UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHAD HANSEN and MELISSA HANSEN, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	**No. 18 C 244**
v.	)	**Judge Rebecca R. Pallmeyer**
COUNTRY MUTUAL INSURANCE CO. d/b/a COUNTRY FINANCIAL, and ELITE CONSTRUCTION CO. INC.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Chad Hansen and Melissa Hansen allege that their homeowners insurer, Defendant Country Mutual Insurance Company ("CMIC"), underpaid them for losses they suffered in a storm. They have sued CMIC and seek to represent a broad class of insured parties who, Plaintiffs allege, were similarly injured. Before the court is Plaintiffs' motion for class certification [217], as well as several motions to exclude certain evidence [246, 247, 248, 251, 252, 261, 262]. As discussed below, Plaintiffs' motion for class certification [217] is denied without prejudice. In conjunction with this ruling, the court grants Defendant's motions to exclude certain of the opinions offered by Plaintiffs' experts, Donald D. Stafford [246, 251] and Russell Thomas [247, 252]. The court need not reach the remaining evidentiary motions [248, 261, 262], and they are therefore denied as moot.

BACKGROUND

Plaintiffs provide little factual information about the events at issue in this case. In their memorandum in support of class certification, Plaintiffs dedicate just three pages to describing the "nature of the case" before diving into their legal argument. (*See* Sealed Mem. in Supp. of Mot. to Certify Class (hereinafter "Sealed Class Certification Mem.") [221] at 1-4.) No further

background information appears in their reply memorandum. (*See* Sealed Reply in Supp. of Mot. to Certify Class [287].) This minimal factual record gravely undermines Plaintiffs' argument for class certification. It also stands in sharp contrast to other class action lawsuits involving claims against insurance companies. *See, e.g.*, *Doe v. Guardian Life Ins. Co. of Am.*, 145 F.R.D. 466, 469 (N.D. Ill. 1992) (citing a "thorough" report by the magistrate judge that "fully explained" the facts of the case); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 572 (N.D. Ill. 1992) ("Both sides have submitted a good deal of evidence bearing on the factual question.")

Because the factual record is minimal, the background discussion in this opinion is also brief. Where useful, the court draws on other sources—including Defendant's experts—for factual details.

I. The Hansens' Insurance Policy with CMIC

Chad Hansen and Melissa Hansen, named Plaintiffs and proposed class representatives, maintained home insurance with Defendant Country Mutual Insurance Company (hereinafter "Country" or "CMIC") "[a]t all relevant times to this litigation" (that is, from January 12, 2008, to the present). (Am. Compl. [16] ¶¶ 7, 35.) CMIC has two levels of insurance coverage: Actual Cash Value ("ACV") and Replacement Cost ("RC"). ACV is defined generally as the fair market value of the lost property. More specifically, ACV is:

> a. For buildings or structures the lesser of the following, as determined by [CMIC]:
>
> > (1) The cost actually and necessarily incurred to repair or replace the damaged property using standard new construction materials of like kind and quality and standard new construction techniques, less depreciation; or
> >
> > (2) Fair market value.
>
> b. For property other than buildings and structures the lesser of the following, as determined by [CMIC]:
>
> > (1) The cost to repair or replace the damaged property using materials of like kind and quality, less depreciation; or
> >
> > (2) Fair market value.

> In determining depreciation, [CMIC] will consider wear and tear, deterioration, obsolescence, age, physical condition and reduced market value of the property.

(Hansen Insurance Policy, Ex. 5 to Redacted Mem. in Supp. of Mot. to Certify Class (hereinafter "Hansen Insurance Policy") [220-5] at 6.) During the relevant time period in this case, the Hansens had RC coverage, which is more expansive than ACV coverage and provides for recovery of the full replacement cost of lost property without any reduction to account for depreciation. (*Id.* at 2.) The policy defines RC as the lesser of:

> (1) The cost to repair the damaged property using materials of like kind and quality; or
>
> (2) The cost to replace the damaged property with a new article identical to it.

(*Id.* at 8.) As is evident by comparing the definitions of ACV and RC, the primary benefit of having RC coverage is that the RC is not reduced to reflect depreciation.

Depreciation is "the decline of an item's value since being placed into use." (*See* Stafford July 14, 2020 Report, Ex. 2 to Def.'s Sealed Mot. to Exclude Test. of Stafford (hereinafter "Stafford July 14, 2020 Report") [246-2] at 4.) The degree to which an item has depreciated is calculated by comparing the condition of the item to its age and its life expectancy; for example, "an item in better than average condition than that expected, given its age, would be anticipated to have greater remaining life and would depreciate less than the norm." (*Id.*) Thus, the condition of property directly affects the ACV. (*See id.* at 5.)

Regardless of whether an insured has purchased ACV or RC coverage, CMIC's policy permits it to initially limit payments on a claim to the ACV amount—put otherwise, CMIC may initially account for depreciation and withhold that value when paying an insurance claim. The greater recovery—that is, the RC value—is available to an insured who has such coverage only if the insured seeks repair or replacement of the lost property within a year of the date of loss. Thus, the Hansens' insurance policy states that CMIC "will not be liable for any loss under [the RC] provision unless and until actual repair or replacement is completed." (Hansen Insurance

Policy at 26.) The policy allows "one year from the date of loss [for the insured] to make the repair or replacement and request payment for the difference between the reasonable cost of repair or replacement and the amount [CMIC] ha[s] already paid." (*Id.*) If the insured does repair or replace an item within one year, CMIC will then pay the depreciation value that it had previously withheld.

II. The Hansens' Insurance and Legal Claim

The Hansens filed an insurance claim with CMIC after wind generated by a tornado caused extensive damage to their home, personal property, and shed on June 22, 2015. (LaPrade Report, Ex. 5 to Pls.' Mot. to Exclude LaPrade and Prowse (hereinafter "LaPrade Report") [261-5] at 56, 58.) As discussed further below, Plaintiffs differentiate between two different types of insurance claims: claims for structures (such as the Hansens' home) and claims for personal property (also referred to as "contents"). With respect to their structure claim, the Hansens engaged in negotiations with CMIC for several months and ultimately received "a final estimate amount of more than $269,000" in December 2015. (LaPrade Report at 60.) Plaintiffs do not state how far off the mark they believe that estimate was, but they argue, without evidentiary support, that CMIC breached its contract with the Hansens—and all members of the proposed class—in various ways. Again, without presenting any evidence that CMIC engaged in the complained-of practices in their own case (or that of any other specific class member), Plaintiffs assert that CMIC is guilty of (1) using an "improper scope" (a "major example" of which is CMIC's alleged "failure to pay steep and/or height surcharges that are necessary to account for decreased labor efficiency when working on steep and/or high roofs"); (2) "using the wrong labor rate" (the "largest example" being CMIC's use of "the general demolition rate for roof removal" instead of the higher "roofer labor rate"); (3) paying for "materials that are below the quality that previously existed" (such as paying for "standard grade" instead of "average" grade or "above average" grade materials); and (4) "using artificially low prices" (such as editing the line-item description for removal of carpet to also include removal of pad, but not increasing the total

amount reimbursed to account for this extra task). (Sealed Class Certification Mem. at 12-13 & nn.42-45.)

In addition to their structure claim, the Hansens also submitted a claim for more than 700 line items of personal property (or "contents"). (LaPrade Report at 62.) An individual line item could include many contents. (*See, e.g.*, *id.* ("Line 18 . . . is for cleaning 197 shirts at a [r]ush.").) Among these items were a pool and hot tub, which accounted for about $20,000 in the Hansens' claim inventory, as well as a large quantity of clothing that had to be dry cleaned and laundered, which accounted for about $33,000. (*Id.* at 63.) CMIC appears to have agreed to pay around $100,000 in total for the Hansens' personal property. (*See* Stafford July 14, 2020 Report at 26.) Plaintiffs argue that CMIC breached its contract with the Hansens—and all members of the proposed class—by calculating estimates for personal property losses on the basis of an assumption that the property was in "average" condition, when in reality some of it was in "above average" condition and therefore entitled to a higher valuation. (Sealed Class Certification Mem. at 10-12.) Plaintiffs rely, for that contention, on CMIC's production of claim estimates that were written using "Xactimate" or "XactContents," a software system in which claims adjusters can edit various fields (such as "condition" or "age") to arrive at an estimated value for a claimant's contents or structure. (*See id.* at 10.)

In their motion seeking class certification, Plaintiffs allege that the Hansens and other policyholders made "valid claims, that were paid, but paid in an amount substantially below what was owed under CMIC's insurance policies." (*Id.* at 2.) Plaintiffs seek to certify a class based on the "underpayments"—to all policyholders, for losses from any disaster beginning in 2008—that "result from CMIC's uniform claims practices, policies, and procedures." (*Id.*) Common claims, Plaintiffs contend, include breach of contract and unreasonable and vexatious practices in violation of 215 ILCS 5/155. (*See* Mot. to Certify Class [217] at 1.) Thus, they propose a class broadly defined as follows:

> All policyholders of Defendant Country Mutual or its subsidiaries who at any point between January 12, 2008 and the present, had their insurance claim(s) accepted and paid, and those payments were based on Defendant Country Mutual Insurance Company's employees['] or agents['] use of estimating guidelines and practices that were established or designed by Defendant Country Mutual Insurance Company.

(*Id.* ¶ 7.) The court presumes that CMIC's agents adhered to CMIC's guidelines and practices in all cases and that Plaintiffs' proposed class effectively includes every person who made a claim against CMIC and was paid, from 2008 to now.

III. Plaintiffs' Experts

After Plaintiffs filed their motion for class certification, and Defendant filed a response, both parties filed additional motions to exclude certain expert testimony and other evidence. The court has reviewed those motions and agrees, to some extent, with both parties that some of the expert testimony and other evidence is not admissible. But Plaintiffs' motion for class certification can largely be resolved without having to rule on the admissibility of the challenged evidence. Thus, for now, the court limits its consideration of those motions to the specific issues that help resolve class certification: the methodological reliability of Plaintiffs' experts. Plaintiffs have proffered the testimony of two experts, one on the issue of CMIC's alleged underpayment of contents claims, Donald Stafford, and one on the issue of CMIC's alleged underpayment of structure claims, Russell Thomas.[1]

A. Donald D. Stafford

Stafford works as a claims consultant for his own firm, Stafford Claims Consulting LLC. (Stafford Curriculum Vitae, Ex. A to Stafford Mar. 16, 2021 Report [246-4] at 53.) Stafford's education includes an undergraduate degree from the New England Conservatory and an MBA from Northeastern University. (*Id.* at 52.) From 1984 to 2012, Stafford was the President of

[1] Plaintiffs' memoranda on all of the evidentiary motions span nearly 200 pages. The court also heard oral argument. Plaintiffs' counsel now seeks leave to supplement the submissions with still more pages of argument, but Plaintiffs' proposed new submissions largely restate points that have been thoroughly discussed by the parties. Their motions for leave to supplement [301, 305] are denied.

Insurers World, a firm that provided valuation services and products to insurance carriers. (*Id.* at 53.) Stafford states that he was responsible "for corporate management, insurance carrier relations, production practices, strategic initiatives, claims business logic, good faith compliance and product development." (*Id.*) Between 2012 and 2015, Stafford held a similar role and performed similar duties for Enservio Inc., which had acquired Insurers World in 2012. (*Id.*) Since 2015, as a consultant with Stafford Claims Consulting, Stafford has worked on "[l]itigation support in the form of consulting, dispute resolution, appraisal and expert witness services," as well as "consult[ation] with insurance carriers on claims practice[s] and process[es] seeking to enhance efficiency, accuracy and customer satisfaction." (*Id.*)

Plaintiffs asked Stafford to provide an opinion regarding "the negative effect on claimants from Country Mutual Insurance Company's failure to consider anything other than average physical condition in calculating depreciation in the determination of [the] ACV of [claimants'] personal property." (Stafford July 14, 2020 Report at 2.) Stafford reviewed the insurance claim that the Hansens filed with CMIC in June 2015. (*See id.* at 10-23.) Stafford then asked the Hansens to state their perception of the condition of the contents that they had listed in their claim. (*See id.* at 24-25.) The Hansens reported that several items were in "above average condition" even though CMIC had listed those (and all other) contents as being in "average condition"; Stafford determined, as a result, that the true ACV for Plaintiffs' contents should have been $108,590.75.[2] (*Id.* at 26.) That amount is $10,894.41 (or 11.15%) higher than the ACV for Plaintiffs' contents if they were in fact in "average condition." (*Id.*) Stafford concluded, without further explanation, "that overall claimants would benefit from ACV personal property payments

---

[2] Stafford does not attempt to justify his methodology, which rests on the Hansens' self-report concerning the condition of their own contents. The credibility of the Hansens' statements on this matter is contestable; for example, while they list many of their items as having been in "above average" condition, they do not list a single item—in a list of more than 700—as having been "below average." (*See* Stafford July 14, 2020 Report at 209-34.) Nor is there any evidence that Stafford queried other potential class members to determine the condition of their lost contents.

between 5% to 7% higher" if CMIC had considered the actual condition of contents—rather than defaulting to average—in calculating depreciation when determining ACV. (*Id.* at 27.) Stafford did not explain what led him to conclude that the other proposed class members' losses were more modest than those suffered by the Hansens. Nor, from what the court can tell, did Stafford consider the possibility that the Hansens may have overstated the value of some of their personal property, or the possibility that some of the Hansens' own personal property, or that of other putative class members, may have been in below average condition.

Stafford issued two supplements to his original report. The supplements mainly serve to calculate the total "deleterious impact" for all of CMIC's claimants based on the 5-7% figure Stafford arrived at in his original report. (*See* Stafford Mar. 16, 2021 Report, Ex. 4 to Def.'s Sealed Mot. to Exclude Test. of Stafford (hereinafter "Stafford Mar. 16, 2021 Report") [246-4] at 11.) Stafford concluded that the total "impact" for contents claims, between 2009 and 2020, was between $48,298,799 (at 5%) and $67,618,318 (at 7%). (*Id.*) Stafford also noted that he reviewed additional evidence beyond the Hansen claim, such as "a number of Country . . . claim files," but found "no reason to alter [his] opinion" about 5-7%, because he "found no indication that any contents condition was considered other than average." (*Id.* at 4, 5, 10.)

B. Russell Thomas

Thomas is self-employed as a Public Insurance Adjuster in Panama City, Florida.[3] (Thomas Resume, Ex. A to Thomas Mar. 16, 2021 Report (hereinafter "Thomas Resume") [247-3] at 27.) Thomas's formal education ended in the ninth grade, though he later obtained his GED. (Thomas Apr. 19, 2021 Dep. Tr., Ex. 5 to Def.'s Sealed Mot. to Exclude Test. of Thomas [247-5] at 23:11-18.) Thomas states that he has 35 years of relevant experience in restoration,

[3] A "public adjuster" does not work for an insurance company or on behalf of any public agency; rather, a public adjuster is hired by a claimant to assist in the preparation, presentation, and settlement of a claim. *See* https://www2.illinois.gov/sites/Insurance/Consumers/ConsumerInsurance/HomeOwnerRenter/Pages/homeowners-and-renters-public-adjusters.aspx (last visited Aug. 6, 2022).

contracting, and handling insurance claims, and that he has "easily written in excess of 10,000 estimates." (Thomas Mar. 16, 2021 Report, Ex. 3 to Def.'s Sealed Mot. to Exclude Test. of Thomas (hereinafter "Thomas Mar. 16, 2021 Report") [247-3] at 1.) Thomas's resume shows that prior to his self-employment, he was a public adjuster with All American Public Adjuster between 2007 and 2010, a public adjuster with Epic Group Public Adjuster between 2006 and 2007, an estimator with Global Link Systems, Inc. between 2004 and 2005, and an estimator for Mold Specialist, Inc. between 2004 and 2005. (Thomas Resume at 28.)

Whereas Stafford analyzed contents claims, Thomas focused on structure claims. Plaintiffs asked Thomas "to review claims data, sample claim files that were selected by Country, and selected internal documents belonging to Country that discuss Country's claims handling policies, practices and procedures." (Thomas Mar. 16, 2021 Report at 1.) Thomas noted that he reviewed a sample set of 313 CMIC claims that had been selected by one of Defendant's experts, as well as other aggregate claim data produced by CMIC. (*Id.* at 2.) Based on his review, Thomas was asked to determine, among other things, whether CMIC was

> making accurate like[,] kind[,] and quality selections for determining replacement cost; setting a proper scope of repairs in its proposals, determining the actual cash value of the claimants' structure in accordance with its contractual obligation; or engaged in other tactics which are designed to thwart a full recovery of benefits due under a claimant's homeowners, condominium, or renters policy.

(*Id.* at 1.) Thomas was also tasked with determining "the amount of damage being caused by Country's practices from 2008 through 2019." (*Id.*) In his report, Thomas named 15 "common tactics Country uses across all of its claims in order to reduce its estimates and claim payments." (*Id.* at 5; *see id.* at 6-21.) Thomas concluded "that Country underestimates the average structure claim by about 30%" when CMIC's final estimates are compared with bids from contractors, and that CMIC's initial estimates were off the mark by as much as 80% when compared with those bids. (*Id.* at 21.) Thomas then "estimate[d] the damage to claimants resulting from improper structural estimating procedures" during the relevant time period, and concluded the damage was $3,796,574,563. (*Id.* at 22.) The methodology Thomas used to arrive at total damages is unclear.

Thomas stated in his report (without support or explanation) that "approximately 13%" of claims are ultimately paid at "30% below the amount of a properly estimated claim." (*Id.* at 22.) Plaintiffs themselves have not explained this, but it appears that Thomas assumed the remaining 87% of claims are underestimated by 80%: Thomas claims to have used 73.5% as the overall underestimation figure to calculate aggregate damages: (13% * 30%) + (87% * 80%) = 73.5%. (*Id.*) He then multiplied the 73.5% figure against publicly available data about the total amounts CMIC has paid in losses.

DISCUSSION

A proposed class must satisfy the four requirements of Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a); *see Bell v. PNC Bank, N.A.*, 800 F.3d 360, 373 (7th Cir. 2015). The class must also meet the requirements of one of the types of classes listed in Rule 23(b). *See Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012). Plaintiffs seek certification under Rule 23(b)(3), which requires them to show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

A "party seeking class certification must affirmatively demonstrate his compliance with the rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs bear the burden of showing that Rule 23's requirements are met by a preponderance of the evidence. *Messner*, 669 F.3d at 811; *see Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (noting that Rule 23 "does not set forth a mere pleading standard"; the movant must satisfy the

Rule's requirements with "evidentiary proof"); *see also Priddy v. Health Care Serv. Corp.*, 870 F.3d 657, 660 (7th Cir. 2017).

In considering Plaintiffs' motion, this court limits its analysis to the briefs submitted by the parties, as well as the admissible evidence attached as exhibits to those briefs. The court notes that some of the materials submitted in this case as exhibits are in fact not evidence so much as additional briefing that circumvents the page limitations imposed by the court. (*See, e.g.*, Major Material Misrepresentations by CMIC, Ex. 3 to Sealed Reply in Supp. of Mot. to Certify Class [287-3].) "[L]abeling a brief an exhibit does not change the essential nature of the thing." *Slaven v. Great Am. Ins. Co.*, 83 F. Supp. 3d 789, 803 (N.D. Ill. 2015) (citing *Blue Cross Blue Shield of Mass., Inc., v. BCS Ins., Co.*, 671 F.3d 635, 637 (7th Cir. 2011).). The court disregards the arguments in those submissions and notes it has already permitted lengthy oversize briefs in this case.

I. Numerosity

Rule 23(a)(1) requires a proposed class to be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Plaintiffs' proposed class definition is extraordinarily broad, as it essentially includes every CMIC policyholder who made any type of claim arising from any loss event in the last 14 years—which apparently totals more than 400,000 individuals. (Sealed Class Certification Mem. at 5.) Defendant does not challenge Plaintiffs' ability to meet the requirements of Rule 23(a)(1). (Sealed Resp. in Opp'n to Mot. to Certify Class [245] at 1 & n.1.) As discussed below, Plaintiffs fall far short of showing that their proposed class merits certification. But if the class definition were otherwise appropriate, it would satisfy the numerosity requirement.

II. Commonality and Typicality

Rule 23(a)(2) requires that Plaintiffs show there are "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Even "a single common question" is sufficient. *See Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 550 (7th Cir. 2016) (quoting *Wal-Mart*, 564 U.S. at 359).

Plaintiffs must do more than show that class members "have all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350. "Instead they must show that the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members." *McCaster v. Darden Rests., Inc.*, 845 F.3d 794, 800 (7th Cir. 2017) (internal quotation marks omitted). "The critical point is the need for *conduct* common to members of the class." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (internal quotation marks omitted).

Plaintiffs make no effective attempt to show that any particular conduct by CMIC caused all 400,000 proposed class members to suffer the same injury. The only common denominator that the court is able to derive from Plaintiffs' proposed class definition is the alleged underpayment of an insurance claim—stated differently, an alleged breach of contract by CMIC. Without more specifics concerning CMIC's alleged unlawful practices resulting in such breach, Plaintiffs' proposed class definition is a nonstarter.

Perhaps anticipating this problem, Plaintiffs now propose two alternative class definitions. (*See* Sealed Reply in Supp. of Mot. to Certify Class at 24-25.) But those definitions largely suffer from the same flaw. The primary difference between the original and alternative definitions is that the latter exclude from the class any claims where "only personal property was involved and no depreciation was withheld from the contents." (*See* Alternative Class Definition #1, Ex. 16 to Redacted Reply in Supp. of Mot. to Certify Class [288-16]; Alternative Class Definition #2, Ex. 17 to Redacted Reply in Supp. of Mot. to Certify Class [288-17].) That alteration does exclude some insureds who could not have been harmed. But slicing off a sliver of the original group does little to unite the remaining proposed class members. Plaintiffs cannot solve the defect in their original class definition by *excluding* certain conduct by CMIC; rather, Plaintiffs must *include* in their definition some conduct that is common to the class.

At best, then, Plaintiffs seem to be hoping that the court will certify a narrower class based on one or more of the 19 "common" questions listed in their motion. (*See* Sealed Class Certification Mem. at 7-9.) A sampling of those questions includes:

a. whether CMIC systematically and knowingly undervalues material or labor costs in the estimates it prepares, and whether such conduct is unlawful;

b. whether CMIC systematically and knowingly writes estimates for repairs to real property that it knows are missing materials and/or labor that are necessary to complete the repairs, and whether such conduct is unlawful;

c. whether CMIC owes insureds for property that is necessarily damaged in the process of repairing damaged property that was damaged by a covered peril;[4]

d. whether CMIC's practice of mechanically applying one depreciation rate to an entire category of property without regard to the brand, model, or quality of the claimant's property is unlawful;

e. whether CMIC's depreciation tables, formulas, and/or assumptions about insured property that overstate the amount of depreciation are unlawful.

(*Id.* at 7.) In listing these and other questions, Plaintiffs do not cite or discuss any evidence whatsoever. As noted, Rule 23 requires Plaintiffs to do more than simply plead; Plaintiffs bear the burden of showing that they have satisfied the Rule's requirements by a preponderance of the evidence. Without analysis of the evidence, the court is unable to determine that these questions are relevant to the claim of even a single class member, let alone all of them. Plaintiffs' commonality showing is plainly inadequate; if a list of speculative questions were sufficient to achieve class certification, it is hard to imagine any class definition that would fail to meet the requirements of Rule 23(a)(2). *See Wal-Mart*, 564 U.S. at 349 ("[A]ny competently crafted class complaint literally raises common 'questions.'"); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014) ("Nothing is simpler than to make an unsubstantiated allegation.").

Instead, Plaintiffs may be conflating the Rule 23(a)(2) requirement of commonality with the Rule 23(a)(3) requirement of typicality, a matter that is "closely related to the commonality inquiry." *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). Plaintiffs have devoted the bulk of their briefs and made their only record citations to this issue. Thus, the court turns to Plaintiffs'

---

[4] As the court understands this oddly worded question, Plaintiffs are asking whether CMIC is required to compensate insureds for damages they suffered during the process of repairing their damaged property.

arguments about typicality in search of evidence that meets the demands of both 23(a)(2) and 23(a)(3).

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). While the typicality requirement is "liberally construed," *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996), the class representatives' claims must have the "same essential characteristics as the claims of the class at large." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006). For that to happen, the representatives' injuries must "arise[ ] from the same event or practice or course of conduct that gives rise to the claims of other class members," and be "based on the same legal theory." *Id.* Overall, "there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011).

Plaintiffs divide the typicality section of their brief into separate subsections on contents claims and structure claims. Thus, the court considers those subsections in turn to determine whether either subsection merits certifying a class on one of those types of claims.

A. Contents Allegation

Plaintiffs' contents allegation is fairly straightforward: "[b]y assuming 'average condition' on all items," they contend, CMIC "underestimates the ACV of contents by five to seven percent on the typical contents claim." (Sealed Class Certification Mem. at 10-11.) Plaintiffs rely on two exhibits to show that CMIC's underestimation is common to and typical of the class: certain testimony in an expert report authored by Donald Stafford, and a table purporting to show the amount of depreciation "recovered" (i.e., paid out later to those insureds having RC coverage, after depreciation was initially withheld from the ACV payment) for several claims, attached to Plaintiffs' motion as Exhibit S. For reasons explained below, however, the court declines to consider the portions of these exhibits that Plaintiffs cite. Without any evidence to support Plaintiffs' claims, the court is left only with Plaintiffs' speculation that CMIC's use of "average"

condition to calculate depreciation of insureds' contents results in breach of contract. Such speculation does not meet the preponderance of the evidence standard.

1. Expert Testimony of Donald Stafford

Defendant has moved to exclude testimony from Stafford as to two of his opinions: first, that CMIC underpaid policyholders on contents claims by 5-7%; and second, that by applying the 5-7% underpayment assumption, the court can determine aggregate damages to the proposed class between $48,298,799 and $67,618,318. (Def.'s Sealed Mot. to Exclude Test. of Stafford [246] at 1-2.) These two of Stafford's opinions are the only ones cited by Plaintiffs in their motion for class certification. (*See* Sealed Class Certification Mem. at 10-12.)

Federal Rule of Evidence 702 and the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)[5] govern the admissibility of expert evidence. Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The court thus ordinarily evaluates "(1) the proffered expert's *qualifications*; (2) the *reliability* of the expert's methodology; and (3) the *relevance* of the expert's testimony." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 779 (7th Cir. 2017). The court has "great discretion regarding the manner in which it conducts that evaluation." *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 704 (7th Cir. 2009). Since it is dispositive in this case, the court's *Daubert* analysis here extends only to the reliability of Plaintiffs' expert testimony.

[5] Though Rule 702 was substantially revised in 2000, and *Daubert* thus interpreted an earlier version of the rule, *Daubert* "remains the gold standard for evaluating the reliability of expert testimony and is essentially codified in the current version of Rule 702." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013).

The Seventh Circuit, summarizing caselaw and the Rule 702 advisory committee's note to the 2000 amendment, has listed several factors that a court may consider in evaluating an expert's reliability:

> (1) whether the proffered theory can be and has been tested; (2) whether the theory has been subjected to peer review; (3) whether the theory has been evaluated in light of potential rates of error; . . . (4) whether the theory has been accepted in the relevant scientific community[;] . . . (5) whether maintenance standards and controls exist; (6) whether the testimony relates to matters growing naturally and directly out of research they have conducted independent of the litigation, or developed expressly for purposes of testifying; (7) [w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; (8) [w]hether the expert has adequately accounted for obvious alternative explanations; (9) [w]hether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and (10) [w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Gopalratnam, 877 F.3d at 779-80 (internal quotation marks omitted). This list "is neither exhaustive nor mandatory." *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 835 (7th Cir. 2015). The test for reliability is "flexible" because "there are many different kinds of experts, and many different kinds of expertise." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 150 (1999). Thus, "[t]he trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Id.* at 152. "The critical inquiry" for the trial court "is whether there is a connection between the data employed and the opinion offered; it is the opinion connected to existing data only by the *ipse dixit* of the expert that is properly excluded under Rule 702." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (internal quotation marks and citation omitted).

In his first report, Stafford found that by using an "average" instead of "above average" condition on the contents that the Hansens lost, CMIC underpaid the Hansens by $10,894.41, or 11.15%. (Stafford July 14, 2020 Report at 26.) Stafford then made the following statement:

> Though the Hansens' case reflects a differential of 11.15%, it is my opinion that overall claimants would benefit from ACV personal property payments between 5% to 7% higher if Country Mutual Insurance Company were to consider the actual prior loss condition in calculating depreciation in the determination of ACV of personal property rather than defaulting to average physical condition.

(*Id.* at 27.) Again, to the court's knowledge, Stafford did not interview any other class members concerning the condition of the contents they lost, nor did he offer any explanation for his arrival at the 5-7% estimate.

In December 2020, Stafford supplemented his report after "review[ing] additional evidence to ascertain whether this information has any impact on the opinions and conclusions expressed in the [first report]." (Stafford Dec. 20, 2020 Report, Ex. 3 to Def.'s Sealed Mot. to Exclude Test. of Stafford [246-3] at 2.) The additional evidence included "a significant number of documents involving numerous loss claims." (*Id.* at 5.) The "materials reviewed" section of Stafford's report does not explain what each of the files actually contains, but from the names of the documents, it appears that Stafford reviewed documents including inventory lists, photographs, and insurance claims. Stafford found "no reason to alter [his prior] opinion that overall claimants would benefit from ACV personal property payments between 5% to 7% higher" if CMIC had considered the actual pre-loss condition for contents instead of defaulting to "average." (*Id.*) Stafford then used the 5-7% figure to arrive at an aggregate "deleterious impact to claimants over the 12 years" (from 2008 to 2019), which he calculated as "between $43,005,257 and $60,207,359." (*Id.* at 7-8.) In March 2021, Stafford supplemented the report again to add a 13th year—2020—to the aggregate analysis, updating the total impact as between $48,298,799 and $67,618,318. (Stafford Mar. 16, 2021 Report at 11.)

Nowhere in his original or supplemental reports has Stafford explained the methodology used to arrive at a 5-7% estimate of underpayment. Plaintiffs belatedly attempt to fill in the methodological gaps, but the effort is ineffective: Plaintiffs note that changing the assessment of the condition of lost property from "average" to "above average" in Xactimate alters the depreciation taken on contents by 40%. (Pls.' Resp. in Opp'n to Def.'s Mot. to Exclude Test. of Stafford (hereinafter "Pls.' Resp. for Stafford") [269] at 19; *see* Stafford July 14, 2020 Report at

21.) And Stafford testified at his deposition about the share of contents he would expect to be at "above average" in a representative claim:

> Q. Okay. And based on your experience what kind of distribution would you expect in terms of average, new, above average, below average, or replaced?
>
> A. That's a lot of variables to consider at once. I would expect if—and this is strictly my opinion based on experience. I would expect, given an opportunity, that insureds would express that maybe 25 percent of the items are in better than average condition.

(Stafford Dep. Tr., Ex. 5 to Def.'s Sealed Mot. to Exclude Test. of Stafford (hereinafter "Stafford Dep. Tr.") [246-5] at 143:3-12.) Plaintiffs then contend that "[b]asic math shows that if [25%] of the contents on a claim are over depreciated by 40%, then the underpayment should be ten percent." (Pls.' Resp. for Stafford at 19.)

Setting aside the fact that Stafford's 25% figure is itself not based on any verifiable methodology, this post hoc "calculation" makes no progress in explaining how Stafford reached 5-7%; the resulting figure, 10%—like the 11.15% figure derived from the Hansens' self-report—is still not logically connected to 5-7%. Stafford also does not appear to have accounted for other basic math: the possibility that CMIC in some circumstances applied an "average" condition to property that was actually in less than average condition. In his deposition, Stafford effectively discounted the possibility, presumably because he believes insured persons would rarely overstate the amount of depreciation; he estimated that if an insured had reported that 5% of their items were in less than average condition, "that would be high." (Stafford Dep. Tr. at 143:14-15.) But Stafford does not otherwise comment on the relevance or reliability of an insured's statement about the condition of their property. If it is unrealistic to assume that contents are never in better than "average" condition, it is likely as unrealistic to assume that they are never in worse than average condition. Nor does Stafford provide any citation for the 5% figure beyond his sense of things based on his experience.

The closest Stafford comes to explaining how he arrived at the at 5-7% figure appears to be this language in his deposition testimony. Stafford stated:

> In the Hansen's case we showed 11.15 percent. The Hansens reflected upon their items and gave an above-average condition on approximately 30 percent of the items. In viewing those items, there were a few items that were quite expensive that you wouldn't normally see on a loss. If I'm not—off the top of my head I believe there's a hot tub and a pool which normally I would not see on a contents list. So I discounted the Hansens to factor in that, I believed to a degree that it would not translate across the entire book of business.

(Stafford Dep. Tr. at 90:21-91:10.) When asked how he arrived at the specific discounted figure of 5-7%, Stafford never suggested he performed any additional analysis, such as interview other insureds. He simply stated that he "felt . . . it would be prudent to moderate [the 11.15 percent figure] to a degree," and 5-7% was chosen "[b]ased on [his] qualifications in the industry and [his] experience." (*Id.* at 91:23-92:1, 92:7-8.) Stafford added that "anything in the exhibits may have influenced [his] decision," but he acknowledged that none of the exhibits he was referencing directly supported the 5-7% estimate. (*Id.* at 93:1-3, 94:20-95:20 ("It's a point of reference for my opinion.").)

In other words, as best the court understands his work, Stafford picked the 5-7% figure by roughly halving the Hansen claim on the basis of an intuition that their claim was unrepresentative of the proposed class. And then later, based on his general sense of the industry and after looking at additional data, Stafford decided to stick with the 5-7% figure. But "even a 'supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method.'"[6] *Timm v. Goodyear Dunlop Tires N. Am., Ltd.*, 932 F.3d 986, 994 (7th Cir. 2019) (quoting *Smith v. Ford Motor Co.*, 215 F.3d at 718). There is no indication that Stafford used any method at all when he chose, and later reiterated, "5-7%." And "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*,

---

[6] Defendant argues that Stafford does not have sufficient qualifications to offer these conclusions even if the court did permit Stafford's *ipse dixit* testimony. (*See* Def.'s Sealed Mot. to Exclude Test. of Stafford at 8-9.) Because Stafford's testimony is excluded on reliability grounds, the court does not reach the qualifications argument. *Cf. Kirk v. Clark Equipment Co.*, 991 F.3d 865, 873-74 (7th Cir. 2021).

522 U.S. 136, 146 (1997). Merely looking at additional data, observing that CMIC applied an "average" condition for other claimants' contents, and then concluding that the earlier figure that was produced without a method is correct, creates "too great an analytical gap between the data and the opinion proffered." *Id.*; *see United States v. Mamah*, 332 F.3d 475, 478 (7th Cir. 2003) ("It is critical under Rule 702 that there be a link between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support.").

In sum, Stafford would have to show *how* accounting for the Hansens' pool and hot tub (among other contents), without any additional data, supports the specific discounted figure of 5-7%, as opposed to 1-2% (or any other figure) across all members of the proposed class. And he must explain *why* 5-7% remains accurate in light of the additional data presented. Most obvious, in the court's view, Stafford must account for the possibility that CMIC's use of an "average" condition results in both underpayment and overpayment, given that at least some contents are in less than average condition. Without presenting such a method, Stafford has not provided a basis on which the court could admit his testimony that CMIC policyholders were underpaid on contents claims by 5-7%. *See Wendler & Ezra, P.C. v. Am. Int'l Grp., Inc.*, 521 F.3d 790, 791-92 (7th Cir. 2008) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.").

The same is true of Stafford's aggregate damages testimony, which the Plaintiffs also cite in the typicality section of their motion for class certification. (*See* Sealed Class Certification Mem. at 12.) The aggregate damages number is directly derived from Stafford's 5-7% finding, and thus it too is the product of unreliable methodology.[7] *See Smith v. Union Pac. R.R.*, No. 11-cv-986,

[7] To calculate aggregate "deleterious impact," Stafford multiplied the 5-7% figure by a "Non[-]Restorable Contents Estimate" figure that he derived from publicly-accessible National Association of Insurance Commissioners ("NAIC") data. (*See* Stafford Mar. 16, 2021 Report at 9-11.) The court does not address the parties' arguments about the use of NAIC data, as its reliability, standing alone, is not ultimately relevant.

2017 WL 2656583, at *8 (N.D. Ill. June 20, 2017) ("[A]ny subsequent opinion predicated on [an unreliable] opinion, without any independent methodology or analysis, is also unreliable.").

For these reasons, the court sustains Defendant's objections to the cited portions of Stafford's testimony. The court notes, further, that, in any event, Stafford's testimony regarding the average degree of harm suffered by potential class members is not particularly helpful to Plaintiffs. Without having first provided evidence that CMIC's application of an "average" condition assumption results in underpayments for all class members, Stafford's calculations of the average amount of damages an eventual successful class member could expect are imprecise and premature. Stafford's 5-7% estimate for each class member is not only insufficient to meet the requirements of commonality and typicality under Rule 23; it is also not directly relevant at this stage. "It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner*, 669 F.3d at 815 (citing *Wal-Mart*, 564 U.S. at 362); *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) ("[T]he action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."). The significant question is whether Plaintiff can establish common questions that would support class certification at all. Stafford's inadequately supported conclusions about class members' purported losses do not meet that test and do not advance Plaintiffs' argument for class certification.

2. Exhibit S: Table Showing Percentage of Withheld Depreciation

Plaintiffs cite a table attached to their memorandum, Exhibit S, as support for their statement that "about eighty percent of the contents claims in the sample set recovered none of the depreciation" that was withheld on the initial ACV payment. (Sealed Class Certification Mem. at 11.) As best the court understands this assertion, it was made to counter the potential argument that for insureds with RC coverage, the amount of depreciation withheld on ACV payments makes little difference in the end, given that RC coverage allows insureds to claim the difference between

ACV and RC for items replaced within one year. Plaintiffs argue, without evidentiary support, that "on contents claims, CMIC will almost always reap a windfall because the claimant typically has to replace dozens if not hundreds of items in order to avoid being harmed by CMIC's improper assumptions regarding the pre-loss condition of a claimant's contents" and "[t]he likelihood of an insured replacing all of their contents is very low." (*Id.*)

The number of items of personal property that an insured replaces is relevant to class certification only if CMIC initially withheld too much depreciation when it made ACV payments. (Plaintiffs do not argue—nor could they, given the clear language of the insurance policy—that CMIC acts unlawfully by declining to pay the RC amount to an insured who fails to replace a covered item within the one-year window.) Hence, the rate at which an insured replaces contents within the one-year window is not, on its own, relevant. And as discussed above, Plaintiffs' only evidence that CMIC underpays the ACV on contents claims is Stafford's unsupported speculation about the average amount of damages that class members suffer as a result of assuming contents are in "average" condition. Plaintiffs have not established that ACV payments are too low, and Exhibit S is not ultimately relevant to this dispute.

Moreover, Plaintiff has not offered foundation necessary for admission of Exhibit S. Federal Rule of Evidence 901 requires that "the proponent . . . produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901. The table in Exhibit S appears to have been created either by or at the direction of Plaintiffs' counsel. (*See* Withheld Depreciation Table, Ex. 12 to Sealed Class Certification Mem. [221-12].) The exhibit does not include the data set relied upon to generate the figures in each cell of the table. (CMIC has also not enlightened the court on this score, but has no burden to do so.) Thus, there is no basis upon which to credit Plaintiffs' assertion that the table shows the percent of depreciation recovered (or not recovered) by CMIC's insureds.[8]In sum, after excluding the only evidence

[8] Plaintiffs alternatively argue that Exhibit S is admissible under Federal Rule of Evidence 1006, which permits "a summary, chart, or calculation to prove the content of

offered by Plaintiffs that might be relevant to classwide allegations of breach of contract for insurance claims involving contents, the court concludes Plaintiffs have offered nothing but their own speculation that the losses they claim to have suffered were also suffered by other insureds. Thus, the court denies Plaintiffs' motion to certify a class with respect to any contents allegations, and now turns to those allegations concerning structure claims.

B. Structure Allegations

Plaintiffs do not include any evidentiary citation for the vast majority of the allegations in their structure claims section. The court will not, on its own, sift through the record in search of support. *See Gross v. Town of Cicero*, 619 F.3d 697, 702 (7th Cir. 2010) ("Judges are not like pigs, hunting for truffles."). Instead, Plaintiffs discuss allegations related to a single insurance claim (often without citing or identifying the claim, or even saying whether it was a claim that the Hansens themselves filed). In doing so, Plaintiffs offer no evidence that the conduct alleged in connection with that single claim occurred classwide. (*See* Sealed Class Certification Mem. at 14 ("The only claim."); *id.* at 15 ("[D]emonstrated by one claim."); *id.* ("[O]nly one claim.").) Allegations specific to a single insurance claim—without evidence showing that the claim is representative of other claims—are grossly insufficient to support class treatment.

Plaintiffs also cite certain CMIC materials that describe CMIC's claims practices. For example, Plaintiffs state that "[w]hen it comes to underscoping roof claims, CMIC's management instructed adjusters that they are not to order Eagleview reports [a type of aerial inspection] to resolve the dispute." (*Id.* at 12 n.42 (citing CMIC Property Calibration Training, Ex. 7 to Sealed Class Certification Mem. (hereinafter "Property Calibration Training") [221-7] at 36).) The page

---

voluminous writings, recordings, or photographs that cannot be conveniently examined in court." (Fed. R. Evid. 1006; *see* Pls.' Resp. to Def.'s Obj. to Certain Evid. [273] at 6.) But Plaintiffs do not explain why calling this spreadsheet a "summary" for purposes of Rule 1006 obviates the need to state where the source data comes from. *See United States v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013) (citing *United States v. Milkiewicz*, 470 F.3d 390, 396 (1st Cir. 2006) ("The proponent must show that the voluminous source materials are what the proponent claims them to be and that the summary accurately summarizes the source materials.")). Whether labeled a "summary chart" or otherwise, Exhibit S is not admissible evidence.

of the training materials cited by Plaintiffs states that "Eagle View" involves "[u]sing satellites to assess damage," and is "[u]sed rarely," such as "[w]hen there is limited access" or "[c]omplex roofs," and it is "[n]ot used to confirm a contractor's estimate." (Property Calibration Training at 36.) According to Plaintiffs, CMIC does not "budge from its estimate[s]" despite "not having, and not obtaining evidence to refute the contractor's assertion." (Sealed Class Certification Mem. at 12. n.42.) This assertion fails for two reasons: (1) the evidence does not support Plaintiffs' statement, and (2) even if it did, it does not show that CMIC has a common practice of underpaying roof claims. The training materials simply state that CMIC does not order an Eagle View report to confirm a contractor's estimate; it does not say that CMIC obtains no evidence to confirm a contractor's estimate.[9] The materials do not specify what (if any) evidence CMIC does obtain, or why the failure to use Eagle View is suspect at all. Perhaps, for example, CMIC does not use Eagle View to confirm a contractor's estimate because CMIC relies instead on reports and pictures taken from workers who were physically present on the roof. Nor is CMIC's claimed refusal to budge from its estimates by itself evidence of breach; for CMIC's alleged intransigence to cause a breach, Plaintiffs must first establish that CMIC's initial estimates were too low. Simply put, Plaintiffs' citations to exhibits discussing CMIC's claims practices are not sufficient, on their own, for Plaintiffs to show commonality and typicality under Rule 23.

Finally, Plaintiffs cite their structure claims expert, Russell Thomas, for their assertion "that on average, CMIC underpaid claims by thirty percent if measured from CMIC's final estimates in

[9] This is just one of several instances in which Plaintiffs misrepresent the evidence. As another example, Plaintiffs state that "CMIC knew that its estimates did not 'reflect the proper Actual Cash Value and replacement cost,' and its refusal to pay more than those estimates is the very definition of bad faith." (Sealed Class Certification Mem. at 16 n.50 (quoting Dec. 16, 2009 Supervisors Meeting Agenda, Ex. 8 to Sealed Class Certification Mem. (hereinafter "Dec. 16, 2009 Supervisors Meeting Agenda") [221-8] at 8.).) The agenda Plaintiffs cite includes the following text: "We should also see our own estimate in the file and not that of a contractor, as our estimates will reflect the proper Actual Cash Value and replacement cost." (Dec. 16, 2009 Supervisors Meeting Agenda at 8.) It is Plaintiffs' insertion of the word "not" before the phrase "reflect the proper Actual Cash Value"—thereby flipping CMIC's statement on its head—that appears to be made in bad faith.

the few cases where CMIC revised its estimate, or eighty percent from CMIC's initial estimate." (Sealed Class Certification Mem. at 17.) Just as it did for Stafford's opinions, CMIC has moved to exclude this testimony. And as was true for Stafford's opinions, the court finds that this testimony is inadmissible for lack of a reliable methodology. But in any event—as was also true for Stafford's opinions—this testimony is largely aimed at calculating damages while glossing over the more important inquiry at this stage: whether (and how) common conduct by CMIC results in breach of the insurance contracts.

1. Expert Testimony of Russell Thomas

As noted, Thomas estimates that CMIC's initial valuation of structure claims is 80% below where it should be under the terms of the contract, but that CMIC then reduced the undervaluation to 30% in its "final estimates" (presumably after the insured pushed back). Thomas wrote that he reached his conclusion that CMIC underpaid claims by 30% to 80% "based on all the information made available to [him] as of th[at] time, and as supported by [his] report and exhibits." (Thomas Mar. 16, 2021 Report at 21.) In a footnote to that sentence, Thomas wrote:

> Due in part to the small number of bids in Country's sample set, I re-wrote a substantial number of Country's estimates in order to get a sense of how accurate Country's estimates are. I wrote my estimates before reviewing the contractor's bid(s) on those claims. The average of my estimates were 74% higher than Country's average initial estimate and 25% higher than Country's final estimate.

(*Id.* at 21 n.11.) Thomas also stated that "[l]ooking at roof claims where the insured managed to obtain a bid from a contractor, Country's estimate was often 33-50% of the cost [that] the roofing contractor ultimately agreed to perform the work for." (*Id.* at 21.) Thomas continued:

> More generally, looking at all of the claims where Country agreed to adjust its estimate, but where there is no evidence of contractor involvement in the claim file, the average change between the initial and final estimates was around 243%. Further, where claimants succeeded in getting a bid from a contractor, the contractor's bid ranged anywhere from being about equal to Country's final estimate to 352% percent above Country's final estimate. In almost every case where the contractor's bid matched Country's estimate, it was usually as a result of the contractor having already written a scope or the insured having already secured a quote for a replacement item. Similar results were found when comparing Country's estimates to estimates I wrote based on what I could observe in the estimate and the photos to the extent they existed. Further, when the

> Hansens obtained bids from contractors, the lowest proposals they could obtain from subcontractors were 117%-278% of Country's estimate.

(*Id.* at 21-22.)

Thomas shows more work than did Stafford; Thomas's own rewritten estimates, in particular—25% and 74%—are fairly close to his 30%/80% conclusion. But it is still not clear how any of this data produced Thomas's specific conclusion. As one example, for the claims that included a contractor bid, Thomas states that the bid could range from equal to CMIC's final estimate to 352% above CMIC's final estimate. That range is substantial; bids equal to CMIC estimates rebut Thomas's conclusions of underpayment by CMIC. Where bids are 352% above CMIC's estimates, Thomas's 30% underestimation figure (for final estimates) is much too low. Thomas does not say how many bids were equal to CMIC's final estimates and how many were hundreds of percentage points higher.

Plaintiffs, in defense of Thomas's 30%/80% figures, state that "[w]hile [the figures are] not the result of calculation, Thomas's 30%/80% [figures are] not a number out of thin air but one that is reasonably close to the averages found in comparing sample set estimates to bids/invoices in the sample set." (Pls.' Resp. in Opp'n to Def.'s Mot. to Exclude Test. of Thomas [271] at 20.) In a footnote following that sentence, Plaintiffs state:

> CMIC's attack on both Stafford and Thomas is odd given that both have offered conservative opinions regarding damages. The percentage both witnesses opine CMIC has underpaid claimants is lower than what the math would suggest. Thomas's 30%/80% opinion is close to the average difference between CMIC's estimates and all contractor bids and invoices in the sample set. If Thomas had offered an opinion based solely on the difference between CMIC's estimates and the small number of bids in the sample set, the deficiency is substantially larger than 30%/80%.

(*Id.* at 20 n.17.)

Plaintiffs' own argument highlights the unreliability of Thomas's opinion. First, Plaintiffs admit that the 30%/80% figures are not the result of calculation; as discussed above in relation to Stafford's testimony, merely stating a conclusion based on a general sense is insufficient under *Daubert* and Rule 702. Second, Plaintiffs' contention that the figures are "reasonably close" or

"close" is insufficient, as it is unclear whether the figures are close enough to be reliable. And finally, Plaintiffs' argument that Thomas is offering a "conservative" opinion essentially acknowledges that Thomas was unable to calculate a figure using any objective methodology, and so he picked a number that seemed safe. Without evaluating any such methodology, though, it is impossible for the court to determine whether Thomas's conclusions actually are conservative.

Thomas's deposition testimony confirms that his opinions do not rest on an objective methodology. When asked by counsel to explain how he arrived at 30%, Thomas acknowledged that it was not based on any calculation, but rather was his "general sense." (Thomas May 7, 2021 Dep. Tr., Ex. 6 to Def.'s Sealed Mot. to Exclude Test. of Thomas [247-6] at 132:11-135:21.) And when counsel asked Thomas whether the figure was based on "what [his] gut tells [him] is something that [he] can support," Thomas responded, "Yes." (*Id.* at 135:12-16.)

Plaintiffs effectively ask the court to conclude that even if Thomas's conclusions are based on *ipse dixit*, his testimony remains admissible. Plaintiffs cite *Smith v. NVR, Inc.*, 17 C 8328, 2021 WL 1517931, at *5 (N.D. Ill. April 16, 2021), in which the court stated that "the damages question . . . can go to a jury even when there is nothing more in evidence than an *ipse dixit* estimate from an expert in the field." But the expert in that case was estimating the cost of repairs for various parts of a single home—a relatively uncomplicated practice for a contractor with "four decades' worth of relevant experience." *Smith v. NVR, Inc.*, 2021 WL 1517931, at *4-5. In contrast, Thomas is offering testimony on the average amount a home insurer underestimates (and, by extension, allegedly underpays) claims for hundreds of thousands of homeowners—testimony that appears to rest on nothing more than the expert's past experience, an inadequate foundation particularly where there is or should be data that would support more certain calculations.

Kirk v. Clark Equipment Co., 991 F.3d 865, 871-72 (7th Cir. 2021), which Plaintiffs cite, provides little support for admission of Thomas's opinions. In *Kirk*, the plaintiffs sued the

manufacturer of a skid-steer loader after it tipped over and injured Tyler Kirk. *Kirk*, 991 F.3d at 869-70. The district court granted the defendant's motion to exclude certain expert testimony on design defect and causation as unreliable in "the absence of data from similar accidents, generally accepted industry standards, and peer review to support [the expert's] conclusion." *Id.* at 874. On appeal, the Seventh Circuit "acknowledged that an expert may sometimes draw a conclusion based on only their extensive and specialized experience." *Id.* at 876 (internal quotation marks omitted). The court nevertheless concluded that the district court "did not abuse its discretion" in excluding the expert. *Id.* at 874-78. To the extent *Kirk* suggests this court may be *permitted* to admit Thomas's 30%/80% testimony, the *Kirk* opinion by no means compels this court to do so.

In sum, because Thomas does not utilize a reliable methodology, the court grants Defendant's motion to exclude Thomas's testimony regarding the 30%/80% figures. Unlike with respect to Stafford's excluded testimony, however, granting Defendant's motion here does not completely resolve the matter. In a footnote in their motion for class certification, Plaintiffs cite a section of Thomas's report—which Defendant does not move to exclude—for their contention that "[o]n virtually every claim[,] CMIC estimates [roof] removal surcharges using the general demolition labor rate as opposed to the roofer labor rate[,] which is on average 200% higher." (Sealed Class Certification Mem. at 12 n.43 (citing Thomas Mar. 16, 2021 Report at 6-7).) Indeed, Thomas states in his report that "based on the Xactimate data Country produced, 89% of Country's roof claims" used the "Demolition Trade instead of a Roofer Trade" in calculating estimates, and "[t]he labor cost for a roofer is typically 200-220 percent greater than a general laborer engaged in demolition who does not go on a roof." (Thomas Mar. 16, 2021 Report at 6-7.) Those two paragraphs discussing roofing labor rates hint at common questions for purpose of class certification; but the court is unwilling to consider certifying a narrow class of insureds who experienced that conduct based on an undeveloped assertion tucked into a footnote. Notably, Plaintiffs have not shown that the Hansens themselves received an estimate for roof

removal using the general demolition rate; if they did not, then this potential class would be without any named representative.

In the end, Plaintiffs fail to show that any common questions apply to a class of CMIC insureds. They also fail to show that the Hansens' claim is typical of class claims. Having failed to meet two of the prerequisites in Rule 23(a), *see* FED. R. CIV. P. 23(a)(2), (a)(3), the court denies Plaintiffs' motion for class certification.[10]

III. Rule 23(b)(3) Requirements

Since Plaintiffs fail to meet (at least) two of the prerequisites under Rule 23(a), the court need not discuss the requirements of Rule 23(b)(3). Still, because both parties spill a great deal of ink on this topic, the court offers a brief analysis. Rule 23(b) requires the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The predominance requirement is "far more demanding" than the commonality requirement, and tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). As Plaintiffs have not established any common questions, there is no possibility that common questions predominate.

That said, the court does not agree with Defendant that individual damages issues would preclude class certification here, even had Plaintiffs raised common questions. (*See* Sealed Resp. in Opp'n to Mot. to Certify Class at 26.) Defendant specifically argues that Plaintiffs are proposing a "Trial by Formula," which the Supreme Court held impermissible in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). (Sealed Resp. in Opp'n to Mot. to Certify Class at 27.) Defendant also argues that the "[P]laintiffs' damages model" is prohibited by *Comcast Corp. v.*

---

[10] For this reason, the court does not reach the parties' arguments about the fourth prerequisite under Rule 23, which requires that Plaintiffs show "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4).

Behrend, 569 U.S. 27 (2013). (Sealed Resp. in Opp'n to Mot. to Certify Class at 27-28.) These concerns may well have merit, but would not by themselves require denial of class certification.

In *Wal-Mart*, the Supreme Court reversed the certification of a class of about 1.5 million Wal-Mart employees who had alleged that the company discriminated against them, on the basis of their sex, by denying them equal pay or promotions in violation of Title VII of the Civil Rights Act of 1964. *Wal-Mart*, 564 U.S. at 343. While Defendant cites *Wal-Mart* in a section of its brief on Rule 23(b)(3) predominance, the Court in *Wal-Mart* was ruling on the requirements of Rule 23(a)(2) (commonality); the Court expressly noted that it was not considering the requirements of Rule 23(b). *Id.* at 346 n.2, 349; *see id.* at 368 (Ginsburg, J., concurring in part and dissenting in part). Nor did the *Wal-Mart* Court hold that individualized damages calculations preclude class certification. The "Trial by Formula" disallowed by the Court involved statistical evidence that the plaintiffs sought to use in place of identifying a "specific employment practice" that caused the alleged discrimination. *Id.* at 357 (majority opinion). In other words, the Court held that to meet the requirements of Rule 23(a)(2), plaintiffs must provide evidence of common questions about *liability* (not damages) beyond generalized statistics. *See Tyson Foods*, 577 U.S. at 458 ("The underlying question in *Wal-Mart* . . . was whether the sample at issue could have been used to establish liability in an individual action."). Even for matters of liability under Rule 23(a)(2), not all representative or statistical evidence is barred. *Id.* at 460 ("Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.").

The *Comcast* Court also did not hold that questions of individual damages necessarily preclude class certification. In that case, reversing certification of a class of some two million Comcast subscribers who alleged violations of federal antitrust laws, the Court noted that Rule 23(b)(3) requires that class damages be susceptible to calculation "through use of a common *methodology*." *Comcast*, 569 U.S. at 30 (emphasis added) (internal quotation marks omitted). That is, a damages model must "measure damages resulting from the particular . . . injury on

which [plaintiffs'] liability in th[e] action is premised." *Id.* at 36. But so long as the damages model is consistent with the theory of liability, there is no requirement that the model calculate equal amounts of damages for each member of a class. As noted above, the Supreme Court more recently reaffirmed as much: "[T]he [class] action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453.

None of this is to say that Plaintiffs have met the requirements of commonality or predominance under *Wal-Mart* or *Comcast*—they have not. But the fact that potential class members may have suffered varying levels of harm, and therefore would be entitled to varying levels of damages, does not provide a basis on which the court would deny Plaintiffs' motion for class certification.

CONCLUSION

Plaintiffs' motion for class certification [217] is denied without prejudice. Plaintiffs have leave to submit an amended motion for class certification, if they can do so consistently with Rule 11, no later than September 15, 2022. The court cautions that any such motion must identify a specific practice or policy that is alleged to have harmed the Hansens and other members of an appropriately drawn class in a similar way. Defendant's motions to exclude certain of the opinions offered by Plaintiffs' experts [246, 247, 251, 252] are granted. The remaining evidentiary motions [248, 261, 262] are denied as moot. Plaintiffs' motions for leave to file [301, 305] are denied. The parties are urged to discuss a possible settlement of their dispute.

ENTER:

Dated: August 8, 2022

REBECCA R. PALLMEYER
United States District Judge