Farm's alleged condition adjustment is impermissible

As to Plaintiff Jama, State Farm argues that it did not violate Section 391(4)(b) by making an adjustment for the damaged car's condition. Plaintiff Jama's points out that without inspecting his and the comparable cars, the condition adjustment is not "appropriate"—as required by Section 391(4)(b)—because it "lacks sufficient empirical foundation, is arbitrary, and falls far short" of Section 391. As alleged, State Farm provided no basis on which to verify whether the perceived condition deduction was "appropriate." The Court finds Plaintiff Jama's allegations sufficient to show a violation of Section 391(4)(b) and to sustain his breach of contract claim.

* * *

State Farm has not demonstrated any pleading deficiencies related to the alleged violations of Section 391. Accordingly, the Court DENIES State Farm's motion as to the breach of contract claims.

C. CPA Claim

State Farm's attack to Plaintiffs' CPA claims turns entirely on its argument that Plaintiffs have not adequately alleged any violations of Section 391. As set forth in Section B, above, the Court disagrees and finds the alleged violations of Section 391 adequately pleaded. The alleged violations of Section 391 constitute *per se* CPA violations, satisfying the first two elements of the claim. *See Van Noy*, 98 Wn. App. at 496; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 785-92, 719 P.2d 531 (1986) (holding that in a private CPA action must contain allegations of: (1) an unfair or deceptive act, (2) that occurred in the conduct of trade or commerce, (3) affecting the public interest, (4) injuring the plaintiff in her business or property, (5) which defendant caused.). State Farm does not challenge the remaining three elements of Plaintiffs' claims. Given the sufficiently-pleaded allegations that State Farm variously violated Section 391, the Court DENIES State Farm's motions to dismiss the CPA claims.

D. Plaintiff Jama's Claims Brought Directly Under Section 391

State Farm correctly asserts that Plaintiff Jama may not pursue claims directly under Section 391 because the

regulation provides no private right of action. The Court GRANTS State Farm's Motion on this issue. But as set forth above, Plaintiff Jama is entitled to pursue his other claims premised on the alleged violations of Section 391.

E. Declaratory Relief

State Farm seeks dismissal of all Plaintiffs' request for declaratory relief, arguing that the claim is "duplicative" of the breach of contract and CPA claims. (*Ngethpharat*, Dkt. No. 16 at 11; *Jama*, Dkt. No. 13 at 11.) State Farm's argument misses the mark. As the Plaintiffs correctly point out, they may pursue declaratory relief under 28 U.S.C. § 2201(a) "whether or not further relief is or could be sought." *See* 28 U.S.C. § 2201(a). And Fed. R. Civ. P. 57 expressly states that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." The Court DENIES State Farm's Motions as to Plaintiffs' declaratory judgment claims.

F. Injunctive Relief

State Farm seeks dismissal of Plaintiffs' separately-alleged claims for injunctive relief. State Farm is correct that an injunction is a remedy for a CPA violation and not a separate cause of action. The Court GRANTS the Motions and Court dismisses Plaintiffs' injunctive relief claims. But the Court notes that the Plaintiffs may still seek injunctive relief as a remedy for the CPA claims.

G. State Farm's Request to Stay and Compel Appraisal

As an alternative, State Farm asks the Court to stay Plaintiffs' claims and compel appraisal. The Court finds no basis to grant this relief.

State Farm fails to demonstrate why an appraisal would resolve the underlying legal dispute. The Plaintiffs all make clear that they do not challenge the amount of the deduction—just its legality. (*Jama* Dkt. No. 15 at 22; *Ngethpharat* Dkt. No. 18 at 18.) Ordering an appraisal to determine the correct "negotiation discount" would not resolve the underlying dispute as to whether any such discount is permissible under Section 391.

Rejection of State Farm's request finds support in a decision from this District involving similar issues. *See Stanikzy v. Progressive Direct Ins. Co.*, C20-118 BJR, Order Denying Defendant's Motion to Compel Appraisal and to Stay Proceedings (Dkt. No. 30), 2020 U.S. Dist. LEXIS 94545 (W.D. Wash. May 29, 2020). In *Stanikzy*, the Court concluded that requiring an appraisal to determine the amount of loss would be "an empty exercise" where the plaintiff did not challenge that amount of a "projected sold adjustment," but challenged whether the adjustment itself violated Section 391(4)(b). 2020 U.S. Dist. LEXIS 94545 at *6. The appraisal "would not obviate Stanizky's [sic] claim that *any* projected sold adjustment is illegal." 2020 U.S. Dist. LEXIS 94545 at *6 (emphasis in original). This reasoning applies equally here and supports denial of

State Farm's request. The Court DENIES State Farm's Motions and will not compel appraisal.[4]

H. The Ngethpharat Plaintiffs' Motion to Strike

The Ngethpharat Plaintiffs filed a surreply (Dkt. No. 27) asking the Court to strike: (1) two declarations submitted with the State Farm's Reply (Dkt. Nos. 25 & 26); (2) new arguments raised in the Reply as to standing; and (3) State Farm's citation to nine cases in the Reply that Plaintiffs claim were not addressed in the opening brief. The Court GRANTS in part and DENIES in part the Motion

First, Plaintiffs are correct that the Court should not accept the declarations filed with the Reply (Dkt. Nos. 25 and 26). Both raise facts that are far beyond the Amended Complaint and are not the appropriate for judicial notice. And Plaintiffs correctly argue that the declarations inappropriately raise new arguments for the first time on reply. *See Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wa. 2006). The Court strikes the two declarations and has not considered them in reaching its decision.

Second, Plaintiffs are correct that State Farm inappropriately raises a new argument in the reply regarding possible standing issues. The Court strikes this argument and has not considered it in reaching its decision.

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4. The Court does not reach the issue of whether Plaintiff Ngethpharat's policy contains an applicable appraisal provision.

Third, Plaintiffs have not demonstrated a valid basis for the Court to strike State Farm's reliance on the nine cases mentioned in the Reply. The cases cited relate to the same arguments raised in the opening brief. The Court has considered these cases in reaching its decision.

CONCLUSION

The Plaintiffs in these two cases have adequately alleged that State Farm's use of a "typical negotiation discount" violates Section 391. These violations form the basis for their breach of contract, CPA, and declaratory relief claims. State Farm is correct that stand-alone for injunctive relief claims and claims brought directly under Section 391 must be dismissed. But the Court finds no merit in State Farm's request to stay and compel appraisal, and denies the request. As set forth above, the Court GRANTS in part and DENIES in part both Motions to Dismiss as well as the Ngethpharat Plaintiffs' Motion to Strike.

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

Dated November 9, 2020.

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