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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE PFA INSURANCE MARKETING LITIGATION

Case No. 4:18-CV-03771-YGR

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARD; MEMORANDUM OF LAW IN SUPPORT THEREOF

Judge: Hon. Yvonne Gonzalez Rogers
Date: January 16, 2024
Time: 2:00 p.m.
Courtroom: 1 – 4th Floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 16, 2024, at 2:00 p.m., before the Honorable Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California, Plaintiffs Dalton Chen and Youxiang Eileen Wang will and do hereby move the Court, pursuant to Federal Rule of Civil Procedure 23(h), for an Order awarding attorneys' fees, reimbursement of litigation expenses, and a service award for the Class Representative.

The Motion is based on this Notice of Motion; the incorporated memorandum of points and authorities; the accompanying Declarations of Daniel C. Girard ("Girard Decl."), William W. Keep, Ph.D. ("Keep Decl."), and Dalton Chen ("Chen Decl."); the record in this action; argument of counsel, including on reply and at the Settlement Hearing; and any other matters the Court may consider.

Dated: August 21, 2023

Respectfully submitted,

GIRARD SHARP LLP

/s/ *Daniel C. Girard*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs respectfully seek an award of attorneys' fees of $6,000,000 and reimbursement of litigation costs and expenses of $371,000. Class Counsel prosecuted this case since early 2019 against Life Insurance Company of the Southwest ("LICS") and Premier Financial Alliance, Inc. ("PFA"), both represented by experienced and dedicated counsel. As a result of counsel's efforts, any class member with an active Living Life policy can now terminate it for an average payment of $4,566, and those with already-terminated policies can recover an average of $1,310. This is the same form of relief the class members would receive under the Endless Chain Law following a victory at trial. The settlement allows class members to recover their premiums, subject to reasonable discounts for litigation risks and delay, and for value received in the form of life insurance, less some overhead expenses. The settlement offers a simplified claim procedure, and without the delays and uncertainties of continuing litigation. Many class members stand to recover thousands of dollars, in some cases more than $10,000. This action could not have been settled on such favorable terms but for Class Counsel's willingness to engage in protracted discovery, hold out through class certification, summary judgment and *Daubert* motions, and final pretrial preparation, and then devote a period of months to negotiating a resolution tailored to the case.

California law governs the fee entitlement in this case, and gives a prevailing party under a fee-shifting statute like the Endless Chain Law the presumptive right to compensation for their hours reasonably expended. Class Counsel took on considerable risk in bringing a novel case and pursuing it on a contingent basis through class certification and summary judgment.[1] The time incurred was necessary to the result achieved, and the resulting lodestar provides a baseline for evaluating the reasonableness of the fee request. The Court already found the parties' agreement as to a reasonable fee resulted from adversarial bargaining, and approving this agreement will not affect the payments to Class members. *See* Dkt. No. 366 at 20, 29. In these circumstances, as many courts have concluded,

[1] The Preliminary Approval Order describes litigation risks that Plaintiffs faced and "finds that, in light of those significant risks, the recovery obtained under the SA is reasonable and adequate." Dkt. No. 366 at 25-26.

the negotiated fee is presumptively reasonable. Class Counsel's lodestar, the novelty and risks of the action, the five-year delay, and the outcome secured for the Class all support granting this fee.

The settlement before the Court vindicates the rights of a vulnerable population[2] by allowing each Class member to recover a substantial percentage of the premiums they paid, as well as securing business changes to make PFA's sales program more transparent. Granting the requested award will further California's public policy of sufficiently compensating counsel in cases such as this one according to their documented lodestar. It will ensure that Class Counsel are not penalized for investing the time needed to achieve this settlement, thereby motivating skilled lawyers to bring difficult cases and assume the risk required to achieve a meaningful outcome, a particular concern in cases like this one that do not lend themselves to settlement for a common fund.

Similarly, the Court should approve the reimbursement of Class Counsel's expenses. These expenditures, largely incurred to fund the work of Plaintiffs' experts, were reasonable and necessary to achieve the result. The Court should also grant Plaintiff Chen's motion for a service award of $10,000 (which Defendants also have agreed to pay). This amount, often approved in class actions, is warranted given the time devoted by Mr. Chen over several years, including appearing for multiple depositions.

II. STATEMENT OF ISSUES TO BE DECIDED

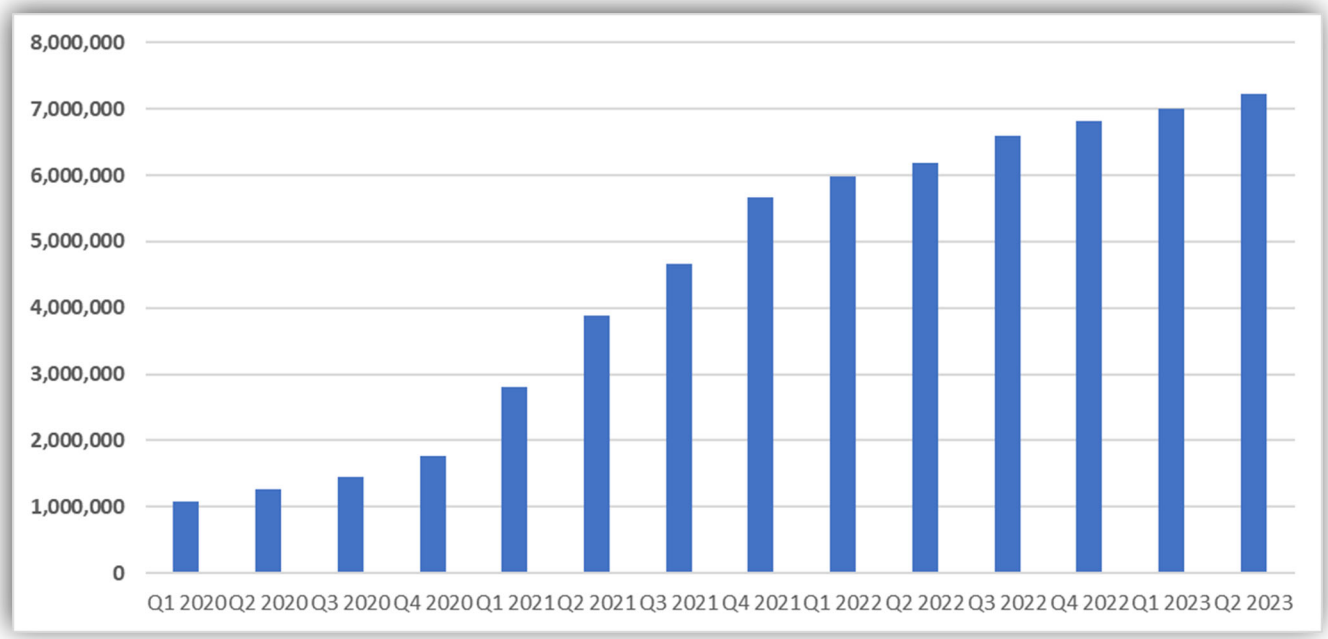
Should the Court grant Plaintiffs' request for attorneys' fees as provided under California Civil Code section 1689.2 and as agreed to by the parties, and approve reimbursement of litigation expenses and a service award for the class representative?

III. SUMMARY OF CLASS COUNSEL'S WORK IN THE CASE

Throughout this case, Class Counsel kept detailed contemporaneous records of their time spent working on this litigation with corresponding task descriptions, and audited those records periodically to ensure time was recorded appropriately for tasks that advanced the litigation. Class Counsel submitted *in camera* quarterly reports of their time and expenses incurred in the prosecution of the case pursuant to the Court's Order Re: Protocol for Interim Class Counsel's Time and Expense Submissions, Dkt. No. 129. The reports show how Class Counsel's lodestar accumulated as the case

[2] See evidence cited by Plaintiffs at Dkt. No. 272 at p. 8 of 32.

unfolded, through PFA's arbitration motions and related discovery, review of the more than 85,000 documents produced by Defendants, participation in 27 depositions, the filing of 16 discovery letter briefs and over 135 motions, responses, and replies, class certification briefing and argument, expert discovery, dispositive motions, pretrial preparation, settlement negotiations, and settlement drafting and briefing. *See* Girard Decl., ¶¶ 3-88, 91. A lodestar chart based on these quarterly reports appears below.



As this bar graph shows, Class Counsel spent most of their professional time in this case in 2021. That year saw intensive deposition practice, related document review, protracted discovery negotiations and motion practice, class certification briefing and argument, appellate work in interlocutory appeals and to defend the Court's certification order, expert work that included assisting in the preparation of reports and taking and defending depositions, and assembling evidence and preparing briefing in opposition to dispositive motions. *See* Girard Decl., ¶¶ 42-43, 45, 49-51, 55-61, 63-67, 75-77, 87. As set forth in more detail in the Girard Declaration, the expenditure of this time was essential to the result. We summarize below in four phases the work required:

A. February 2019 – April 2020

The initial phase began with Class Counsel's work to initiate the related case, *Wang v. LICS*, No. 4:19-cv-01150-YGR (N.D. Cal. filed Feb. 28, 2019), and ended with the Court's consolidation

and appointment orders entered on April 16, 2020 (Dkt. Nos. 128, 129, 134).[3] During this initial period, Class Counsel:

- Investigated our client Eileen Wang's allegations through a series of interviews, reviewed the record in the related action, and examined PFA social media posts and other marketing materials.
- Researched potential causes of action, drafted the initial complaint, and filed it on February 28, 2019.
- Amended the complaint on April 30, 2019, to add Mr. Chen as a Plaintiff, among other changes.
- Appeared at conferences with the Court on May 6, 2019, August 20, 2019, and February 25, 2020.
- Negotiated and submitted proposed case management orders regarding confidential information, expert discovery, discovery of electronically stored information, and privilege.
- Obtained an order compelling discovery related to PFA's motion to compel arbitration, and propounded written discovery.
- Deposed PFA's Rule 30(b)(6) corporate representative in Atlanta, Georgia on topics generally related to its arbitration and transfer motions and its business operations on June 21, 2019.
- Prepared Mr. Chen and Ms. Wang for depositions related to PFA's arbitration motion, and defended those depositions on July 2 and July 9, 2019.
- Opposed PFA's motion to compel arbitration or transfer the case to the Northern District of Georgia, filed a supplemental opposition, and filed objections to PFA's reply evidence.
- Conferred with plaintiffs' counsel in the related action, in an attempt to reach agreement on a joint approach, before ultimately moving for appointment as interim class counsel under Rule 23(g).
- Briefed and argued consolidation and appointment as interim class counsel.
- Filed the operative Consolidated Complaint on April 30, 2020.

[3] Although this litigation commenced in June 2018, Girard Sharp was retained in January 2019.

See Girard Decl., ¶¶ 4-27.

B. April 2020 – November 2021

The second phase ended with the Court's class certification order entered on November 3, 2021 (Dkt. No. 239). During this period, Class Counsel:

- Served PFA with a first set of document requests and analyzed and conferred with PFA regarding its objections and responses.
- Submitted a joint letter concerning PFA's responses and compliance with ESI guidelines, and on September 21, 2020, appeared before Magistrate Judge Sallie Kim regarding the dispute.
- Conferred further with PFA regarding its productions and prepared meet-and-confer letters to PFA confirming the timing of its anticipated productions and setting forth Plaintiffs' positions related to alleged production deficiencies.
- Secured Judge Kim's order compelling PFA to produce its Executive Chairman, Jack Wu, for deposition as a managing agent.
- Served LICS with a first and second sets of document requests and analyzed and conferred with LICS regarding its objections and responses.
- Submitted a joint letter brief seeking an order directing LICS to provide identifying information regarding Class members that, under California Insurance Code § 791.13, LICS required a Court Order to produce.
- Served objections and responses to Defendants' document requests and conferred with Defendants regarding those requests.
- Reviewed and analyzed over 85,000 documents produced by Defendants.
- Consulted throughout the case with Plaintiffs regarding their collection and production of responsive documents, and analyzed and produced over 2,100 documents, including in supplemental productions pursuant to Rule 26(e).
- Served LICS with two additional sets of interrogatories (the first having been served in the arbitration phase), and analyzed and conferred with LICS regarding its responses.

- Prepared Mr. Chen and Ms. Wang for merits-phase depositions and defended those depositions on March 24, March 26, and June 1, 2021.
- Prepared Class Witnesses Donna Daniele, Yunhai Li, Shannon Xiao for their depositions and defended those depositions from June 13 to June 17, 2021.
- Deposed Defendants' fact witnesses Hercules (Hermie) Bacus, Christine Keene, Louis Puglisi, Steven G. Early, David Carroll, Michael Peterson, Jeffrey Johnson, Jennifer Warfield, Christopher Weber, Michael Andaya, Wayne Meadows III, and Mehran Assadi.
- Deposed LICS's experts Patrick Kennedy, Jim Toole, and Bill Post.
- Retained and assisted Plaintiffs' experts William Keep, Christopher Snyder, and Larry Stern in drafting their reports, prepared them for deposition, and defended those depositions.
- Obtained an order compelling LICS's CEO to appear for deposition.
- Moved to extend fact discovery on July 30, 2021 so that Plaintiffs could pursue the deposition of Jack Wu and their subpoena enforcement action against Steven Early.
- Pursued discovery under Rule 45 from PFA's former outside counsel, Steven Early,[4] and five senior, nonparty operatives in PFA's hierarchy, some of whom proved difficult to serve.
- Briefed and argued class certification.
- Served a confidential mediation brief, mediated with the Honorable William J. Cahill (Ret.) on August 17, 2021, and agreed to adjourn the mediation pending further proceedings.

See Girard Decl., ¶¶ 28-63, 75, 87.

C. November 2021 – June 2022

In the third phase the parties completed expert discovery and briefed dispositive motions. It concluded on June 15, 2022, when the Court issued its summary judgment and *Daubert* orders (Dkt. Nos. 306, 307). During this period, Class Counsel:

[4] The dispute over Mr. Early's compliance with Plaintiffs' subpoena *duces tecum* proceeded on a separate docket managed by Judge Kim and involved several appeals to this Court along with two Ninth Circuit appeals. A summary appears at paragraphs 64-73 of the Girard declaration.

- Filed a consolidated response to the Defendants' Rule 23(f) petitions challenging the Court's class certification.
- Moved to exclude the opinions of LICS's liability expert Bill Post and filed a reply further supporting the motion.
- Opposed PFA's and LICS's separate motions for summary judgment, including by responding to their Supporting Separate Statements.
- Consulted with Plaintiffs' experts William Keep, Christopher Snyder, and Larry Stern regarding LICS's motions to exclude their expert testimony, and opposed those motions.
- Argued dispositive motions.

See Girard Decl., ¶¶ 57, 76-81.

D. June 2022 – Present

In the fourth phase, Plaintiffs continued preparing for trial while also negotiating with Defendants. PFA's counsel Michael Hassen was diagnosed with a terminal illness and passed away, and PFA selected new counsel. During this final period, Class Counsel:

- Moved to approve and disseminate Class notice, and filed a reply to PFA's opposition, in summer 2022.
- Filed a joint statement providing additional information requested by the Court relating to the proposed method of notifying the Class of the certification, and filed a revised notice in accordance with the Court's instruction.
- Served a confidential mediation brief and participated in a full-day mediation with the Honorable Diane M. Welsh (Ret.) on August 11, 2022, reaching no agreement.
- Continued negotiations and, on December 16, signed a term sheet memorializing the parties' agreement in principle.
- Drafted and negotiated the specific provisions of the settlement agreement and its exhibits.
- Moved for preliminary approval of the settlement and filed a reply in support of the motion.

- Continued negotiations with the Defendants in response to the Court's Order Directing Further Submission in Support of Pending Motion for Preliminary Approval of Class Action Settlement
- Drafted revisions to settlement notices and related documentation, and filed a 38-page supplemental statement responding to the Court's Order on June 1, 2023.
- Met with defense counsel and the Claims Administrator to implement the Court's preliminary approval order, reviewed notices, prepared responses to Class Member FAQs, reviewed website format, and oversaw the initial work of the Claims Administrator.

See Girard Decl., ¶¶ 82-86, 88, 91, 95.

IV. ARGUMENT

A. California Law Governs and Provides for a Reasonable Fee Award in This Case.

Rule 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Subject matter jurisdiction here is predicated on diversity of citizenship—Plaintiffs did not assert a federal claim. *See* Consol. Compl., ¶ 7 (citing 28 U.S.C. § 1332). The Court certified the Class to under the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, for Defendants' alleged violations of the Endless Chain Law, Cal. Penal Code § 327 and Cal. Civ. Code. § 1689.2, which expressly provides for fee-shifting by authorizing the court to "award reasonable attorney's fees to a prevailing plaintiff." Class Counsel's fee request arises under this code provision because Plaintiff Chen sought relief under this California law. Therefore, California fee jurisprudence governs. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("Because Washington law governed the claim, it also governs the award of fees.") (citing *Mangold v. Calif. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995)); *accord Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P.*, 888 F.3d 455, 461 (10th Cir. 2017) ("In a diversity case, the matter of attorney's fees is a substantive legal issue and is therefore controlled by state law.") (citation omitted); *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002) ("State law controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision."); *Davis v. Mutual Life Ins. Co. of N.Y.*, 6 F.3d 367, 382-83 (6th

Cir. 1993); *Riordan v. Nationwide Mutual Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992); *Northern Heel Corp. v. Compo Indus.*, 851 F.2d 456, 475 (1st Cir. 1988).

The rule that state attorney fee jurisprudence governs an award of fees to a party that prevailed under state law follows from *Erie* doctrine, under which "federal courts are constitutionally obligated to apply state law to state claims." *Felder v. Casey*, 487 U.S. 131, 151 (1988); *see Mujica v. AirScan Inc.*, 771 F.3d 580, 604 (9th Cir. 2014) ("when a federal court is hearing state-law claims" it "must faithfully apply" state law). The Rules Enabling Act, 28 U.S.C. § 2072, also forbids applying a rule of procedure to abridge or modify any substantive right, and a fee entitlement under state law is a substantive right. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) (observing that when the Supreme Court enforced a state statute in *Sioux County v. National Surety Co.*, 276 U.S. 238 (1928), "the Court treated the [fee-shifting] provision as part of a statutory liability which created a substantive right."); *Chieftain Royalty*, 888 F.3d at 462-63 (applying the Rules Enabling Act to hold that state law regarding attorney fee determination applied in a diversity suit because "Rule 23(h) does not establish a rule of decision for assessing attorney fees.").

In addition to state law, the parties' agreement as to a reasonable fee provides an independent basis for granting Class Counsel's fee request. Rule 23 empowers the Court "to award 'reasonable attorney's fees . . . authorized by law *or* by the parties' agreement.'" *Kearney v. Hyundai Motor Am.*, 2013 WL 3287996, at *7 (C.D. Cal. June 28, 2013) (emphasis added) (quoting Fed. R. Civ. P. 23(h)). The parties' agreement on fees merits substantial deference because, as the Court found, this agreement resulted from informed, adversarial bargaining. Dkt. No. 366 at 20, 29. "When there is no evidence of collusion, an agreement between the parties on attorneys' fees is entitled to significant weight, especially where the attorneys' fees are paid separate and apart from the fund provided to class members." *Beck-Ellman v. Kaz USA, Inc.*, 2013 WL 10102326, at *9 (S.D. Cal. June 11, 2013) (citing *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1992 U.S. Dist. LEXIS 14337, at *12-13, 1992 WL 226321, at *4 (C.D. Cal. June 10, 1992)); *see also, e.g.*, *Wehlage v. Evergreen at Arvin LLC*, No. 4:10-CV-05839-CW, 2012 WL 4755371, at *1 (N.D. Cal. Oct. 4, 2012) ("find[ing] that the agreed amounts for attorneys' fees and expenses . . . are presumed to be reasonable" because "Class Counsel

negotiated at arms length with Defendants to arrive at a fee that all parties concluded is reasonable. . . . [and] will be paid directly by Defendants and will not affect the injunctive relief").

Therefore, "since the proper amount of fees is often open to dispute and the parties are compromising precisely to avoid litigation, the court need not inquire into the reasonableness of the fees even at the high end with precisely the same level of scrutiny as when the fee amount is litigated." *Staton v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003). Defendants here will offer settlement payments worth up to $66 million under the terms of the settlement. Defendants wished to settle the fee before entering into a settlement agreement, to know their total exposure and avoid the risk of paying Class Counsel a higher fee. Girard Decl., ¶ 94. Class Counsel in turn forfeited the possibility of a larger fee in exchange for the agreement not to contest a $6 million fee. *Id*. California and federal law encourage this practice: "Ideally, of course, litigants will settle the amount of a fee" and "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see Consumer Priv. Cases*, 175 Cal. App. 4th 545, 553 (2009) (affirming award and recognizing that the practice of negotiating the fee after an agreement on relief for the class "serves to facilitate settlements and avoids a conflict, and yet it gives the defendant a predictable measure of exposure of total monetary liability for the judgment and fees in a case.") (citation omitted).

Moreover, because this litigation could not create a fund under the Endless Chain Law—which provides that a participant "may rescind" and "may recover" amounts paid as part of the scheme, less any consideration they received, Cal. Civ. Code § 1689.2—there was no alternative of basing the fee on a percentage of a common fund recovered for class members, with any reduction going to the class. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2016 WL 5793336, at *6 (N.D. Cal. Oct. 4, 2016), *aff'd*, 894 F.3d 1030 (9th Cir. 2018) (rejecting objector request to depose plaintiffs and emphasizing that "the recovery provided under the terms of the Settlement is consistent with the possible recovery under that statute").

B. Application of the Lodestar Method Demonstrates the Fee Request Is Reasonable.

California law makes the lodestar-multiplier method the required method for determining fees when there is no common fund. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1134 (2001); *see also Delacruz*

v. CytoSport, Inc., No. 4:11-CV-03532-CW, 2014 WL 12648451, at *5 (N.D. Cal. July 1, 2014) ("Class Counsel advanced the public interest by enforcing consumer protection laws, and obtained significant benefits . . . . Accordingly, this Court applies the lodestar method"). The lodestar "constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous" but seeks "to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." *Ketchum*, 24 Cal. 4th at 1138. To arrive at the lodestar, the Court multiplies the number of hours counsel reasonably devoted to the litigation by a reasonable hourly rate. *See Graham v. DaimlerChrysler Corp*., 34 Cal. 4th 553, 579 (2004).

Class Counsel's lodestar to date exceeds their $6 million fee request. Girard Decl., Ex. B. *See, e.g.*, *Rosado v. Ebay Inc.*, No. 5:12-CV-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016) (conducting a lodestar cross-check, finding that a negative multiplier "strongly suggests the reasonableness of the negotiated fee."); *Aarons v. BMW of N. Am., LLC*, 2014 WL 4090564, at *18 (C.D. Cal. Apr. 29, 2014); *Oxina v. Lands' End, Inc.*, 2016 WL 7626190, at *5-7 (S.D. Cal. Dec. 2, 2016). The final multiplier will be even lower because the current lodestar does not reflect future work. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 746 F. App'x 655, 659 (9th Cir. 2018) (affirming inclusion of projected future work in lodestar cross-check calculation); *Perez v. Rash Curtis & Assocs.*, No. 4:16-CV-03396-YGR, 2020 WL 1904533, at *18-21 (N.D. Cal. Apr. 17, 2020) (class counsel's future work supported lodestar multiplier). Class Counsel will continue to communicate with Class members and oversee settlement administration, including the processing and payment of claims, and will appear at the Settlement Hearing and prepare the post-distribution accounting required by the Procedural Guidance. Girard Decl., ¶ 96.

1. Class Counsel's Hourly Rates Are Reasonable.

When applying the lodestar method, the Court "determine[s] a reasonable hourly rate to use for attorneys and paralegals in computing the lodestar amount. The prevailing market rates in the relevant community set the reasonable hourly rate for purposes of computing the lodestar amount." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013) (internal quotation marks and citation omitted); *see Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984). In addition, because counsel should be compensated for the delay in payment, it is appropriate to apply each biller's current rates for all

hours. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) ("The lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement."); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007) (holding "delay in payment . . . a factor properly considered in arriving at a reasonable hourly rate"); *Hurtado v. Rainbow Disposal Co.*, 2021 WL 2327858, at *5 (C.D. Cal. May 21, 2021) (applying these principles).

The Girard declaration details Class Counsel's billing rates. Such "[d]eclarations regarding the prevailing market rate in the relevant community suffice to establish a reasonable hourly rate." *In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 461 (C.D. Cal. 2014) (citing *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996)). Class Counsel's rates are typical of prevailing rates in the market for comparable legal services. *See Fleming v. Impax Lab'ys Inc.*, 2022 WL 2789496, at *9 (N.D. Cal. July 15, 2022) (approving rates of up to $1,325 for partners); *see also Hope Med. Enters., Inc. v. Fagron Compounding Serv., LLC*, 2022 WL 826903, at *3 (C.D. Cal. Mar. 14, 2022); *In re Auto. Parts Antitrust Litig.*, 2019 WL 13090127, at *3 (E.D. Mich. Dec. 29, 2019). The rates used in the lodestar calculation are the same rates currently being paid by our fee-paying clients in other complex litigation (Girard Decl., ¶ 122), and courts have recently approved Class Counsel's rates. *See In re MacBook Keyboard Litig.*, 2023 WL 3688452, at *15 (N.D. Cal. May 25, 2023); *see also* Girard Decl., ¶ 125.

2. The Amount of Time Class Counsel Devoted Is Reasonable.

Class Counsel spent an appropriate amount of time on the matter in light of the complexity and duration of the action and the vigorous defense. *See Gonzalez*, 729 F.3d at 1202. Class Counsel and their staff have dedicated a total of approximately 10,069.30 hours to this litigation, and more work remains. Girard Decl., ¶ 121. These hours were spent on tasks performed for the benefit of the Class. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (noting that "lawyers are not likely to spend unnecessary time on contingency fee cases" and, "[b]y and large, the court should defer

to the winning lawyer's professional judgment as to how much time he was required to spend on the case."). Insofar as the reasonableness of litigation time may be informed by a comparison with other similar cases, Class Counsel's lodestar does not approach the $9,816,633 in fees awarded in a recent Fifth Circuit case alleging an endless chain scheme. *See Torres v. SGE Mgmt., LLC*, No. 4:09-CV-02056, 2021 WL 3661528, at *10 (S.D. Tex. Aug. 18, 2021), *aff'd sub nom. Clearman v. Kochanowski*, No. 21-20518, 2022 WL 2163781 (5th Cir. June 15, 2022).

While not apparent from the description of work performed, almost every aspect of this litigation was bespoke. There is no case law governing the application of the endless chain statute or federal MLM decisions like *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975), or *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776 (9th Cir. 1996), to the promotion of life insurance sales by an independent marketing organization and there was no clear path to class certification. Girard Decl., ¶ 126. PFA was represented by three different law firms and LICS by two. PFA filed a second arbitration motion even after the Court denied its first arbitration motion, which necessitated a period of intensive arbitration-related discovery. The Defendants filed summary judgment and *Daubert* motions after the Court observed at the November 2021 premotion conference that this case was fact intensive. Much of the discovery from PFA and related parties required motion practice. There was no blueprint for resolution of this case; almost every aspect was negotiated and drafted from scratch. Girard Decl., ¶ 127.

Even so, and though "some amount of duplicative work is inherent in the process of litigating over time," *Stetson*, 821 F.3d at 1166, Class Counsel avoided duplicating work and other inefficiencies. Daniel Girard oversaw and directed overall case strategy, took depositions, revised written work, led discussions with Plaintiffs' experts, and negotiated the settlement. Jordan Elias was responsible for all briefing, including in the Ninth Circuit, argued class certification and summary judgment, deposed LICS's expert economist and expert actuary, and supervised the work of Plaintiffs' experts William Keep, Christopher Snyder, and Larry Stern. Adam Polk took most of the depositions, including of the two CEOs, and handled meet-and-confers with opposing counsel and case management conferences with the Court. Associates Angelica Ornelas, Sylvain Frayer, and Sean Greene reviewed and analyzed documents and provided other necessary support. Additional

associates also reviewed documents during the litigation's discovery phase, but no contract attorneys were used. Reflecting Class Counsel's commitment to efficient staffing, no more than two Plaintiffs' attorneys appeared at each deposition, and only attorneys who were prepared to address the Court appeared at hearings. Girard Decl., ¶ 113.

Thus, Class Counsel's lodestar is reasonable.

3. The Lodestar Adjustment Factors Weigh in Favor of Granting the Requested Fee.

The lodestar adjustment factors—the novelty and complexity of the action, the benefits obtained for the Class, the skill displayed by counsel, and the contingent risk of nonpayment—confirm the reasonableness of the fee agreed to by the parties. *See Ketchum*, 24 Cal. 4th at 1132.

a. The Relief Secured for the Class Is Excellent.

The settlement achieves the relief afforded by statute—the right to rescind, less value conferred. But because rescission is offered through settlement, the proof requirements are minimal and the relief comes now rather than years from now (assuming the Class were to prevail at trial and on appeal). Girard Decl., ¶ 100; Dkt. No. 239 at 11 (the Court describing Plaintiffs' proposal for a post-trial claim process for "any proposed class members who wish to receive this optional rescission"). The settlement allows every Class member whose policy lapsed or was surrendered to recover a substantial portion of the premiums they paid and every Class Member with an active policy to terminate it for similar relief. Regardless of the total value of approved claims, the option to rescind a Class member's insurance policy and/or recover premiums is a valuable right.

The negotiated formula reduces these awards by a factor of only one-third. Although the payments will vary based on total premiums paid and other actuarial factors, most Class members eligible for payment can recover thousands of dollars. If Class members with active policies with a cash surrender value greater than their settlement payment do not claim (which would not be in their interest given their policy's higher value), the remaining Class members could recover up to $66 million. For the Class as a whole, the average payment is $3,860. Girard Decl., ¶ 102.

The PFA business changes add to the settlement's value and generally track those obtained in FTC consent decrees. *See* Keep Decl., ¶ 8. According to Plaintiffs' MLM expert, "[r]eporting the number of Associates and average earnings paid at each commission level will make clearer the

challenge of obtaining positive earnings, and disclosing the median, minimum, and maximum earnings at each level will provide additional useful information." *Id*. "Further, the requirement to purchase an insurance policy, whether communicated explicitly or implicitly, was part of the overall marketing message that helped deliver immediate financial benefits to the defendants. PFA now has agreed to prominently disclose that buying a policy is *not* a prerequisite . . . ." *Id*.

Plaintiffs prevailed, and the relief obtained by Class Counsel is consistent with what Class Members could recover at trial, less reasonable discounts. As such, the fee negotiated at arm's length by reference to counsel's lodestar is appropriate.

b. Class Counsel Assumed Significant Risks and Litigated the Case on a Fully Contingent Basis.

The contingent nature of Class Counsel's representation, the nearly five-year delay in payment, and the risks of litigation further support granting the requested fee. *See In re Ferrero Litig.*, 583 F. App'x 665, 668 (9th Cir. 2014) (declining to disturb award of attorneys' fees based in part on "the contingent nature of the case"). "The risk that further litigation might result in plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008). In practice, "courts have routinely enhanced the lodestar to reflect the risk of non-payment" and no enhancement is requested here. *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1300.

Class Counsel held out for a satisfactory result for the Class, pursuing the claims against LICS and PFA until "several weeks before their jury trial was set to begin," as the Court noted. Dkt. No. 366 at 25. In granting preliminary approval, the Court also described several of the risks that Plaintiffs would have faced absent settlement (*id.*), and the Defendants' arguments could have persuaded a jury. For instance, LICS argued that one cannot "inventory load" an insurance policy and that the *Koscot* test could not be met because recruits neither had to buy a policy to join PFA, nor paid for the right to sell a product or to receive rewards unrelated to policy sales. Dkt. No. 263 at 14-16. PFA argued that paying the $125 enrollment fee did not entitle anyone to sell a policy and that no one at PFA earned money from recruiting unless they actually sold a policy. Dkt. No. 252 at 16-17. To prevail in the litigation, Plaintiffs would have had to overcome a likely motion to decertify and then prevail on challenging issues at trial and in a subsequent appeal. *See Mazzei v. Money Store*, 829 F.3d 260, 265-

67 (2d Cir. 2016) (court can decertify class following verdict in favor of a certified class); Dkt. No. 366 at 25 (describing LICS's class certification arguments). Speaking from his experience in similar litigation, Dr. Keep describes some of the risks inherent in a case of this nature:

> Cases against MLM companies can be particularly complex as the defendant tries to shift accountability to independent representatives, attribute a lack of success to inadequate individual effort, and dismiss corporate responsibility for harmful actions, even actions repeated by top distributors over many years. Unlike franchising, the MLM model purposely relies heavily on the revenue and profits generated by failing independent representatives (i.e., the extremely high percentage with financial losses). For these reasons, MLM companies invest considerable resources to avoid the pyramid scheme label.

Keep Decl., ¶ 6. The considerable risks of litigation underscore the immediate benefits of the settlement for the Class.

Furthermore, "[w]hen counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment . . . justifies a significant fee award." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015). Class Counsel's fee was entirely contingent. Since January 2019, we advanced all costs with no guarantee of recovery against a well-capitalized insurance company defendant and its sales agency, and our work on this litigation precluded other paying work. Girard Decl., ¶¶ 111-12; *see Ching v. Siemens Indus.*, 2014 WL 2926210, at *8 (N.D. Cal. Jun. 27, 2014) (noting "public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work.").

c. The Quality of Class Counsel's Work and Their Experience Support the Fee Request.

The quality of Class Counsel's work is reflected in the outcome, which allows every Class member to make their own decision about whether to keep their life insurance (for active policyholders) or make a claim to recover a substantial portion of their premiums paid (for both active and former policyholders). *See Moreyra v. Fresenius Med. Care Holdings, Inc.*, 2013 WL 12248139, at *3 (C.D. Cal. Aug. 7, 2013) ("The single clearest factor reflecting the quality of . . . services to the class are the results obtained.") (citation omitted).

Class Counsel drew on their decades of experience representing plaintiffs and classes, including in other cases against insurers alleging unfair or deceptive practices, to negotiate a resolution and claim procedure tailored to this case. Girard Decl., ¶ 128. *See Thompson v. Transamerica Life Ins. Co.*, 2020 WL 6145104, at *4 (C.D. Cal. Sept. 16, 2020) (lodestar multiplier was "particularly justified" by class counsel's "extensive" relevant experience). Class Counsel did so in the context of an alleged scheme to sell indexed life insurance, a factual setting that implicated actuarial complexities not at issue in the typical such case involving personal care products. We developed a robust record, secured the relief sought in almost every discovery motion, deposed over 15 witnesses, obtained class certification, engaged and worked with accomplished expert witnesses, and prevailed in substantial part on summary judgment. Girard Decl., ¶ 128. Dr. Keep, who has worked with many private and government lawyers in cases arising from multi-level sales plans, attests to "[t]he level of superior organization [that] sped my analysis and writing processes, demonstrating the clear focus of these attorneys in documenting . . . aspects of the conduct alleged in the case." Keep Decl., ¶ 9.

When negotiating with Defendants, Class Counsel, working with their expert actuary, Phil Bieluch, "design[ed] creative solutions" to "fairly distribute . . . resources" in a prudent manner. *Mergens v. Sloan Valve Co.*, 2017 WL 9486153, at *12 (C.D. Cal. Sept. 18, 2017); Girard Decl., ¶ 90; *see, e.g.*, *Trosper v. Stryker Corp.,* No. 13-CV-00607-LHK, 2015 WL 5915360, at *1 (N.D. Cal. Oct. 9, 2015) (counsel's work with experts weighed in favor of fee request when it was "essential in effectuating a substantial settlement for the class."). Class Counsel will continue to work with the Claims Administrator to ensure claims are properly handled, processed, and paid. Girard Decl., ¶ 96. The Court may properly take that future time into consideration in its lodestar assessment. *See In re Volkswagen*, 746 F. App'x at 659; *Perez*, 2020 WL 1904533, at *18-21.

C. Class Counsel Are Presumptively Entitled to Recover Their Lodestar.

Class Counsel acknowledge recent Ninth Circuit cases,[5] cited by the Court in its Preliminary Approval Order, that, while recognizing a district court's broad discretion to award reasonable

[5] *Lowery v. Rhapsody Int'l, Inc.*, — F.4th —, 2023 WL 4933917 (9th Cir. Aug. 2, 2023); *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *Kim v. Allison*, 8 F.4th 1170 (9th Cir. 2021); *Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

attorneys' fees, emphasize the importance of total money paid out to class members in determining what fee amount is reasonable. Dkt. No. 366 at 29. We respectfully submit that these decisions do not preclude the award of the full fee sought here (without reference to claim experience) for several reasons.

1. California Law Entitles a Prevailing Plaintiff Under a State Fee-Shifting Statute to Recover a Reasonable Attorney Fee.

Most recently, the Ninth Circuit deemed it "unreasonable to award attorneys' fees that exceed the amount recovered for the class, absent meaningful nonmonetary relief or *other sufficient justification*." *Lowery*, 2023 WL 4933917, at *7 (emphasis added). This holding came in a federal copyright case, but California fee jurisprudence governs the Court's award here. *Vizcaino*, 290 F.3d at 1047. Under California law, "it is *inappropriate* and an abuse of a trial court's discretion to *tie an attorney fee award to the amount of the prevailing buyer/plaintiff's damages or recovery*" under a fee-shifting statute like the Endless Chain Law. *Warren v. Kia Motors Am., Inc.*, 30 Cal. App. 5th 24, 37 (2018) (emphasis added). The public policy behind this rule is that, "[b]ecause the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class." *In re G.M. Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995); *see also Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995) (similar policy arises from fee-shifting provision of Fair Debt Collections Practices Act).

Because class representative Dalton Chen is the prevailing party, California law creates a presumption in favor of granting Class Counsel's lodestar-based fee. Both the option to recover premiums and the business changes have value, and together these forms of relief vindicate the rights of the Class and accomplish Class Counsel's goal in bringing suit. These benefits make Plaintiffs "prevailing plaintiffs" under the Endless Chain Law because they "succeed[ed] on any significant issue . . . which achieves some of the benefit the parties sought in bringing the suit." *Maria P. v. Riles*, 43 Cal. 3d 1281, 1292 (1987) (citation omitted); *see, e.g.*, *Hall v. Cole*, 412 U.S. 1, 8, (1973) (upholding award of attorneys' fees where the lawsuit vindicated valuable rights of union membership). For purposes of shifting fees to a prevailing party, the California Supreme Court

instructed that "an attorney fee award should ordinarily include compensation for *all* the hours reasonably spent . . . ." *Ketchum*, 24 Cal. 4th at 1133 (emphasis added); *see also Serrano v. Unruh*, 32 Cal. 3d 621, 634-35 (1982).

Applying these doctrines, California courts have rejected attempts to limit a lodestar-based fee by reference to the actual recovery in the case because "such a rule of proportionality . . . will 'make it difficult, if not impossible' for individuals with meritorious . . . claims to obtain redress from the courts." *Warren*, 30 Cal. App. 5th at 37 (citation omitted) (reversing lodestar-based fee to the extent it had been reduced in light of damages awarded); *see also, e.g.*, *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1251-52 (2014) (affirming $680,520 fee where jury awarded only $160,000); *Gong-Chun v. Aetna Inc*., 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (recognizing that "where attorneys' fees are awarded pursuant to a statutory fee-shifting provision and are not taken out of a common-fund, the proportionality of the attorneys' fees to the damages award is not the measure of reasonableness.") (citing *Vo v. Las Virgenes Mun. Water Dist.*, 79 Cal. App. 4th 440, 446 (2000) (affirming $470,000 fee award when plaintiff recovered only $37,500, as "a party who qualifies for a fee should recover for all hours reasonably spent unless special circumstances would render an award unjust.")); *see also Harman v. City & County of San Francisco*, 158 Cal. App. 4th 407 (2007) (upholding, subject to limited remand, $1.1 million fee on $30,300 in damages).

Erie and the Rules Enabling Act mandate a faithful application of the California doctrines. *See supra* Section IV.A. *Briseño* itself draws a similar distinction, openly acknowledging that "*Erie*'s effect on fee-shifting law" was "not implicated in this appeal." 998 F.3d at 1030. *See also Mangold*, 67 F.3d at 1478 ("[W]e follow other circuits that apply state law in calculating the fee" based upon *Erie* doctrine); *Chieftain Royalty*, 888 F.3d at 462-63 (Rules Enabling Act mandates that a court exercising diversity jurisdiction apply state law regarding determination of attorneys' fees).

The public policy underlying California fee jurisprudence is particularly apparent in a case like this one. This case could have settled in 2020, or 2021, when Class Counsel had invested a fraction of their total time in the case. But, as is their right, Defendants chose to test their defenses to class certification, summary judgment, and Plaintiffs' expert witness testimony. If *Lowery* is interpreted literally, however, the level of claims required scales upward as defense spending increases and the

class attorneys necessarily match those expenditures. The resulting disincentive to invest the resources needed to prevail against a determined and deep-pocketed adversary has been rejected by California courts as contrary to the public interest. *See Peak-Las Positas Partners v. Bollag*, 172 Cal. App. 4th 101, 114 (2009) ("A defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.") (quotation marks and citation omitted); *Serrano*, 32 Cal. 3d at 638 (same); *Calvo Fisher & Jacob LLP v. Lujan*, 234 Cal. App. 4th 608, 627 (2015) (rejecting challenge to fee award where the respondent's attorneys' fees were increased due to the appellant's own "aggressive" conduct). Moreover, in many cases, the economic benefits to a corporate defendant of continuing a challenged practice will far exceed the attorneys' fees at issue. Thus, the result would be to weaken class counsel's incentives to maximize recovery for the class or, more likely, impel counsel to simply avoid taking cases that are unlikely to result in creation of a common fund. *See* Keep Decl., ¶ 11 (highlighting the importance of private enforcement in curbing deceptive practices and noting that if skilled litigators "are not compensated . . . even when they hold an MLM accountable and vindicate the rights of the participants, they will stop bringing these cases and the deterrent and compensatory effect of these types of cases will be lost.").

These incentives undermine California law and public policy. *See Ketchum*, 24 Cal. 4th at 1133-34; *Serrano*, 32 Cal. 3d at 634 (California policy on attorneys' fees is designed in part to avoid a situation where litigators "become wary about taking Title VII cases, civil right cases, or other cases for which attorneys' fees are statutorily authorized."); *Lealao v. Beneficial Cal. Inc.*, 82 Cal. App. 4th 19, 47 (2000) ("Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior."); *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819, 839 (2001) (courts should be "sensitive to the need to encourage 'private attorneys general' willing to challenge injustices in our society. Adequate fee awards are perhaps the most effective means of achieving this salutary goal. Courts should not be indifferent to the realities of the legal marketplace or unduly parsimonious in the calculation").

2. *Bluetooth* and Its Progeny Involved Exceptional Circumstances Not Present Here.

The *Bluetooth* line of authority[6] should be read against the backdrop of the settlements at issue in those cases. In each case, the Court highlighted what it apparently viewed as the pretextual nature of the settlement, and the seeming effort to generate a fee payment without reference to the underlying objectives of the litigation:

- In *Bluetooth*, the plaintiffs sought damages but, instead of developing the record and moving for class certification, they settled early in the litigation and recovered nothing for class members. 654 F.3d at 939.
- In *Chambers*, the court never ruled on any substantive motion, and 96% of the claims were for coupons to buy one of the defendant's own products. 980 F.3d at 655.
- In *Briseño*, the settlement would have paid participants 15 cents for each bottle of olive oil purchased, and the defendant stopped marketing the oil as all-natural two years before the settlement. 998 F.3d at 1020, 1028.
- In *Kim*, no class was certified for trial, and the in-app perks that formed the consideration were effectively worthless because 44% of the class had already stopped using Tinder and the remaining app users already received many in-app perks. 8 F.4th at 1179.
- In *Lowery*, almost the entire class had released the claims at issue by participating in a separate settlement with a musicians' trade group. 2023 WL 4933917, at *2-3.

None of these types of concerns exist here. The life insurance sales in question involve substantial expenditures, retirement savings, and the promise of funds for critical care. Many Class members have limited proficiency in English, and many will be unfamiliar with class actions and the American legal system. The case was fully and competently litigated, and the settlement offers Class members substantial per capita recoveries, not pennies or coupons. As Plaintiffs "achieved [their] primary objective," reducing the lodestar "would impede the Legislature's intent of 'encouraging attorneys to act as private attorneys general and to vindicate important rights affecting the public interest.'" *Center for Biological Diversity v. County of San Bernardino*, 185 Cal. App. 4th 866, 897-98

[6] Cited in footnote 5 above.

(2010) (citing *Ketchum*, 24 Cal. 4th at 1133-34); *see also Serrano*, 32 Cal. 3d at 634; *Thayer*, 92 Cal. App. 4th at 839; *Lealao*, 82 Cal. App. 4th at 53 (noting that "awards that are too small can . . . chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims.").

Moreover, the right under the Endless Chain Law is not to damages but to optional rescission. *See In re Volkswagen*, 2016 WL 5793336, at *6 (finding it significant that "the recovery provided under the terms of the Settlement is consistent with the possible recovery under that statute"). Giving Class members the option to make a claim was the only realistic means of structuring a settlement given this statutory scheme and the need for some Class members to retain their policies for reasons beyond Class Counsel's control, such as changes in health, risk profile, financial decision-making, or inattention. Girard Decl., ¶ 104. There is no reason to think a win at trial would result in any greater level of participation, and further delay would likely erode Class member interests.[7] Girard Decl., ¶ 105. The Settlement eliminates any barrier to participation, and offers a notice translated into five languages; the claim form does not ask for any proof but instead asks Class members to check boxes, and, before making a claim, every Class member can go online to type in their unique ID and password listed on the notice to see an estimate of the payment they would receive for each applicable policy, along with its independent cash surrender value. Girard Decl., ¶ 106.

Those who choose to terminate their policy stand to recover an average of $4,566—much, much more than the amount made available to the class members in any of the *Bluetooth* settlements. Former policyholders who claim stand to recover an average of $1,310. Girard Decl., ¶ 107. And these recoveries are substantial in relation to the corresponding losses: after expense deductions, the formulae for these payments reduce the premiums to be returned to claiming Class members by a factor of only one-third. Girard Decl., ¶ 108. The Court correctly found that "the recovery obtained under the SA is reasonable and adequate." Dkt. No. 366 at 25-26.

[7] Consider if the parties' settlement is terminated and Class Counsel try the case and prevail, securing the same right to rescind under Section 1689.2 that the settlement currently provides. In that post-trial scenario, Class Counsel would have no more ability to control whether Class members elect to make a claim, and California law would *not* limit their fee as a prevailing party based on the total payout. *See Ketchum*, 24 Cal. 4th at 1133-34; *Warren*, 30 Cal. App. 5th at 37; *Vo*, 79 Cal. App. 4th at 446.

D. The Expense Reimbursements Should Be Approved.

"As a general rule, the prevailing party in civil litigation is entitled to recover his or her costs as a matter of right." *Scott v. City of San Diego*, 38 Cal. App. 5th 228, 234 (2019); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). Reasonable reimbursable litigation expenses include those incurred for document production and database maintenance, experts and consultants, depositions, translation services, travel, mailing and postage expenses. *See In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995); *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *remanded on other grounds*, 461 U.S. 952 (1983).

In prosecuting this case since 2019, Class Counsel have incurred $432,931.70 in litigation expenses including as part of the expert witness proceedings. Girard Decl., ¶ 130. These expenses, which are detailed in the accompanying declaration of counsel, were advanced for the benefit of the Class and were reasonably incurred and necessary to achieving the result. Girard Decl., ¶ 114. The agreed sum of $371,000 in expense reimbursements should, therefore, be approved.

E. The Court Should Grant $10,000 Service Award for the Class Representative.

Finally, Class Counsel respectfully ask that the Court approve a $10,000 service award to Plaintiff Dalton Chen. These awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (internal citation omitted). The requested award is consistent with current case law. *See, e.g.*, *Terraza v. Safeway Inc.*, No. 16-CV-03994-JST, 2021 WL 11607173, at *4 (N.D. Cal. July 19, 2021) (granting $10,000 service awards to two class representatives).[8]

As summarized in his accompanying declaration, Plaintiff Chen devoted many hours to this case over a period of several years, assisting counsel in preparing the complaint, monitoring and

[8] *See also Sypherd v. Lazy Dog Restaurants, LLC*, 2023 WL 1931319, at *6 (C.D. Cal. Feb. 10, 2023) (granting $10,000 service awards to three class representatives "for bringing and maintaining the action for three years, assisting with discovery, risking reputational injury, and conferring with counsel."); *Diaz v. Solar Turbines, Inc.*, 2022 WL 3161900, at *7 (S.D. Cal. Aug. 8, 2022) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)); *Reyes v. Experian Info. Sols., Inc.*, 2020 WL 5172713, at *5 (C.D. Cal. July 30, 2020) (noting that federal courts sitting in California "have found a service award of $15,000 per named plaintiff to be reasonable.").

communicating with counsel about case developments, responding to written discovery requests, gathering and producing documents, and preparing for and testifying at deposition twice. Chen Decl., ¶¶ 3-7. The proposed $10,000 award for Mr. Chen recognizes his dedication and commitment to the Class members in this vigorously disputed case. The requested service award is agreed to by Defendants and proportional to the range of settlement awards for individual Class members. As such, it should be approved as reasonable.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court award attorneys' fees in the amount of $6,000,000, reimbursement of litigation expenses in the amount of $371,000, and a service award of $10,000 to the Class Representative.

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Respectfully submitted,

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