

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

THE EICHHOLZ LAW FIRM, P.C., on
behalf of itself and all others similarly
situated,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

Case No. 1:24-cv-03403-TRJ

**DEFENDANT STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY’S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

I. INTRODUCTION

Plaintiff’s Second Amended Complaint does not cure the fatal deficiencies in its pleadings. Despite being given another chance to sufficiently allege that State Farm waived its one-year contractual limitations period, Plaintiff has failed to do so. Instead, Plaintiff falls back on the same tired refrain—that State Farm is still negotiating the payment of Plaintiff’s property damage claim. But that is simply not the case. Plaintiff erroneously conflates (i) Plaintiff’s property damage *insurance claim* with (ii) Plaintiff’s instant *post-suit claim*. Those are two very different things. Plaintiff cannot bootstrap confidential settlement negotiations among lawyers for the resolution of Plaintiff’s *post-suit claim* in this lawsuit—

communications that necessarily began *after* the time-barred lawsuit was filed—to argue the lawsuit is not time-barred. The Court should see right through Plaintiff’s attempted ruse. Plaintiff does not allege that, at any point before Plaintiff first filed this lawsuit, State Farm engaged in any negotiations of the **insurance claim** or did anything else to lull Plaintiff into thinking it did not need to file this lawsuit. Even on its third attempt, Plaintiff still fails to pen a complaint that contains sufficient facts to support Plaintiff’s claim that State Farm waived its one-year contractual limitations period.

Since Plaintiff does not sufficiently allege waiver, the issue before the Court remains a straightforward one—whether Plaintiff’s claim against State Farm is barred by the one-year limitations period in Plaintiff’s insurance policy. Georgia law resoundingly honors contractual limitations periods in insurance policies, and there is no dispute that Plaintiff filed this case more than a year after it suffered the loss. Put simply, Plaintiff blew past the one-year limitations period by almost **three years**, and the lawsuit is therefore time-barred. That the attorneys of record for the Parties to the lawsuit are in ongoing settlement communications for the potential resolution of this litigation does not change this, and Plaintiff’s revisionist history shell game of trying to pass off confidential litigation settlement negotiations for insurance claim handling done in the ordinary course of business should be called out for what it is: improper gamesmanship to side-step the plain application of an

unambiguous contractual provision.¹

As such, the Court should therefore dismiss the Second Amended Complaint.

II. BACKGROUND

A. Plaintiff Files Suit Against State Farm Nearly Four Years After the Date of Loss.

On August 1, 2020, The Eichholz Law Firm, P.C.'s ("Plaintiff"), vehicle was damaged. Second Amended Complaint ("SAC") ¶ 17. Plaintiff was insured with Defendant State Farm Mutual Automobile Insurance Company ("State Farm") at the time. *Id.* ¶ 16. Plaintiff failed to attach the Policy to the Second Amended Complaint, but State Farm has attached Plaintiff's certified Policy here as Exhibit A ("Policy").² After its vehicle was damaged, Plaintiff submitted a first-party claim for property damage coverage, under its Policy, and State Farm paid for repairs.

¹ It should be noted that, when Plaintiff first filed their opposition to State Farm's now mooted motion to dismiss, counsel for State Farm informed Plaintiff's counsel that their opposition brief improperly referenced the Parties' confidential settlement communications. *See, e.g.*, ECF No. 23 at 6. Counsel for State Farm asked that Plaintiff file an amended opposition brief without any language that remotely referenced the Parties' confidential settlement communications. Not only did State Farm's request go ignored, but Plaintiff also elected to amend their Complaint to explicitly refer to these settlement communications. SAC ¶ 24.

² State Farm has attached as Exhibit A to this Motion a copy of the operative automobile insurance Policy governing Plaintiff's claims. The Court may consider the Policy without converting the present motion into one for summary judgment because the Policy is central to the asserted claims. *See Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 n.3 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity.").

SAC ¶¶ 17–18.

Plaintiff’s Policy contains a “Legal Action Against Us” section, which provides that “Legal action may not be brought against *us* until there has been full compliance with all provisions of this policy. In addition, legal action may only be brought against *us* regarding: . . . c. Physical Damage Coverages if the legal action relating to these coverages is brought against *us* ***within one year immediately following the date of the accident or loss.***” Ex. A at State Farm Car Policy Booklet at 37 (emphasis added).

Nevertheless, nearly four years after the date of loss, Plaintiff filed this lawsuit on July 31, 2024. ECF No. 1. Subject to the Court’s August 7, 2024 order, Plaintiff filed the Amended Complaint on August 22, 2024. *See gen.* ECF No. 10.³ State Farm moved to dismiss Plaintiff’s First Amended Complaint on October 24, 2024. ECF No. 18. State Farm’s motion was fully briefed on January 14, 2025. ECF Nos. 23, 26.

B. Plaintiff’s Second Amended Complaint.⁴

Following a *sua sponte* review, the Court denied State Farm’s Motion to

³ *See also* ECF No. 32 at 2 n.1 (“This Court previously instructed Eichholz to file an amended complaint that adequately pleaded the specific facts necessary to establish subject matter jurisdiction.”).

⁴ State Farm considers these allegations as true only for the purposes of this Motion to Dismiss. *Hardy v. Regions Mortg., Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006).

Dismiss Plaintiff's First Amended Complaint as moot and ordered Plaintiff to file a Second Amended Complaint that sufficiently alleged subject matter jurisdiction. ECF No. 32 ("Order") at 1, 5–6. The Court concluded Plaintiff's First Amended Complaint failed to sufficiently allege facts that satisfied the required amount in controversy of \$5,000,000 under the Class Action Fairness Act. *Id.* at 4. Additionally, the Court ordered Plaintiff to remove its claim for declaratory relief and attorneys' fees, since those claims were withdrawn in Plaintiff's response to State Farm's Motion to Dismiss the First Amended Complaint. *Id.* at 6; *see also* ECF No. 23 at 7. The Court also stated that Plaintiff's "Second Amended Complaint should contain facts sufficient to support [Plaintiff's] claim that State Farm waived the contractual one-year filing requirement." ECF No. 32 at 6.

Subject to the Court's Order, Plaintiff filed the Second Amended Complaint on May 16, 2025. ECF No. 33 ("SAC"). As in its prior Complaints, Plaintiff alleges State Farm breached the Policy by not offering to pay or paying the diminished value of the damaged vehicle. SAC ¶¶ 35–42.⁵ Plaintiff purports to bring this case as a class action on behalf of Georgia insureds who were issued a policy by State Farm

⁵ Even though Plaintiff alleges State Farm failed to pay diminished value in Georgia (SAC ¶¶ 35–42), in an order denying class certification that was later affirmed by the Eleventh Circuit, Judge Land recognized that State Farm was already regularly paying Georgia insureds diminished value on their vehicles using the court-approved *Mabry* 17(c) formula and made detailed observations about State Farm's process. *Baker*, 2021 WL 4006124, at *2.

and made a claim for property damage under that policy where State Farm determined that the vehicle was not a total loss and paid to have the vehicle repaired but did not offer to pay money for diminution in value. SAC ¶ 30. Despite the unambiguous language in its Policy, Plaintiff purports to represent a putative class that dates back *twenty-three* years, which is when *State Farm Mutual Automobile Insurance Company v. Mabry*, 556 S.E.2d 114 (Ga. 2001) was decided. SAC ¶¶ 5–7, 28, 30, 33, 39.

Consistent with the Court’s Order, in the Second Amended Complaint, Plaintiff removed its claim for declaratory relief and attorneys’ fees. *See gen.* SAC; ECF No. 32 at 6. Plaintiff also added allegations about the damages amounts being sought in an attempt to establish subject matter jurisdiction. SAC ¶¶ 11, 27, 33, 39. Specifically, Plaintiff amended the pleadings to reference an Eleventh Circuit case mentioning in dicta that surveys show typical diminished value vehicle claims range from \$2,500 to \$8,000, and that using those calculations, only between 625 and 2,000 claims are required to satisfy CAFA. *Id.*⁶

⁶ While State Farm does not opine on the validity of the statistics cited in dicta which speak for themselves, for purpose of establishing subject matter jurisdiction in the Court in which Plaintiff brought this case, only Plaintiff’s allegations and the relief sought by Plaintiff are to be considered in determining the value of the claims as pled and the amount in controversy. *See e.g., Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 913 (11th Cir. 2014). Under the theory and allegations articulated in the Second Amended Complaint and the terms of Plaintiff’s Policy, Plaintiff’s alleged breach of contract damages are the sum of the diminished value amounts State Farm owed to

Otherwise, in response to the Court’s Order, Plaintiff only added three substantive allegations in an attempt to support its claim that State Farm waived the one-year contractual limitations period. SAC ¶¶ 22–24:

- “Defendant never denied coverage of Plaintiff’s claim.”
- “Defendant never indicated to Plaintiff in anyway that a limitation period was approaching and/or ran until after this action was filed.”
- “Defendant offered Plaintiff a partial payment of the damages resulting from its property damage claim. At the time of this filing, Plaintiff and Defendant are still negotiating the payment of his property damage claim.”

III. ARGUMENT

Plaintiff’s bare-bones additional three allegations do nothing to demonstrate that State Farm has waived the plain application of its contractual limitations provision. Plaintiff first filed its Complaint nearly three years after the one-year limitations period in the Policy expired—that is, nearly four years to the day after the date of loss. Courts in this District routinely enforce nearly identical limitations

Georgia insureds on first-party claims for property damage to covered vehicles during the contractual one-year limitations period. SAC ¶¶ 36, 39. While State Farm affirms that, as a matter of course, it has paid the diminished value of damaged vehicles in Georgia during the relevant time period, it denies liability and otherwise maintains that Plaintiff’s claim is time-barred; since July 31, 2023 (a year before Plaintiff first filed a Complaint in this case), there were at least 33,269 first-party claims for property damage to covered vehicles in Georgia, with an average diminished value payment of \$603.42. *See* Exhibit B (VanDerwerken Decl.) ¶¶ 6–7. As such, Plaintiff has put \$20,075,180 in controversy per the allegations of its Second Amended Complaint, which exceeds the minimum amount required under CAFA. SAC ¶¶ 36, 39; *see also* ECF No. 32.

periods in insurance contracts, especially where, like here, the plaintiff fails to sufficiently allege waiver. Indeed, even after the Court gave Plaintiff an opportunity to amend its pleadings for the specific purpose of sufficiently pleading that State Farm waived the one-year contractual limitations period, Plaintiff cannot move the needle. Plaintiff's attempt to conflate negotiations of an underlying insurance claim with the Parties' ongoing confidential settlement communications through their lawyers for the potential resolution of this litigation is disingenuous and does not save Plaintiff's breach of contract claim. As other Courts in this District have done under these circumstances, at this procedural posture, the Court should dismiss Plaintiff's Second Amended Complaint.

A. Legal Standard.

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint will be dismissed if it does not contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It is not enough to allege facts that create only a "sheer possibility that a defendant has acted unlawfully." *Id.* "[W]hen failure to comply with the statute of limitations is plain on the face of the complaint," dismissal is

appropriate. *Foster v. Savannah Commc 'n.*, 140 F. App'x 905, 907 (11th Cir. 2005); *see also Fetterhoff v. Liberty Life Assurance Co.*, 282 F. App'x 740, 744 (11th Cir. 2008) (affirming district court's dismissal of complaint in part because the suit was filed after the contractual limitations period expired).

B. Plaintiff's Claims Are Time-Barred Because Plaintiff Filed This Action After the One-Year Limitations Period in the Policy.

The Policy provides for a one-year period from the date of loss for Plaintiff to file suit: "legal action may only be brought against *us* regarding: . . . c. Physical Damages Coverages if the legal action relating to these coverages is brought against *us* within one year immediately following the date of the accident or *loss*." Ex. A at State Farm Car Policy Booklet at 37. Here, Plaintiff's date of loss was August 1, 2020. SAC ¶ 17. Yet Plaintiff first filed its Complaint just one day shy of four years after its date of loss. ECF No. 1. Plaintiff's claims fail immediately for this reason.

It is indisputable that Georgia courts routinely enforce nearly identical limitations periods in insurance contracts. *See, e.g., Thornton v. Ga. Farm Bureau Mut. Ins. Co.*, 695 S.E.2d 642, 643–44, 649 (Ga. 2010) (enforcing the "clear and unambiguous" one-year limitation provision in plaintiff's insurance policy and reasoning that, although "the statute of limitation for contract claims is six years, *see* OCGA § 9-3-24, [] the courts have nevertheless enforced much shorter contractual periods of limitation, including the one-year limitation in insurance policies like the one in this case" and citing cases); *White v. State Farm Fire & Cas. Co.*, 728 S.E.2d

685, 687–88 (Ga. 2012) (enforcing one-year limitation provision and finding that plaintiff’s claim was “barred because he failed to initiate that claim within the policy’s one-year statute of limitations provision.”); *Rountree v. Encompass Home & Auto Ins. Co.*, 501 F. Supp. 3d 1351, 1356 (S.D. Ga. 2020) (“Georgia courts enforce contractual limitations periods in insurance policies.”).

To illustrate, in *Tucker v. State Farm Mutual Automobile Insurance Co.*, Judge Story considered the same exact State Farm policy provision and concluded that the plaintiff’s claims were barred by the contractual one-year limitation period in his policy. 109 F. Supp. 3d 1350, 1352–53 (N.D. Ga. 2015). The court reasoned, “[i]nsurance is a matter of contract and the parties are bound by the terms of the policy. It is also the general rule that the insured is chargeable with knowledge of all the conditions imposed upon him by the terms of his policy.” *Id.* (citation omitted). In that case, the court did not find State Farm waived the limitation period because “insurers may investigate a claim without waiving any provisions of the policy . . . so it does not matter that State Farm continued to investigate the claim more than one year after the loss.” *Id.* at 1353. Judge Story even relied on Georgia Court of Appeals cases finding there was no waiver of contractual limitations policy provisions because “merely negotiating for a possible settlement of a disputed claim [] is not conduct designed to lull the claimant into a false sense of security and does not preclude the assertion of the contractual one-year provision by the insurer.” *Id.*

(quoting *Cambridge Mut. Fire Ins. Co. v. Okonkwo*, 460 S.E.2d 302, 304 (Ga. Ct. App. 1995)).

Judge Story’s reasoning here is persuasive because he found that, even where there were continued negotiations **prior to the plaintiff filing his lawsuit**, the insurer did not necessarily waive the contractual limitations period. The rationale is even stronger here, where no such insurance claim negotiations prior to the lawsuit being filed were even alleged. The court ultimately dismissed all claims because plaintiff’s lawsuit was time-barred. *Tucker*, 109 F. Supp. 3d at 1353. The same result is required here, as Plaintiff failed to file this case within the time permitted under the Policy. SAC ¶ 16; ECF No. 1.

Further, in *Piper v. USAA Casualty Insurance Company*, like here, the plaintiff’s insurance policy had an unambiguous provision that contained a one-year limitations provision, and Judge Totenberg reasoned that compliance with the provision was “a condition precedent for entitlement to recovery.” No. 1:20-cv-3516-AT, 2022 WL 1691182, *4–5 (N.D. Ga. Feb. 1, 2022); Ex. A at State Farm Car Policy Booklet at 37. The Northern District concluded that, by filing suit about a month after the one-year limitations period, plaintiff “failed to comply with a condition precedent for recovery under the terms of the policy, and her claims [were] therefore time-barred.” *Piper*, 2022 WL 1691182, at *6. The court further observed that because plaintiff’s “contractually based claims are time-barred under the terms

of the insurance policy[,]” all of her remaining “claims therefore fail.” *Id.* The same result is required here.

And tellingly, in *Baker*, a case where plaintiffs sought to certify a diminished value class against State Farm in Georgia, plaintiffs only sought to “certify a class where the loss occurred on or after December 7, 2017 (one year before the complaint date due to the policy’s contractual statute of limitations).” *Baker v. State Farm Mut. Auto. Ins. Co.*, No. 4:19-CV-14 (CDL), 2021 WL 4006124, at *6 (M.D. Ga. Sept. 2, 2021), *aff’d*, No. 21-14197, 2022 WL 3452469 (11th Cir. Aug. 18, 2022).

Plaintiff’s initial Complaint simply was filed almost three years too late. Thus, under well-settled Georgia law, the Second Amended Complaint should be dismissed in its entirety. *See Morrill v. Cotton States Mut. Ins. Co.*, 666 S.E.2d 582, 584–85 (Ga. Ct. App. 2008) (citation omitted) (“[T]his court has decided that an insurance policy provision placing a one-year limitation upon the right of the policyholder to sue the insurer is valid and enforceable. . . .”); *Thornton*, 695 S.E.2d at 649 (Ga. 2010); *Encompass Ins. Co. of Am. v. Friedman*, 682 S.E.2d 694, 696 (Ga. Ct. App. 2009); *Tucker*, 109 F. Supp. 3d at 1352–53; *Piper*, 2022 WL 1691182, at *6; *Butler v. Nationwide Mut. Fire Ins. Co.*, No. 1:21-cv-2138-MLB, 2022 WL 684157, at *1 (N.D. Ga. Mar. 8, 2022).

C. The Court Should Dismiss This Case Because it is Apparent from the Face of the Complaint that Plaintiff's Claims Are Time-Barred.

1. Plaintiff's Second Amended Complaint Still Fails to Plausibly Allege State Farm Waived the One-Year Limitations Period in the Policy.

In its May 7, 2025 Order, the Court alerted Plaintiff that its “Second Amended Complaint should contain facts sufficient to support [Plaintiff’s] claim that State Farm waived the contractual one-year filing requirement.” ECF No. 32 at 6. Presumably to that end, Plaintiff added three allegations to the Second Amended Complaint. SAC ¶¶ 22–24. Plaintiff’s amendments, however, fall short, and Plaintiff still fails to plausibly allege State Farm waived the one-year limitations period in the Policy.

First, Plaintiff alleges that State Farm “never denied coverage of Plaintiff’s claim.” *Id.* ¶ 22. There is no question State Farm had already accepted coverage for Plaintiff’s property damage **insurance claim** and paid for the auto repairs years before Plaintiff filed this lawsuit. SAC ¶¶ 18, 21. Plaintiff’s addition in Paragraph 22 therefore does not support waiver. Nor does Plaintiff’s added allegation that State Farm “never indicated to Plaintiff in anyway that a limitation period was approaching and/or ran until after this action was filed” support Plaintiff’s waiver theory. SAC ¶ 23. “It is [] the general rule that the insured is chargeable with knowledge of all the conditions imposed upon him by the terms of his policy.” *Tucker*, 109 F. Supp. 3d at 1352. And there is no question that the one-year

limitations period is plainly stated in Plaintiff's own Policy Booklet. Ex. A at State Farm Car Policy Booklet at 37.

The third (and final) allegation that Plaintiff added to the Second Amended Complaint to support waiver is that State Farm “offered Plaintiff a partial payment of the damages resulting from its property damage claim. At the time of this filing, Plaintiff and [State Farm] are still negotiating the payment of [its] property damage claim.” SAC ¶ 24. That allegation, in addition to being patently false, does not save Plaintiff's claim either. This is nothing more than a reprise of the sleight of hand Plaintiff first attempted in opposing State Farm's (now mooted) Motion to Dismiss the First Amended Complaint. ECF No. 23 at 2, 4–6; ECF No. 32. In no uncertain terms, Plaintiff is improperly referring to ongoing confidential settlement negotiations pursuant to Federal Rule of Civil Procedure 408, between the Parties' respective attorneys of record in this lawsuit for the potential resolution of this *litigation*—which did not exist before Plaintiff first filed its untimely Complaint. SAC ¶¶ 17, 21.⁷

Plaintiff's only alleged basis for waiver fatally conflates Plaintiff's property damage *insurance claim* with Plaintiff's instant *post-suit claim* for the recovery of

⁷ Rule 408 of the Federal Rules of Evidence requires exclusion of “conduct or a statement made during compromise negotiations about the claim.” Fed. R. Evid. 408. State Farm reserves the right to move to strike and remove from the public record the portions of Plaintiff's Second Amended Complaint that reference or otherwise reflect the Parties' confidential settlement communications. *Id.*

diminished value. SAC ¶ 24. These are two very different things. One is the property damage *insurance claim* that Plaintiff pursued with State Farm and its claims representatives after Plaintiff's vehicle was damaged and in need of repair. SAC ¶¶ 16–18. The dealings between Plaintiff and State Farm on the property damage *insurance claim* occur directly and in the ordinary course of business. The other is Plaintiff's untimely lawsuit that it filed in this Court and for which communications have occurred between State Farm's undersigned litigation counsel and Plaintiff's counsel in this litigation. *See gen.* ECF No. 1; SAC. It borders on frivolity for Plaintiff to allege that State Farm waived the one-year limitations period in the Policy because it engaged in confidential and protected settlement communications among counsel of record in this lawsuit for the resolution of a *post-suit claim*, that did not exist at the time the Complaint was untimely filed. This is the only threadbare basis Plaintiff alleges to support waiver, and it is plainly insufficient.

Plaintiff fails to allege any other basis for waiver, for estopping State Farm from enforcing the one-year limitations period, or for tolling otherwise. SAC ¶¶ 41, 44.⁸ Plaintiff does not allege that State Farm continued negotiating Plaintiff's

⁸ Plaintiff alleges State Farm is estopped from “asserting any statute of limitations defense to the claims.” SAC ¶ 44. State Farm is not asserting any statute of limitations defense. Instead, State Farm is asserting Plaintiff's claims are untimely under the contractual one-year limitation provision in the Policy.

insurance claim (or anything, for that matter) before this lawsuit was filed. Instead, Plaintiff alleged that State Farm already accepted coverage for the property damage **insurance claim** and paid for the auto repairs. SAC ¶ 18. Plaintiff does not allege that State Farm omitted any necessary information that was not otherwise available to Plaintiff, intentionally prolonged **insurance claim** negotiations, or that State Farm did anything else, before the lawsuit was filed, to ostensibly lull Plaintiff into missing the contractual limitations period for bringing this lawsuit. Nor does Plaintiff allege that State Farm did *anything* between when it paid for Plaintiff's repairs following the date of loss and when the one-year Policy limitation period expired a year later that rendered Plaintiff's alleged injury "inherently undiscoverable." SAC ¶¶ 17–18, 44. Put simply, State Farm did not hide or otherwise "suppress[]" that it was required to evaluate the diminished value of Plaintiff's vehicle. SAC ¶ 44. In fact, State Farm does not dispute that it was required to evaluate the diminished value of Plaintiff's vehicle, to the extent it had any.⁹

Notably, the basis for Plaintiff's claim in this litigation is the Georgia Supreme

⁹ State Farm acknowledges that, under Georgia law, it is required to calculate the diminished value of damaged vehicles and pay it where owed as set forth in *Mabry. State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114 (Ga. 2001); *Baker*, 2021 WL 4006124, at *2–3. Notably, the plaintiffs in *Baker* did not dispute that State Farm applied the 17(c) formula to assess diminished value in Georgia. *Id.* at *2, *8–9.

Court's decision in *Mabry*, which found that insurers are required to evaluate first-party property damage claims for diminution in value. SAC ¶¶ 5–7, 26–28, 34, 39–42 (citing *Mabry*, 556 S.E.2d 114). But the *Mabry* decision is public record and was decided in 2001—that is, nearly two decades before Plaintiff's date of loss and when State Farm paid to repair Plaintiff's vehicle. *Mabry*, 556 S.E.2d 114; SAC ¶¶ 1, 17–18. As such, Plaintiff cannot claim it had no knowledge before August 1, 2021 (the date the Policy's one-year limitation period expired) that State Farm was required to evaluate and offer to pay the diminished value of its vehicle. SAC ¶ 17; *Mabry*, 556 S.E.2d 114.

2. Dismissal of Plaintiff's Time-Barred Claim is Appropriate.

Under Georgia law, “[a]bsent special circumstances such as waiver, estoppel or impossibility, compliance with a suit limitation is generally a condition precedent to an insured's recovery.” *Encompass Ins. Co. of Am. v. Friedman*, 682 S.E.2d 694, 696 (Ga. Ct. App. 2009). Georgia “law will not infer the waiver of an important contract right unless ‘the waiver is *clear and unmistakable*.’” *Vratsinas Constr. Co. v. Triad Drywall, LLC*, 739 S.E.2d 493, 496 (Ga. Ct. App. 2013) (quoting *Accurate Printers, Inc. v. Stark*, 671 S.E.2d 228, 232 (Ga. Ct. App. 2008)). And the “burden of proof lies with the party asserting waiver.” *Id.* (internal citations omitted). Plaintiff has not met its burden. Plaintiff is on its third Complaint in this case and—having had three bites at the apple—has failed to sufficiently allege State Farm

waived the one-year limitations period in Plaintiff's Policy.

As such, dismissal at this procedural posture is appropriate. In fact, the Northern District granted a motion to dismiss under precisely these circumstances. *Porter v. Travelers Home & Marine Ins. Co.*, No. 1:22-CV-04049-SCJ, 2022 WL 19976174, at *4 (N.D. Ga. Dec. 13, 2022) (quoting *Gonsalvez v. Celebrity Cruises Inc.*, 750 F.3d 1195, 1197 (11th Cir. 2013)). Judge Jones granted the defendant insurer's Rule 12(b)(6) motion to dismiss and enforced the contractual limitations period in the policy. *Id.* The court rejected the plaintiff's only argument for tolling, concluded the plaintiff "failed to assert any basis for tolling," and therefore found the complaint was time-barred. *Id.*

Other Georgia courts have likewise rejected plaintiffs' arguments that the applicable limitations period was somehow tolled and instead granted Rule 12(b)(6) motions to dismiss because the claims were time-barred. *Lord v. Am. Gen. Life Ins. Co.*, No. 4:21-cv-00031, 2021 WL 2546454, at *5 (S.D. Ga. June 21, 2021) (granting motion to dismiss, finding equitable tolling inapplicable, and enforcing contractual limitations period in insurance policy); *Smith v. Ga. CVS Pharmacy, LLC*, No. 4:22-cv-65, 2022 U.S. Dist. LEXIS 217669, at *13–25 (S.D. Ga. Nov. 21, 2022) (granting motion to dismiss and concluding statute of limitations was not tolled by emergency order). This Court should reach the same inevitable conclusion here.

IV. CONCLUSION

Plaintiff's only remaining claim against State Farm should be dismissed because it is barred by the Policy's one-year limitations period and Plaintiff has failed to sufficiently allege waiver.

Respectfully submitted, this 30th day of May, 2025.

/s/ Tiffany L. Powers

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's CM/ECF system to all counsel of record.

/s/ Melissa G. Quintana _____

Melissa G. Quintana