

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

KOSMOE MALCOM, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

GEICO INDEMNITY COMPANY,
GOVERNMENT EMPLOYEES INSURANCE
COMPANY, and GEICO GENERAL
INSURANCE COMPANY, Maryland
corporations,

Defendants.

CIVIL ACTION
FILE NO.: 5:20-cv-00165-MTT

**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT AND
CERTIFICATION OF SETTLEMENT CLASS**

Plaintiffs Nicholus Johnson (“Johnson”), Kosmoe Malcom (“Malcom”), Aqueelah Coleman (“Coleman”), and Todra Washington (“Washington”) (collectively “Plaintiffs”), individually and on behalf of the Settlement Class, file this Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class. Defendants GEICO Indemnity Company (“GEICO Indemnity”), GEICO General Insurance Company (“GEICO General”), Government Employees Insurance Company (“Government Employees”) (collectively, “GEICO” or “Defendants”) do not oppose this Motion. The Settlement Agreement (“Agreement”) is attached as Exhibit A.

I. FACTS

This is a class action lawsuit on behalf of GEICO Georgia insureds who submitted covered first party auto total loss claims with dates of loss during the class period. Third Amended Complaint (Doc. 108) at ¶ 1. All Settlement Class Members were insured under form auto insurance policies with identical material terms. *Id.* at ¶ 2; Doc. 130-1 at ¶ 26; Exhibit B, Declaration of Christopher Hall (“Hall Decl.”) at ¶ 4. Plaintiffs allege that GEICO failed to pay the proper title ad valorem tax (“TAVT”) due on the claims required under Georgia law to buy a vehicle to replace the total loss vehicle. Doc. 108 at ¶ 121.

A. Plaintiffs’ Total Loss Claim and GEICO’s Alleged Breach.

Plaintiffs entered into Georgia private passenger auto policy agreements to be insured by GEICO under terms contained in form policies (the “Policies”) with material total loss physical damage terms that were the same for all Plaintiffs and all class members. Doc. 108 at ¶ 2. The Policies provided physical damage coverage for Plaintiffs and class members’ total loss vehicles. Doc. 130-1 at ¶ 26. The Policies required GEICO to pay actual cash value on total loss claims. *Id.* at ¶¶ 31-32. Actual cash value is defined in the Policies as “the replacement cost of the auto or

property less depreciation or betterment.” *Id.* at ¶ 32.

Plaintiffs allege that the “replacement cost” on a total loss vehicle includes the title ad valorem tax that would be due to in fact replace the vehicle. Doc. 108 at ¶ 32. Georgia law imposes TAVT on the purchase of vehicles pursuant to O.C.G.A. § 48-5C-1(b)(1)(A). Elton Decl. (Doc. 51-7) at ¶¶ 5-12.

Each Plaintiff and class member suffered a total loss of their GEICO insured vehicle. Doc. 130-1 at ¶ 76. Plaintiffs allege that they and each class member were underpaid on the TAVT due on their total loss claims. *Id.*

B. Class Member Claims.

Discovery has revealed that over 31,000 class members submitted first party total loss claims during the class period and were not paid the full TAVT due under their GEICO Policy. Hall Decl. at ¶ 5. The total underpayments are approximately \$5,100,000.00. *Id.* The average class member TAVT underpayment is approximately \$164.00. *Id.*

C. Procedural Background.

On April 29, 2020, Plaintiff Malcom and former Plaintiffs Tamara Ewing (“Ewing”), and Kwanze Gardner (“Gardner”) filed a putative class action Complaint in the United States District Court for the Middle District of Georgia, Case No. 5:2020-cv-00165 against GEICO Indemnity, GEICO General, and Government Employees. The Complaint alleged that GEICO underpaid the TAVT and license plate transfer fees¹ to its Georgia insureds on auto insurance total loss claims. Doc. 1.

On June 30, 2020, GEICO filed a Motion to Dismiss. Doc. 20.

¹ Plaintiffs ultimately did not seek certification of license plate transfer fees. No claims for license plate transfer fees are released by the Agreement.

On July 21, 2020, Plaintiffs Ewing, Malcom, and Gardner filed a First Amended Complaint. Doc. 23.

On August 3, 2020, GEICO filed a Motion to Dismiss the First Amended Complaint. Doc. 28. On August 24, 2020, Plaintiffs Ewing, Malcom, and Gardner filed a response in opposition to the Motion to Dismiss. Doc. 29. On September 8, 2020, GEICO filed a reply in support of the Motion to Dismiss. Doc. 30. On October 9, 2020, the Court granted in part and denied in part the Motion to Dismiss. Doc. 31. On October 23, 2020, GEICO filed an Answer to the First Amended Complaint. Doc. 33.

On January 19, 2021, Plaintiffs filed a Motion for Leave to File Second Amended Complaint. Doc. 37. On February 9, 2021, GEICO filed a response and took no position on Plaintiffs' Motion for Leave to File Second Amended Complaint. Doc. 40. On February 10, 2021, the Court granted leave for Plaintiffs to file a Second Amended Complaint. Doc. 41. On February 16, 2021, Plaintiffs filed their Second Amended Complaint. Doc. 42. On March 18, 2021, GEICO filed their Answer to Plaintiffs' Second Amended Complaint. Doc. 43.

On August 23, 2021, Plaintiffs filed their Motion for Class Certification and Incorporated Memorandum of Law. Doc. 51. On September 9, 2021, GEICO filed their Response in Opposition to Plaintiffs' Motion for Class Certification. Doc. 56. On March 11, 2022, GEICO filed a Notice of Supplemental Authority relating to the Motion for Class Certification. Doc. 83. On March 16, 2022, Plaintiffs filed a Response in Opposition to GEICO's Supplemental Authority. Doc. 84. On May 19, 2022, the Court granted Plaintiffs' Consolidated Motion to Certify the Class. Doc. 89.

On June 2, 2022, GEICO filed a Motion for Reconsideration of the Order certifying the class. Doc. 91. On June 16, 2022, Plaintiffs filed a Response in Opposition of GEICO's Motion for Reconsideration. Doc. 94.

On June 23, 2022, the Parties filed a Joint Notice of Filing Proposed Notice Plan. Doc. 96.

On July 6, 2022, Plaintiffs filed a response to motion for reconsideration seeking leave to amend the Third Amended Complaint to add a new party. Doc. 98. On July 18, 2022, GEICO filed a response in opposition to Plaintiffs' request to amend the complaint and add a party. Doc. 103. On July 25, 2022, Plaintiffs filed a reply in support of their request to amend the complaint and add a party. Doc 104.

On July 29, 2022, GEICO filed a Motion for Limited Reopening of discovery. Doc. 105. On August 3, 2022, the Court held a hearing on the Motion for Reconsideration of the Order on motion to certify the class. Doc. 106. On August 5, 2022, the Court granted Plaintiffs' Motion to Amend or Substitute Party and granted GEICO' Motion for Limited Reopening of Discovery. Doc. 107.

On August 25, 2022, Plaintiffs Ewing, Malcom, Gardner, Coleman, and Washington filed their Third Amended Complaint adding Plaintiff Nicholus Johnson ("Johnson"). Doc. 108. On August 25, 2022, GEICO filed an Answer to the Third Amended Complaint. Doc. 110.

On October 11, 2022, the Court dismissed Plaintiff Gardner with prejudice. Doc. 123.

On October 11, 2022, the Court denied GEICO's Motion for Reconsideration of the Order granting class certification. Doc. 124.

On October 11, 2022, GEICO filed a Motion for Summary Judgment. Doc. 127.

On October 11, 2022, Plaintiffs filed a Motion for Summary Judgment. Doc. 129.

On October 25, 2022, the Court entered an Order Amending the Order granting Consolidated Motion for Class Certification only on the issue of Plaintiff Ewing and substituting Plaintiff Johnson as a designed class representative for Plaintiff Ewing. Doc. 133.

On November 11, 2022, GEICO filed a response in opposition to Plaintiffs' Motion for

Summary Judgment. Doc. 137. On November 11, 2022, Plaintiffs filed a response in opposition to GEICO's Motion for Summary Judgment. Doc. 139. On November 15, 2022, GEICO filed a reply in support of GEICO's Motion for Summary Judgment. Doc. 146. On November 15, 2022, Plaintiffs filed a reply in support of Plaintiffs' Motion for Summary Judgment. Doc. 149.

On November 18, 2022, the Parties filed a joint motion to amend/correct notice (Doc. 151), which the Court granted on December 5, 2022. Doc. 153.

On December 12, 2022, the United States Court of Appeals for the Eleventh Circuit denied GEICO's petition for permission to appeal the order on class certification pursuant to Fed. R. Civ. P. 23(f). Doc. 155.

On January 24, 2023, the Court set the matter for trial on July 17, 2023. Doc. 156.

On April 14, 2023, Plaintiffs filed an emergency motion to amend order on motion to certify class. Doc. 159

On May 9, 2023, GEICO filed a motion to decertify the class and motion to exclude the testimony of Plaintiffs' expert Jeffrey Martin. Docs. 166 and 167.

On May 9, 2023, the Court denied Plaintiffs' emergency motion to amend. Doc. 168.

On May 19, 2023, GEICO filed a motion for clarification of the Court's Order denying Plaintiffs' Emergency Motion to Amend. Doc. 169. On May 19, 2023, the Court granted the motion for clarification. Doc. 171.

On May 30, 2023, Plaintiffs filed a response in opposition to the motion to decertify the class, and to exclude the testimony of expert Jeffrey Martin. Docs. 173 and 174.

On June 12, 2023, Plaintiffs gave Notice of Provision of Class Notice. Doc. 177.

On June 13, 2023, GEICO filed replies in support of motion to decertify the class and to exclude expert Jeffrey Martin. Docs. 178 and 179.

On June 13, 2023, GEICO filed a motion for leave to file supplement relating to pending motions. Doc. 180. On June 16, 2023, Plaintiff filed a response in opposition to GEICO's motion for leave to file supplement relating to pending motions. Doc. 181. On June 20, 2023, the Court denied GEICO's motion for leave to file a supplement relating to pending motions. Doc. 182.

On June 20, 2023, Plaintiffs filed pretrial disclosures. Doc. 183.

On June 27, 2023, the Parties filed a Joint Motion to Hold in Abeyance Rulings on Pending Motions due to scheduled mediation. Doc. 184. On June 28, 2023, the Court granted the motion to hold in abeyance. Doc. 185.

The Parties participated in a mediation on July 14, 2023 before mediator Rodney Max and reached a settlement agreement in principal. Ex. F, Declaration of Rodney Max ("Max Decl.") at ¶¶ 13-18. On July 18, 2023, the Parties filed a motion to stay the case pending settlement. Doc. 186. On July 20, 2023, the Court granted the motion to stay. Doc. 187.

II. The Agreement is Fair, Reasonable, and Adequate.

The Agreement should be approved because it is fair, reasonable, and adequate, not the subject of collusion. Fed. R. Civ. P. 23(e)(2); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1265 (11th Cir. 2021); Ex. F, Declaration of Rodney Max at ¶¶ 13-18 (explaining arms-length negotiations without collusion).

A. The Agreement Provides 100% Payment of TAVT.

The Agreement provides payment of 100% of TAVT in the amount alleged to be owed to Plaintiffs and all class members who submit a claim. Hall Decl. at ¶ 8; Exhibit A, Agreement at ¶¶ 114, 148. The cash benefit available to class members in the settlement is approximately \$5,100,000.00. Agreement at ¶114; Hall Decl. at ¶ 8.

On March 1, 2013, Georgia eliminated sales tax on motor vehicle purchases and replaced

it with TAVT. O.C.G.A. § 48-5C-1(b)(1)(A); Elton Decl. (Doc. 51-7) at ¶¶ 5-6. From then until December 31, 2019, Georgia law required that TAVT be determined by applying the TAVT percentage rate to the vehicle's fair market value ("FMV") as of the purchase date, as set forth in the Georgia Motor Vehicle Assessment Manual for Title Ad Valorem Tax.² *Id.* at ¶ 16 and exhibits A/1, A/2, and A/3. The applicable Assessment Manuals for the class period are available at <https://dor.georgia.gov/georgia-motor-vehicle-assessment-manual-title-ad-valorem-tax>. *Id.* at ¶ 7. The TAVT percentage to be applied to the assessment value was 6.75% in the class period April 29, 2014 through December 31, 2014, and 7% for the class period January 1, 2015 through December 31, 2019. Elton Decl. at ¶ 11; O.C.G.A. § 48-5C-1(b)(1)(A) (all prior versions). The Agreement requires full payment of TAVT based on these percentage rates applied to the fair market value in the applicable Assessment Manual. Hall Decl. at ¶ 9; Agreement at ¶ 148.

B. The Agreement Provides Robust Notice And Easy Claim Submission.

The Settlement provides a robust notice and easy claim submission. All class members will receive a postcard notice with a detachable pre-filled, return addressed, and pre-paid postage claim form to simply sign and place in the mail. Agreement at ¶¶ 104. The postcard notice is attached here as Exhibit C. The claim form attached to the postcard notice does not require the insured to provide any information other than to sign the claim form and provide a corrected address if needed. *Id.*

The Agreement also requires a second reminder postcard notice in the same form that also includes a detachable pre-filled, return addressed, and pre-paid postage form to simply sign and place in the mail. Agreement at ¶ 123.

² Approximately 98.5% of vehicles are listed in the Assessment Manual. Martin Report (Doc. 51-9) at ex. A (column F identifies 1,085 out of 1,100 claims for which the eservices website has TAVT FMV).

The Agreement also requires email notice that will include a hyperlink to a pre-filled claim form to make a claim on the Settlement Website. Agreement at ¶¶ 122-124. The email notice is attached as Exhibit D. A second reminder email also will be sent to each class member, which also will have a hyperlink to a pre-filled claim form to make a claim on the Settlement Website. *Id.*

The Agreement requires a long form notice and other important case documents to be available to class members on the settlement website www.GaAutoLossClass.com. Agreement at ¶¶ 83, 103. The long form notice is attached hereto as Exhibit E.

Members of the Settlement Class may alternatively submit claim forms online electronically with a “Submit a Claim” button at the Settlement Website (www.GaAutoLossClass.com) by providing one of the following in addition to their name and address: 1) the unique claim number found on the Notices; or 2) the claim number associated with the Total Loss. Agreement at ¶ 143. *See Braynen v. Nationstar Mortg., LLC*, 2015 WL 6872519, at *18 (S.D. Fla. Nov. 9, 2015) (robust notice plan is evidence that the terms of settlement are fair and reasonable).

The Agreement also provides for a toll-free number for class members to submit questions and request additional information. Agreement at ¶ 118 (f).

C. The Agreement Provides an Expanded Class.

One issue in this lawsuit was whether to identify claimants based on the pdf TAVT Assessment Manual effective January 1 of each year, or the end-of-year Assessment Manual Data provided in Excel format by the Georgia Department of Revenue. See Doc. 159. The difference between the two manuals is that (1) the Excel format includes more vehicles because some vehicles are added to the manual after January 1 through the year by way of updates; and (2) the Excel format includes updates to the pdf data, but only if the update to the data results in a decreased fair

market value resulting in a lower TAVT.³ Agreement at ¶ 148. The Settlement resolves both issues in favor of Class Members: (1) the Settlement includes any total loss claim for a vehicle in either the pdf or Excel formats (the more expansive Excel data provides recovery to more class members); and (2) the Settlement provides payment based on the higher pdf fair market valuation if the total loss vehicle was in fact listed in the pdf TAVT Assessment Manual. *Id.* For those claimants whose vehicles were not in the January 1 pdf version, but whose vehicles were added during the year: they are included in the class by use of the Excel data. *Id.* For those claimants whose vehicle fair market values were reduced during the year due to updates, they receive the TAVT payment based on the *higher* original pdf value. *Id.* The Agreement also provides for payment of any TAVT underpayment relating to approximately 31 total loss claims insured by GEICO affiliate GEICO Casualty Company.

D. The Agreement Provides a Limited Release.

The release is narrow. Agreement at ¶ 91. Class members release claims only for TAVT and sales tax. They do not release any claim for any other type of fee, or any claim for vehicle valuation or any other type of claim underpayment. *Id.*

E. The Agreement Resolves a Case With Unsettled Legal Issues.

To counsel's knowledge, Georgia is the only state that imposes a title ad valorem tax in this manner. Hall Decl. at ¶ 10. Counsel believes this case was the first case alleging failure of an insurer to pay the proper TAVT. *Id.* No court has decided how the TAVT regulation should be applied to total loss claims. *Id.* The Agreement resolves these issues in favor of the Settlement Class. *Id.*; Agreement at ¶ 148.

F. The Agreement Provides Reasonable Attorneys' Fees.

³ The updates were implemented only if the updated fair market value of the vehicle decreased. Martin Declaration (Doc. 118-1) at ¶ 3.

This was a highly contested lawsuit relating to a novel legal theory without precedent relating to the payment of TAVT pursuant to the statute. Hall Decl. at ¶ 11. The proposed Agreement provides that Class Counsel may apply for attorneys' fees and costs not to exceed \$1,504,500.00, with costs of up to \$86,000.00. Agreement at ¶¶ 114(d), 159; Hall Decl. at ¶ 12. The percentage for attorneys' fees of 29.5% falls within the Eleventh Circuit benchmark for attorneys' fees, which is 20-30% of the benefit to the class. *See Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 767 (11th Cir. 2017) (“[I]n this circuit we have identified twenty to thirty percent of the common fund as a ‘benchmark’ for an attorney's fee award.”); *see also In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019) (“In this Circuit, courts typically award [attorneys' fees] between 20-30% [of the class benefit], known as the benchmark range.”).

Class Counsel is entitled to a reasonable fee award from the common fund. Fed. R. Civ. P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Lunsford v. Woodforest Nat'l Bank*, 2014 WL 12740375, at *11 (N.D. Ga. May 19, 2014). The Eleventh Circuit provides that the amount of attorneys' fees in common fund cases “shall be based upon a reasonable percentage of the fund established for the benefit of the class.” *Camden I*, 946 F.2d 768, 774 (11th Cir. 1991).

Courts have long recognized the common fund doctrine, under which attorneys who create a recovery benefitting a group of people may be awarded their fees and costs from the recovery. *See, e.g., Van Gemert*, 444 U.S. at 478. The doctrine serves the “twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts.” *In re Gould Sec. Lit.*, 727 F. Supp. 1201, 1203 (N.D. Ill. 1989). This doctrine also ensures that those who benefit from a lawsuit are not “unjustly enriched.” *Van Gemert*, 444 U.S. at 478. The Eleventh Circuit has directed that the fee be based upon a percentage of the class benefit. *See*

Camden I, 946 F.2d at 774-75. Courts have significant discretion in choosing the proper percentage. *Id.* at 774 (“There is no hard and fast rule...the amount of any fee must be determined upon the facts of each case.”). Courts should look at factors such as the time at which settlement was reached, any substantial objections, the economics of class actions, the *Johnson* criteria, and any other “unique” circumstances. *Id.* at 775. The Eleventh Circuit prescribed that a fee award of 50 percent of the benefit is the upper limit; and that most fee awards fall between 20-30 percent. *Id.* at 774-75.

III. The Court Should Certify the Settlement Class.

Plaintiffs seek to certify a Settlement Class of:

All insureds covered under an Automobile Insurance Policy issued by GEICO providing auto physical damage coverage for comprehensive or collision loss, who during the period April 29, 2014 through December 31, 2019 had a total loss and made a comprehensive or collision first-party claim that GEICO determined to be a covered total loss claim, whose claim was adjusted and paid as a total loss, and (1) whose total losses were of Vehicles That Had a Fair Market Value Listed in the TAVT Assessment Manual and who were not paid the full TAVT due on their claims based on fair market value in the TAVT Assessment Manual; and (2) whose total losses were not Vehicles That Had a Fair Market Value Listed in the TAVT Assessment Manual but whose total losses were Vehicles Listed in the DRIVES Assessment Manual Data and who were not paid the full TAVT due on their claims based on the fair market value in the DRIVES Assessment Manual Data.

Settlement Agreement at ¶ 99.

A. The Class Meets All of the Requirements of Fed. R. Civ. P. 23(a).

1. The Class is So Numerous that Joinder of All Members is Impracticable.

The Rule 23(a)(1) numerosity inquiry focuses on “whether joinder of proposed class members is impractical.” *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986). It is not necessary to establish the “precise number of class members,” but merely the “reasonable estimate[.]...as to the size of the proposed class.” *Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D.

697, 699 (M.D. Fla. 2000). “Generally, less than twenty-one is inadequate, more than forty adequate.” *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)). Plaintiffs’ expert Jeffrey Martin has identified over 31,000 class member claims. Hall Decl. at ¶ 13. The numerosity requirement is satisfied.

2. Questions of Law and Fact Are Common to the Class.

“Commonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members.” *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009). This requirement presents a “low hurdle” under Rule 23(a)(2). *Id.* at 1356. “[F]actual differences may exist between class members’ claims without defeating certification, provided common questions of law exist.” *AA Suncoast Chiropractic v. Progressive Am. Ins.*, 321 F.R.D. 677, 685-86 (M.D. Fla. 2017).

Commonality is satisfied here because the central legal question is the same for all class members. Plaintiffs allege that the form Policy language applicable to all class members requires GEICO to pay “actual cash value” (“ACV”) on total loss claims. Doc. 1 at ¶ 5. The Policy defines ACV as “the amount it would cost, at the time of loss, to buy a comparable vehicle.” *Id.* ACV reasonably includes TAVT because TAVT must be paid on the purchase of a replacement vehicle. *Id.*; O.C.G.A. § 48-5C-1. Courts have routinely found commonality satisfied in similar cases involving breaches of uniform insurance policies. *See, e.g., Powers v. Govt. Employees Ins. Co.*, 192 F.R.D. 313, 318 (S.D. Fla. 1998) (finding commonality and certifying Rule 23(b)(3) class where plaintiff alleged auto insurer breached insurance policies by not refunding full amount of deductible after recovering under subrogation claims); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659, 675 (S.D. Fla. 1997) (finding commonality and certifying Rule 23(b)(3) class where plaintiff alleged auto insurer breached policies by failing to provide coverage to injured occupants); *Thompson v. State Farm Fire & Cas. Co.*, 2016 WL 951537, at *8 (M.D. Ga. Mar. 9, 2016),

reconsideration denied, 2016 WL 2930958 (M.D. Ga. May 19, 2016) (finding commonality and certifying Rule 23(b)(3) where plaintiff alleged home insurer breached its insurance policies by not including diminished value in coverage for property damage claims). Commonality is met here.

3. The Claim of the Representative Parties Are Typical.

“Typicality, along with the related requirement of commonality, focuses on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification.” *Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001). “Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class.” *Id.*

Here, Plaintiffs’ claims are typical and have a clear nexus with the claims of each class member. The alleged breach of contract is the same for each class representative and class member: GEICO’s failure to include the full TAVT as part of “actual cash value” as defined by the form Policy. Doc. 1 at ¶ 5; Agreement at ¶ 1. Plaintiffs’ claims are typical of the claims of the putative class members because Plaintiffs and each Class Member were underpaid TAVT. Agreement at ¶ 99; *see also, Roth v. GEICO Gen. Ins. Co.*, 2018 WL 9403428, at *4 (S.D. Fla. May 4, 2018) (finding typicality because “Plaintiff and all class members were injured by the alleged failure to pay sales tax and title transfer fees” owed under the policies). Typicality is satisfied in this case.

4. The Representative Parties Are Adequate.

The final requirement under Rule 23(a) is that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). There is no conflict of

interest between the named Plaintiffs and the members of the class. Hall Decl. at ¶ 14. To the contrary, their interests are perfectly aligned. *Id.* Moreover, class counsel is experienced in litigating class actions and complex litigation, including successfully litigating a class action with similar issues. *Id.* at ¶¶ 15, 23-33. Plaintiffs and Class Counsel will adequately protect the interests of the class. *Id.*

B. The Putative Class Should Be Certified Pursuant to Fed. R. Civ. P. 23(b)(3).

Certification is proper pursuant to Fed. R. Civ. P. 23(b)(3) because “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

1. Questions of Law and Fact Common to Class Members Predominate Over Any Questions Affecting Only Individual Members.

“Determining whether common questions of law or fact predominate over questions affecting only individual members . . . requires a showing that ‘the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole ... predominate over those issues that are subject only to individualized proof.’ ” *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). A complete absence of individual issues is not necessary. *Cox*, 784 F.2d 1546, 1557 (11th Cir. 1986). A plaintiff merely must demonstrate that issues subject to generalized proof predominate over issues that require individualized proof. *Rosen v. J.M. Auto Inc.*, 270 F.R.D. 675, 681 (S.D. Fla. 2009), *order vacated in part on reconsideration* (May 26, 2009) (*citing Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989)).

Courts routinely find predominance in cases involving the interpretation of uniform material insurance provisions. *See Leszczyński*, 176 F.R.D. at 675 (S.D. Fla. 1997) (“A legal

determination as to whether the [auto] policy in question covers claimants . . . is the predominant question of interest among the class members.”); *Thompson*, 2016 WL 951537, at **9-10 (breach of contract claim that auto policies required insurer to assess for diminished value predominated over individual issues).

Here, questions of law or fact common to class members predominate over any questions affecting only individual members. The predominate issue, common to all class members, is whether GEICO breached the Policy by failing to properly pay ACV – including TAVT – owed to its insureds. Doc. 1 at ¶ 5. Every class member was insured by GEICO under identical material Policy terms. *Id.* at ¶ 3; Hall Decl. at ¶ 4. As the *Roth* Court found, the answer to this question will be determined by common proof on the meaning of the subject contract language. *Roth*, 2018 WL 9403428, at *5.

Damages will be determined based on applying the proper TAVT FMV to each claim and subtracting as a set-off the TAVT already paid. Agreement at ¶ 148; *see Brown v. Electrolux Home Products*, 817 F. 3d 1225, 1239 (11th Cir. 2016) (“The ‘black letter rule’ recognized in every circuit is that ‘individual damage calculations generally do not defeat a finding that common issues predominate.’”) (*citing* Newberg on Class Actions).

2. This Class Action is the Superior Method of Adjudication.

A class action is superior to any other method for a fair and efficient adjudication of Plaintiffs’ and the class members’ claims.

The average TAVT underpayment for each class member is approximately \$164.00, which is relatively small when compared to the cost of litigating a breach of contract case against a large insurance company. Hall Decl. at ¶ 16; *see also Leszczynski*, 176 F.R.D. 659, 676 (S.D. Fla. 1997) (“Class actions are particularly appropriate, where... multiple lawsuits would not be justified

because of the small amount of money sought by the individual plaintiffs.”). Plaintiffs are unaware of any other class member filing a lawsuit asserting the same claims as asserted in this lawsuit. The Middle District of Georgia is well equipped to handle insurance class actions such as this, and all claims arise from Georgia policies of insurance. The crux of this case is the uniform policy provision in question. Damages will be determined by simple formula. On this record, the case is not merely manageable as a class, it is ideal for class treatment. *Cty. of Monroe, Fla. v. Priceline.com, Inc.*, 265 F.R.D. 659, 672 (S.D. Fla. 2010) (“Given the number of issues subject to class-wide proof, there will be no unique difficulties in managing this case as a class action, beyond those inherent in complex cases.”).

C. The Court Should Approve Notice.

Courts routinely approve the type of mailed notice provided here. In *Davis et al v. GEICO Casualty Company*, 2:19-cv-02477-EAS-EPD, Docket No. 229 (Oct. 12, 2023), the Ohio Southern District Court approved a notice plan similar to the present one involving GEICO’s failure to pay the full taxes on total loss claims. The *Davis* settlement included two postcard notices and one email notice. *Id.* Here, there are two postcard notices and two email notices. *McPheeters v. United Servs. Auto. Ass’n*, 1:20-cv-00414-MWM, Docket No. 98 (Dec. 5, 2022) (approving class action settlement notice consisting of two postcard notices with detachable claim forms and website); *see also, Kinder v. Koch Industries, Inc.*, 1:20-CV-02973-MHC, 2021 WL 3360130, at *1 (N.D. Ga. July 30, 2021) (approving of claims made settlement with a single mailed notice and no electronic claims submission); *McGaffin v. Argos USA, LLC*, 4:16-CV-104, 2020 WL 1493929, at *2 (S.D. Ga. Mar. 24, 2020) (approving mail notice and a reminder notice with internet website).

D. The Court Should Grant Preliminary Approval of the Settlement.

Preliminary approval is not binding, and “[a] proposed settlement should be preliminarily approved if it is ‘within the range of possible approval’ or, in other words, [if] there is ‘probable cause’ to notify the class of the proposed settlement.” *Fresco v. Auto Data Direct, Inc.*, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007) (internal citations omitted). This is because preliminary approval is to ensure the proposed settlement appears sufficiently fair and reasonable to justify notifying Class Members and provide an opportunity to be heard prior to a full analysis at final approval. Fed. R. Civ. P. 23(e)(1) (preliminary analysis of settlement is to “determine whether to give notice of the proposal to the class,” which is proper if it demonstrates “the court will likely be able to” approve the settlement).

As will be set forth in greater detail in the Motion for Final Approval – and as demonstrated by the attached Agreement – all six factors used by courts to evaluate the fairness and adequacy of a class action settlement strongly support approval here. *See Leverso v. Southtrust Bank*, 18 F.3d 1527, 1530 n.6 (11th Cir. 1994) (outlining the six factors). There was no fraud or collusion in the settlement. Hall Decl. at ¶ 17. The settlement negotiations were conducted at arm’s length, and settlement was reached after a failed mediation, and following lengthy negotiations. *Id.*

Second, complexity, expense, and likely duration support the settlement. The legal issues presented in both class certification and merits questions in this case were complex, involving substantial data, and with issues involving TAVT that have not been resolved by any court. Class certification issues were litigated rigorously at both the district court and appellate court.

Third, the stage of the proceedings and amount of discovery completed support settlement. Plaintiffs propounded and GEICO responded to extensive discovery in this case. The Parties engaged in sophisticated data analysis and relied upon multiple expert witnesses. Class Counsel have extensive experience analyzing GEICO data, having resolved class action cases against

GEICO in the past. *Davis*, 2:19-cv-02477, Docket No. 229 (Oct. 12, 2023); *McPheeters*, 1:20-cv-00414-MWM, Docket No. 98 (Dec. 5, 2022) (approving class action settlement for unpaid sales tax on auto total loss claims); *see also Bastian v. United Servs. Auto. Ass'n*, 2017 U.S. Dist. LEXIS 180757 (M.D. Fla. Nov. 1, 2017)⁴ (approving class action settlement for unpaid sales tax on auto total loss claims). The Parties engaged in extensive motion practice right up to the time of trial. Plaintiffs have a complete understanding of all issues in this litigation. Hall Decl. at ¶ 18.

Fourth, the Plaintiffs' probability of ultimate success on the merits supports settlement. The outcome of this case has been uncertain from the outset and remains uncertain today. Class certification would have been disputed, and no court has ruled on the present issues. Some courts have found taxes and/or fees are not owed under an ACV policy. For example, in *Sigler v. GEICO Cas. Co.*, 2019 WL 2130137, at *3 (C.D. Ill. May 15, 2019), *aff'd*, 967 F.3d 658 (7th Cir. 2020), the court granted GEICO's motion to dismiss claims for tax and title transfer fees. *See also, Barlow v. Gov't Emps. Ins. Co.*, 2020 WL 5802274 (E.D.N.Y. Sept. 29, 2020). Plaintiffs believe *Sigler* and *Barlow* were wrongly decided, and note that they applied different law.

Fifth, the range of possible recovery supports the settlement. As noted, the Agreement provides payment of 100% of the unpaid TAVT. Agreement at ¶ 148. The Settlement resolved hotly contested issues in favor of the Settlement Class Members relating to which TAVT Assessment Manual to apply.

Sixth, the opinions of the Class Counsel and the class representatives support settlement.⁵ It is the reasoned opinion of Class Counsel, experienced in complex class action litigation, that settlement is in the interest of the previously certified classes and the Settlement Class, and

⁴ Lexis cites are provided where the order is not available on Westlaw.

⁵ The sixth factor includes analysis of the substance and amount of opposition, which is irrelevant until after Notice and the opportunity to request exclusion or object is provided.

eliminates the risk of proceeding with litigation. Hall Decl. at ¶ 19.

It is well-settled that a claims-made structure does not impact the “fairness, reasonableness, or adequacy of proposed settlement.” *See, e.g., Hamilton v. SunTrust Mortg. Inc.*, 2014 WL 5419507, at *6 (S.D. Fla. Oct. 24, 2014) (quotations omitted). GEICO asserted and confirmed it would not settle the cases absent the claims made structure. Hall Decl. at ¶ 20. Courts find a defendant’s refusal to settle absent a claims-made structure to be a critical factor in determining whether a claims-made settlement is fair and reasonable. *Montoya v. PNC Bank, N.A.*, 2016 WL 1529902, at *14 (S.D. Fla. Apr. 13, 2016) (claims-made settlement offered the best and “only real relief” possible in settlement because defendants “would not have agreed” to direct-pay structure).⁶ The question is not whether a claims made settlement compares favorably to a hypothetical settlement, but rather whether the settlement is fair and reasonable on its own terms. This type of settlement structure is regularly approved by courts in this Circuit. *See, e.g., Faught v. Am. Home Shield Corp.*, 668 F.3d 1233 (11th Cir. 2011) (upholding lower court’s approval of class action settlement); *Montoya v. PNC Bank, N.A.*, 2016 WL 1529902 (S.D. Fla. Apr. 13, 2016) (approving similar claims-made settlement in class action concerning lender-placed insurance).

The Agreement removes the risk that class members will recover nothing due to an unfavorable ruling on class certification, at summary judgment, or on appeal. The Agreement removes the risk and required full payment of TAVT.

E. The Court Should Preliminarily Approve The Separate Release and Payment to Plaintiffs.

After negotiating the class settlement, the parties considered a more expansive release of

⁶ Moreover, even if GEICO had been willing to settle on a direct-pay model (it was not), this would surely have meant significantly less payment amount per class member than under a claims-made model of 100% of requested damages are paid for each claim made.

claims by Plaintiffs. The Parties reached an agreement for more expansive release (beyond the release for claims relating to TAVT) for \$5,000.00. Hall Decl. at ¶ 22; Max Decl. at ¶¶ 13-18. Although the Eleventh Circuit held incentive or service awards that compensate a class representative solely for her time and for bringing a lawsuit unlawful, here Plaintiffs are being paid \$5,000.00 not as “a salary, a bounty, or both,” but in exchange for agreeing to a broader (separate) release of claims than the release applicable to the other class members. *See Sinkfield v. Persolve Recoveries, LLC*, No. 2023 WL 511195, at *3 n.2 (S.D. Fla. Jan. 26, 2023)(“Because the Plaintiff is being paid this \$1,500.00, not as “a salary, a bounty, or both,” but in exchange for agreeing to a broader of claims than the release the other Class Members have given, this payment doesn’t violate the strictures of *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1258 (11th Cir. 2020).”); *Broughton v. Payroll Made Easy, Inc.*, No. 2:20-CV-41-NPM, 2021 WL 3169135, at *4 (M.D. Fla. July 27, 2021) (same). Plaintiffs will not allow this issue to defeat or delay payment to class members, and if an objection is made (or the Court does not approve the payment), Plaintiffs have agreed that the release and payment will be void. Agreement at ¶ 161.

CONCLUSION

Plaintiffs respectfully request that the Court grant Preliminary Approval of the Agreement and certify the Settlement Class, and enter the Proposed Order attached as Exhibit 4. The Order approves the form of notice to be given to the class, establishes a schedule and process for the submission of any objections or requests for exclusion from the class, and provides for a fairness hearing to be held by the Court. Plaintiffs will request final approval of the settlement and file a motion for approval of attorneys’ fees, costs, and separate Plaintiffs’ settlement before the fairness hearing.

This 16th day of October 2023,

/s/Christopher B. Hall

Christopher B. Hall
Georgia Bar No. 318380
Hall & Lampros, LLP
300 Galleria Parkway, Suite 300
Atlanta, GA 30339
Telephone: (404) 876-8100
Facsimile: (404) 876-3477
chall@hallandlampros.com

W. Thomas Lacy
Georgia Bar No. 431032
Lindsey & Lacy, PC
200 Westpark Drive, Suite 280
Peachtree City, GA 30269
Telephone: 770-486-8445
tlacy@llptc.com

Bradley W. Pratt
Georgia Bar No. 586673
Pratt Clay LLC
4401 Northside Parkway
Suite 520
Atlanta, GA 30327
Telephone: (404) 949-8118
bradley@prattclay.com

Scott Edelsberg, Esq. (pro hac vice)
Edelsberg Law, PA
20900 NE 30th Ave., Suite 417
Aventura, FL 33180
Telephone: (305) 975-3320
scott@edelsberglaw.com

Andrew J. Shamis
Georgia Bar No. 494196
Shamis & Gentile, P.A.
14 NE 1st Ave., Suite 1205
Miami, FL 33132
Telephone: (305) 479-2299
Facsimile (786) 623-0915
ashamis@shamsigentile.com

Rachel Dapeer (pro hac vice)
Dapeer Law, P.A.

300 S. Biscayne Blvd, #2704
Miami, FL 33131
Telephone: 305-610-5223
rachel@dapeer.com

Edmund A. Normand (pro hac vice)
Jacob L. Phillips (pro hac vice)
Appearing Pro Hac Vice
Normand PLLC
Post Office Box 1400036
Orlando, FL 32814-0036
Telephone: (407) 603-6031
ed@ednormand.com
jacob.phillips@normandpllc.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, October 16, 2023, I filed the foregoing *Motion for Preliminary Approval* on the Court's ECF to the below counsel:

Valerie Strong Sanders
Eversheds Sutherland (US) LLP
999 Peachtree St NE
#2300
Atlanta, GA 30309
valeriesanders@eversheds-sutherland.com

Kymerly Kochis
Alexander Fuchs
Eversheds Sutherland (US) LLP
1114 Avenue of the Americas
The Grace Building, 40th Floor
New York, New York 10036
kymkochis@eversheds-sutherland.com

/s/Christopher B. Hall

Christopher B. Hall