UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

AXA EQUITABLE LIFE INSURANCE COMPANY COI LITIGATION

[This document relates to *Brach Family Found, Inc., et al. v. AXA Equitable Life Ins. Co.*, No. 16 Civ. 740 (JMF)]

ECF CASE

No. 1:16-cv-00740 (JMF)

DECLARATION OF SETH ARD IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Seth Ard, declare as follows:

1. I submit this declaration in support of Plaintiffs' Motion for Final Approval of the Class Action Settlement.

2. I am a partner in the law firm of Susman Godfrey L.L.P., which is counsel for Plaintiffs and the Court-appointed Class Counsel (referred to herein as "Class Counsel") in the above-captioned matter. I am a member in good standing of the bar of this Court. I have personal, first-hand knowledge of the matters set forth herein and, if called to testify, as a witness, could and would testify competently thereto.

3. Susman Godfrey has significant experience with insurance litigation and class actions, including cost of insurance ("COI") class actions and settlements thereof. Susman Godfrey has been appointed sole Class Counsel in numerous cases seeking recovery of COI overcharges against insurers, including cases involving Phoenix Life Insurance Company, Security Life of Denver Insurance Company, Voya Retirement Insurance and Annuity Company, Lincoln Life & Annuity Company of New York, ReliaStar Life Insurance Company, John Hancock Life Insurance Company (U.S.A.), North American Company for Life and Health Insurance, and PHL Variable Insurance Company.[1] A copy of the firm's profile in such cases, and the profiles of myself and my fellow Class Counsel, are attached hereto as **Exhibit 1**.

4. My firm's results in such cases have been lauded by federal judges as "superb," *Fleisher v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405 (S.D.N.Y. Sep. 24, 2015), Dkt. 319 at 3:9-11,

[1] The following is a non-exhaustive list of COI cases in which Susman Godfrey has been found to be "adequate" class counsel: *Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 12224042, at *12 (S.D.N.Y. July 12, 2013); *Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y.*, 2022 WL 986071, at *5 (S.D.N.Y. Mar. 31, 2022); *Advance Tr. & Life Escrow Servs., LTA v. Sec. Life of Denver Ins. Co.*, 2021 WL 62339, at *9 (D. Colo. Jan. 6, 2021); *Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374, 387 (S.D.N.Y. 2019); *Advance Tr. & Life Escrow Servs., LTA v. ReliaStar Life Ins. Co.*, 2022 WL 911739, at *11 (D. Minn. Mar. 29, 2022); *Advance Tr. & Life Escrow Servs., LTA v. N. Am. Co. for Life & Health Ins.*, 592 F.Supp. 3d 790, 809-10 (S.D. Iowa 2022); and *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15 Civ. 9924 (S.D.N.Y. Nov. 1, 2018), Dkt. 139 ¶¶ 7-8.

"the best settlement pound for pound for the class I've ever seen," *id.*, and "quite extraordinary," *37 Besen Parkway, LLC v. John Hancock Life Insurance Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:08-10 (S.D.N.Y. Mar. 18, 2019). I also closely follow other class actions involving life insurance, particularly COI class actions. I am thus intimately familiar with the terms of settlement in these types of cases, how to evaluate the relative strengths and weaknesses in such cases, and what a successful result looks like.

5. The Court preliminarily approved the settlement in this action on June 22, 2023. Dkt. 705.

6. This case was originally filed over seven (7) years ago on February 1, 2016. Fact discovery lasted until April 5, 2019, with supplemental discovery obligations under Federal Rule of Civil Procedure 26(e) continuing thereafter. Plaintiffs and their experts analyzed over 750,000 pages of documents, which included extensive actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all Class Members' policies, and thousands of spreadsheets. In total, Plaintiffs issued 71 requests for production, 58 interrogatories, and 311 requests for admission. Plaintiffs engaged in myriad rounds of meet and confers with respect to these discovery requests, including extended negotiations over search terms, custodians, and other issues.

7. AXA did not respond to many key discovery requests without a fight and the meet and confer processes were extensive. To facilitate the meet and confer process, Class Counsel proposed an innovative procedure, which the Court adopted, where the parties would provide monthly status reports to the Court exhaustively describing the status of all discovery discussions and disputes the parties were having, whether ripe for Court review or not, and to flag for the Court the issues that were ripe for resolution by the Court. This procedure was an enormous undertaking,

but also highly successful. The parties filed 32 letters with the court pertaining to discovery issues, with over 900 pages of attachments. Plaintiffs' diligence was rewarded as during the discovery process, Plaintiffs uncovered key documents on liability issues, including contemporaneous emails between AXA personnel that Plaintiffs used to challenge the COI Increase. One of the hottest documents was an email describing AXA's decision to alter its mortality assumptions for the group impacted by the COI increase because, in the words of an AXA actuary describing the motivations of the architect of the COI increase (Dominique Baede), that was the group of policies that Mr. Baede "wants to hit." Dkt. 492-21. This document—which was so hot that Mr. Baede lapsed into silence for several minutes when questioned about it by Class Counsel at his deposition—was not even produced in AXA's initial document production nor captured by AXA's search terms. The document was produced on June 17, 2018. The document came to light only after Class Counsel pressed for broader search terms and additional documents. Class Counsel also fought hard to obtain APL programming code with the archaic and complicated modeling that AXA used to devise its mortality assumptions.

8. Plaintiffs also issued 26 subpoenas to relevant third parties, including AXA's actuarial consultants, financial advisors and reinsurers. Plaintiffs obtained thousands of pages of valuable documents from these subpoenas, much of which had not already been produced by AXA. For example, Plaintiffs' subpoena of reinsurer Canada Life brought to light an AXA executive's phone call admitting that the COI increase was designed to "***target minimally funded UL*** at higher issue ages and larger amounts." Dkt. 495 at 83-84. After issuing a subpoena and filing a motion to compel, Plaintiffs also secured access to Milliman's MG-ALFA actuarial software and their experts attended multi-day training sessions from Milliman in order to use and understand the software. Securing access to and becoming proficient with MG-ALFA was critical as this software

was used by AXA to model the COI Increase and was essential to allow Plaintiffs' experts to opine on the impropriety of the COI Increase.

9. Plaintiffs took and defended 28 highly technical fact depositions (some of which took place over two days). Plaintiffs issued a detailed Rule 30(b)(6) deposition notice containing over 100 topics including sub-topics. AXA designated multiple individuals to testify on behalf of AXA in response to Plaintiffs' Rule 30(b)(6) notice. Through these depositions, Plaintiffs obtained key admissions that they deployed to overcome summary judgment.

10. AXA issued 53 requests for production, 45 interrogatories, and 66 requests for admission to Plaintiffs. In response, Plaintiffs and Class Counsel worked together to collect responsive documents. Class Counsel reviewed and produced over 5,000 pages of documents. Class Counsel and Plaintiffs also spent several hours and engaged in multiple conferences to answer to 45 interrogatories and 66 requests for admissions directed to Plaintiffs. In addition to the written discovery, AXA also deposed each of the Plaintiffs. The Class Representatives, together with Class Counsel, spent many hours over multiple days preparing for their depositions. Zigmond Brach on behalf of the Brach Family Trust was deposed for nearly five hours and Al Dyer on behalf of the Currie Children Trust was deposed for nearly six hours. While not Class Representatives, Malcolm Currie, the elderly insured under the Currie Children Trust Policy, and his wife Barbara Currie, were both deposed as well. Plaintiffs have stayed actively involved throughout this case, communicating regularly with Class Counsel about case status, discovery, and settlement.

11. Plaintiffs produced expert reports from the following 3 opening experts: actuarial expert Jeremy Brown, liability expert James Rouse, and damages expert Robert Mills. Plaintiffs produced opening expert reports from Rouse, Brown, and Mills on May 17, 2019. In response,

AXA designated actuarial expert Timothy Pfeifer, regulatory experts Mary Jo Hudson and Howard Mills, and economist Glenn Hubbard. AXA produced reports from its experts on July 15, 2019. In rebuttal, on September 25, 2019, Plaintiffs produced reports from Rouse, Brown and Mills, as well as Deborah Senn and Jeffrey Angelo – two regulatory experts engaged to rebut the opinions of AXA experts Hudson and Mills. Collectively, Plaintiffs' experts produced eight expert reports that totaled 488 pages, with over 5,350 pages of exhibits and appendices. Collectively, the parties produced 12 expert reports that totaled 893 pages, with over 5,633 pages of exhibits and appendices. Class Counsel also retained several consulting experts, who provided invaluable assistance to Plaintiffs and the Class. Plaintiffs' experts spent 3,475.34 hours conducting their essential work in this case.

12. Plaintiffs' experts engaged in extensive analyses of AXA's models, data and documents produced in the Action. This work included learning and reviewing the decades-old actuarial models AXA used to price AUL II policies which were all in a defunct programming language called APL and undertaking the laborious task of learning APL. As a result of this work, Plaintiffs' experts discovered a critical discrepancy in AXA's mortality assumptions and quantified the magnitude of AXA's unreasonable assumptions underlying the COI Increase. *See* Dkts. 457-44 (Rouse Rept.) ¶¶ 52-69. This error was so significant that AXA had to confess to NYDFS that it made a critical error in analyzing the COI increase.

13. In developing Plaintiffs' damages model, Plaintiffs' damages expert had to process and analyze detailed historical policyholder data. To even process the data required dozens of hours of analysis and the issuance of highly technical data topics to AXA as part of Plaintiffs' Federal Rule of Civil Procedure 30(b)(6) notice. These questions were so complex that AXA chose to answer many of them in written form.

14. Class Counsel worked closely with their experts in the preparation of the initial and rebuttal reports. This work included collecting and reviewing large volumes of relevant documents and data to assist in the experts' work and numerous conferences to discuss and analyze the challenged COI Increase as well as the underlying modeling in MG ALFA and APL programming. Class Counsel and their experts also spent significant time conferring together in preparation for the numerous depositions of fact witnesses who were actuaries or performed actuarial and financial analysis.

15. All nine experts were deposed. The opinions offered by the experts in this case were complex and factually intensive. Class Counsel spent significant time preparing for the depositions of AXA's experts, including conferring with Plaintiffs' experts to gain an in-depth understanding of AXA's experts' opinions, including the underlying reasoning and methodologies. In addition, Class counsel spent significant time preparing all five of Plaintiffs' experts for their depositions, including reviewing the extensive reports and anticipating multiple areas of attack by AXA's counsel.

16. Plaintiffs engaged in extensive motion practice in this Action and defeated multiple attempts by AXA to summarily dismiss the case. The court adjudicated in Plaintiffs' favor two separate Rule 12(b)(6) motions and, later, a motion for reconsideration of the court's denial of AXA's motion to dismiss plaintiff's claim under New York Insurance Law § 4226. Dkts. 63, 135, 261. Plaintiffs also defeated a motion for MDL consolidation.

17. On May 17, 2019, Plaintiffs filed their motion for class certification, which included 25-page brief supported by 48 exhibits totaling over 3,700 pages. Dkts. 352-353, 357. On July 15, 2019, AXA opposed Plaintiffs' motion, filing a 39-page opposition brief, supported by 252 exhibits. Dkts. 364, 369. On September 25, 2019, Plaintiffs filed their reply in support of class

certification, including a 25-page brief supported by 20 exhibits totaling over 200 pages. Dkts. 376-377. AXA submitted a 12-page sur-reply brief in opposition to Plaintiffs' motion for class certification on November 1, 2019. Dkt. 386. On July 13, 2020, the Court *sua sponte* issued an order requesting that the parties file briefs addressing 5 issues relating to claims-splitting. Dkt. 398. On July 27, 2020, both parties filed 20-page briefs addressing the issues outline by the Court. Dkts. 400-401. Collectively, with respect to class certification, Class Counsel prepared and filed 70 pages of briefing supported by 68 exhibits totaling over 3,900 pages.

18. On August 13, 2020, after over 140 pages of briefing by the parties (and over 11,000 pages of exhibits), the Court certified a nationwide Policy-Based Claims Class, a nationwide Illustration-Based Claims Class, and a New York Illustration-Based Claims Sub-Class. Dkt. 403 at 3, 18, 34 & 36. The Policy-Based Claims Class included "all individuals who, on or after March 8, 2016, owned AUL II policies that were issued by AXA and subjected to the COI rate increase announced by AXA on or about October 1, 2015, as well as those residents' heirs, successors, or assigns." Dkt. 403 at 18. The Illustration-Based Claims Class included "all individuals who, on or after March 8, 2016, owned an AUL II policy unaccompanied by a Lapse Protection Rider that was issued by AXA and subjected to the COI rate increase announced by AXA on or about October 1, 2015." *Id*. at 34. The New York Illustration-Based Claims Sub-Class included "all members of the Illustration-Based Claims Class who reside in New York." *Id*. at 36. The classes and sub-class excluded "defendant AXA, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing, and the plaintiffs in the Related Actions." *Id*. at 3, 18, 34. The Court declined to certify California subclasses for policy-based and illustration-based claims brought under California's Unfair Competition Law, as well as policy-based claims under California's Elder Abuse Law. *Id.* at 21-22.

19. Following class certification, the Court approved Class Counsel's proposed notice plan and appointed JND Legal Administration LLC ("JND") as the Notice Administrator. Dkt. 447 at 5. Class Members were given notice by first-class mail and were given a 90-day window in which to opt out. Dkt. 449 ¶¶ 4-7; Dkt. 434 at 1. JND also set up a website with information in a long form notice, as well as a toll-free number that Class Members could call. Dkt. 449 ¶¶ 9, 11. JND received 475 requests from Class Members to opt out of the class during the opt-out period. It is my opinion that JND adequately discharged its duties in its role as the Notice Administrator.

20. After the court certified the class, AXA filed a Rule 23(f) petition in the United States Court of Appeals for the Second Circuit, which Plaintiffs opposed. The United States Chamber of Commerce and The Life Insurance Council of New submitted amicus briefs in support of AXA for the Rule 23(f) petition. *See* Case No. 20-2848 (2d Cir.), Dkt. 23-2 & 24. The Second Circuit agreed with Plaintiffs and denied the petition.

21. On January 21, 2021, AXA moved for summary judgment on all claims brought by Plaintiffs. Dkt. 456. AXA supported its motion with a 58-page brief and 113 exhibits. Dkts. 457, 463. On March 22, 2021, Plaintiffs filed their 60-page opposition brief and 111-page factual counterstatement to AXA's motion for summary judgment along with 105 exhibits totaling over 2,400 pages. Dkts. 492, 495, 499. On May 21, 2021, AXA filed its 45-page reply in support of summary judgment supported by 24 exhibits. Dkts. 551, 557. On June 23, 2021, Plaintiffs filed a 15-page sur-reply in opposition to AXA's motion for summary judgment along with 11 exhibits totaling 265 pages. Dkts. 579, 580. Collectively, in opposing AXA's motion for summary judgment, Class Counsel prepared and filed 186 pages of briefing supported by 116 exhibits.

22. By Court order, Class Counsel was required to coordinate with multiple opt-out plaintiffs to brief the *Daubert* motions. Dkt. 396. Class Counsel took the lead on the key

substantive issues. On February 21, 2021, AXA filed a *Daubert* motion to preclude certain opinions of Plaintiffs' experts supported by a 69-page brief and 52 exhibits. Dkt. 479, 481, 482. On May 27, 2021, Plaintiffs filed opposition to AXA's *Daubert* motion, including 90 pages of briefing and 15 exhibits totaling over 400 pages. Dkts. 522, 528. On June 14, 2021, AXA filed its 49-page reply supported by 20 exhibits. Dkts. 561, 562. Plaintiffs also filed a motion to preclude certain opinions of AXA's experts, including submitting 60 pages of briefing and 34 exhibits totaling hundreds of pages. Dkts. 524, 532, 534, 587, 588. Collectively, with respect to the cross-*Daubert* motions, Class Counsel prepared and filed 150 pages of briefing supported by 49 exhibits.

23. After full briefing by the parties on the summary judgment and *Daubert* motions, encompassing over 550 pages of briefing (and nearly 8,000 pages of exhibits), the Court denied AXA's motion for summary judgment against the Plaintiffs on all but two grounds. Dkt. 596 at 3-4. The two exceptions were that the Court concluded that registered owners in the Illustration-Based Class who purchased policies after the COI Increase did not have a claim and that policyholders who sold their policies prior to the COI Increase could not pursue their claims under New York Insurance Law Section 4226. *Id*. at 41, 56. The Court further denied AXA's motion to exclude portions of Plaintiffs' experts' opinions. *Id*. at 84-85.

24. AXA moved the Court to reconsider its finding that Wells Fargo, a securities intermediary, had standing to pursue its illustration-based claims. On reconsideration, the Court agreed that Wells Fargo and by implication other securities intermediaries did not have standing to pursue illustration-based claims. Dkt. 632 at 12. Because a large portion of the policies in the Illustration-Based Claims Class and the New York Illustration-Based Subclass were held by securities intermediaries, AXA moved to decertify these classes. In response, Plaintiffs argued that the class definitions should be modified to substitute the underlying entitlement holders for the

registered owners who are securities intermediaries. AXA argued that at least because some of the entitlement holders lacked standing, the class must be decertified under *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021). The Court rejected AXA's argument, holding:

> Thus, *TransUnion* did not alter the well-established law in this Circuit — reaffirmed by the Court of Appeals only a few months ago — that standing in a class action "is satisfied so long as at least one named plaintiff can demonstrate the requisite injury," *Hyland v. Navient Corp.*, 48 F.4th 110, 117 (2d Cir. 2022), and that "each member of a class" need not "submit evidence of personal standing" to certify a class that meets Rule 23's requirements . . . .

Dkt. 667 at 2. Ruling in favor of Plaintiffs, the Court denied AXA's motion for decertification and modified the Nationwide Illustration-Based Claims Class as follows:

> All individuals who, on or after March 8, 2016, are or were registered owners of an AUL II policy unaccompanied by a Lapse Protection Rider that was issued by AXA after July 10, 2006 and subjected to the COI rate increase announced by AXA on or about October 1, 2015, unless the registered owner of such policy is a securities intermediary, in which case the securities intermediary is not a class member but the entitlement holder with respect to that policy is. This excludes individuals who purchased their policies after the COI rate increase was announced, and defendant AXA, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing, and the plaintiffs in the Related Actions.

Id. at 7.

25. Plaintiffs served subpoenas on the relevant registered-owner securities intermediaries to collect identity and contact information for the Substituted Illustration Class Members. In response, Class Counsel received identity and contact information of entitlement holders for nearly all policies owned by Substituted Illustration Class Members**.**

26. Class Counsel also prepared for and conducted a full-day mock trial in New York on August 8, 2022. The mock trial was administered by a nationally renowned trial consultant using thirty-two mock jurors from the local community divided into three juror panels. The mock trial required weeks of preparation, including the creation of extensive multimedia presentations.

Class Counsel utilized the information it learned during the mock trial as part of settlement assessments and to drill down on the core issues and mitigate concerns for trial during its pretrial preparation, including the deposition designations, witness lists, and exhibit lists, as well as impending motions *in limine*.

27. The Court set a trial date for October 30, 2023, and the parties began trial preparation. On May 12, 2023, the parties exchanged witness lists and deposition designations. Plaintiffs had prepared their exhibit list and were planning to exchange exhibit lists with AXA when the parties reached this settlement.

28. Plaintiffs' expert Robert Mills developed a damage model for trial, but there was the risk that the jury, even if it found breach, would not award any damages, or only minimal damages. Through March 2023, the date of AXA's pre-mediation refresh of damages data, Class Members nationally paid approximately $399 million more than they would have had the 2015 COI increase not been implemented, under Plaintiffs' maximum damages theory and if liability were found.

29. The Settlement Agreement, Dkt. 701-2, is the result of four rounds of settlement discussions and negotiations over a period of nearly four years, including three in-person and one remote, all-day mediation sessions and numerous telephone and email exchanges. As part of the mediation process, the parties submitted position statements, briefing on critical issues, and updated damages estimates for the case. The parties were unable to reach agreement at any of the four mediation sessions. After the most recent mediation session on May 7, 2023, the parties continued to negotiate with the assistance of the mediator, and a little over one week later, on May 16, 2023, reached a memorandum of understanding for a settlement and promptly informed the Court of the development. A long form settlement agreement was fully executed on June 12, 2023.

30. Throughout the life of the case, the parties exchanged numerous settlement offers and counteroffers and engaged in several mediations, led by Hon. Layn Phillips (retired U.S. District Judge for the Western District of Oklahoma) and David Murphy. The parties' sharply different views about virtually all issues, including class certification, merits, damages, and what could be argued to the jury, however, made it extremely difficult to reach any agreement, or even come close to one.

31. As detailed above, Class Counsel was very well informed of all material facts. This case had long advanced past class certification and summary judgment; full expert reports had been completed and trial preparation had begun. Throughout this case, Class Counsel took steps to ensure that we had all the necessary information to advocate for a fair, adequate, and reasonable settlement that serves the best interests of the Class. The settlement negotiations were hard fought and non-collusive. It is my unequivocal opinion that the Settlement is fair, adequate, and reasonable, and reflects a tremendous result for the Class, particularly given the risks faced at trial. This risk of a lower-than-expected recovery is aptly illustrated in a recent COI class action trial in *Meek v. Kansas City Life Insurance Co.*, No. 19-CV-472 (W.D. Mo.), where the class sought $18 million in damages. Despite prevailing on liability, and having had a class certified in the case, that class ultimately recovered less than six percent of the alleged overcharges after the jury awarded just $5 million, which was further reduced to just $900,000 after the court granted partial decertification post-trial. *See Meek* 4/28/2023 Tr. At 69:9-16 (a true and correct copy attached as **Exhibit 2**); *Meek* Dkt. 311 (verdict form) (a true and correct copy attached as **Exhibit 3**); *Meek* Dkt. 329 (Order (1) Granting Defendant's Motion to Partially Decertify Class, (2) Dismissing Count V Without Prejudice, and (3) Directing that Judgment be Entered) (a true and correct copy attached as **Exhibit 4**).

32. The principal terms of the settlement are as follows:

- **CASH:** A cash Settlement Fund of up to **$307,500,000.00**, which is equal to **77%** of all COI overcharges collected by AXA from the Class Policies through March 31, 2023. For any Substituted Illustration Class Member that opts out, the Settlement Fund is reduced by the *pro rata* share of the maximum Settlement Fund (*i.e.,* $307,500,000) attributable to the Illustration Class damages for the policy or policies owned by that Substituted Illustration Class Member.

- **CLASS RATE INCREASE FREEZE:** A total and complete freeze on any new COI rate schedule increase for a period of seven years following the date the parties accepted the mediator's proposal. Thus, even if AXA experiences a future change in expectations that would otherwise permit a COI rate increase under the terms of the policies, AXA will not increase COI rates for seven years. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for a substantial period of time.

- **VALIDITY CLAUSE:** AXA has agreed not to challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of STOLI, or lack of an insurable interest, or misrepresentations in the application for such policies.

33. The cash portion of the Settlement alone is, in Class Counsel's view, exceptional: It represents over 77% of Plaintiffs' total alleged past COI overcharges and assumes liability is found.

34. The non-monetary benefits provide additional, real value to the Class. The COI Rate Increase Freeze ensures that the Class is protected against any new rate action until seven years following the date the parties accepted the mediator's proposal at the earliest (over 14 years after the last increase), at a time when other insurers continue to impose new COI increases. The Validity Clause prevents AXA from nullifying the benefits provided in this settlement by challenging the validity of any Class Policy on STOLI grounds. Plaintiff's financial COI increase modeling expert (Mr. Rouse), who has deep expertise in longevity markets, values the non-monetary relief at approximately $167.5 million. The total gross settlement value, combining the nonmonetary and monetary benefits, is $475 million.

35. The Releases are also equitable, as they treat all Class Members equally and do not affect apportionment of damages.

36. Under the Settlement, Substituted Illustration Class Members have the right to opt-out. For any Substituted Illustration Class Member that timely and validly opts out during the Federal Rule of Civil Procedure 23(e)(4) period, the Settlement Fund decreases on a *pro-rata* basis measured by the incremental COI charges collected by AXA from May 8, 2016 through March 31, 2023 (the "Final Settlement Fund"). The deadline for filing opt-outs is August 28, 2023. No opt-out requests have been submitted. The deadline for filing any objections to the Settlement, including Class Counsel's fee, is August 28, 2023. No objections have been submitted.

37. Class Counsel proposed a plan of allocation developed in conjunction with Plaintiffs' expert Robert Mills who has significant experience developing such plans for COI litigation. This distribution plan treats all Final Class Members equitably because it distributes settlement proceeds on a *pro rata* basis using each Final Class Member's share of overcharges for both the Nationwide Illustration-Based Claims Class and/or Illustration-Based Claims Sub-Class, as applicable for each policy. The COI overcharges represent the difference between the COI charges AXA actually assessed on the policy after implementation of the COI increase through March 31, 2023 and the amount it would have assessed but for the COI rate increase. The checks will be mailed directly to Final Class Members, using the addresses in AXA's files and, in the case of substituted entitlement holders, the files of registered securities intermediaries, with no need to fill out claims forms, and with no possibility of reversion to AXA. For Contract Class Members, checks will be sent to the registered owner that AXA maintains on file as of the date the Settlement is approved. For Illustration Class Members, the check will be sent to the

owner (either registered owner or entitlement holder, as applicable) of the relevant policy as of October 1, 2015, as reflected in AXA's records or, for entitlement holders, the records of securities intermediaries.

38. There are a total of 945 policies in the Classes. Assuming the requested attorneys' fees ($101,076,853), costs ($4,269,440), and incentive awards ($200,000) are awarded, the Net Settlement Fund is $201,953,706. The average cash payment per policy is over $213,000 if all amounts requested herein are approved, meaning that this the average cash payment from the cash fund net of fees, expenses, and service awards.

39. In Class Counsel's experience, this is an outstanding recovery, particularly given the complexity of COI cases, the conflicting expert testimony on technical actuarial issues that a jury would be required to weigh, and the inherent uncertainties of litigation.

40. Susman Godfrey frequently takes high-stakes non-class commercial cases on a contingent fee basis (e.g., patent, legal malpractice, antitrust, etc.). In cases like this one where the firm is advancing expenses, the firm typically negotiates contingent fee arrangements in such cases, where the firm advances expenses, starting at 40% of the gross sum recovered, with increases to 45% and 50% of the gross sum recovered by a settlement that is agreed upon, or other resolution that occurs, after the 60th day preceding any trial, plus reimbursement of expenses. Sophisticated parties and institutions have agreed to these standard market terms. The requested fee here of 21.5% of the settlement benefit, or 1/3 of the cash component viewed in isolation, net of expenses, is substantially *less* than what Susman Godfrey would receive under its standard contingency agreement entered into in a competitive market.

41. Unlike many firms on the class action side, Susman Godfrey represents plaintiffs and defendants; when entering into result-based fee deals, Susman Godfrey strives for a

substantial return on its investment in time and expenses to compensate for risks and opportunity costs, including the opportunity to work on hourly billing work that provides a steady income stream. As is common in the industry, Susman Godfrey's contingency percentages are traditionally based on the gross amount recovered and provide for the recoupment of any advanced expenses as well.

42. The schedule below is a summary reflecting the amount of time spent by the attorneys and professional support staff of Susman Godfrey who were involved in this litigation, and the lodestar calculation using 2023 billing rates or equivalent 2023 billing rates for an attorney or paralegal who left the firm prior to 2023. The following schedule was prepared from daily time records regularly prepared and maintained by Susman Godfrey, which are available at the request of the Court. Time expended in preparing Class Counsel's application for fees and reimbursement of expenses are excluded and not reflected below. Hours worked by summer associates and a small number of attorneys and staff who provided occasional "spot project" support at various points in the case also have been excluded and are not reflected below.

Attorneys	Current Rate	Hours	Value
Adimora, Brenda (Staff Attorney)	$400.00	24.60	$9,840.00
Ard, Seth (Partner)	$1,200.00	2,217.10	$2,660,520.00
Bridgman, Glenn (Partner/Associate)[2]	$800.00	2,650.60	$2,120,480.00
Bundy, Daniel (Staff Attorney)	$350.00	142.00	$49,700.00
El-Hakam, Moustapha B. (Staff Attorney)	$475.00	78.90	$37,477.50
Fenwick, Samantha (Staff Attorney)	$400.00	2,758.10	$1,103,240.00
Hartfiel, Lauren (Staff Attorney)	$400.00	152.10	$60,840.00
Josephs, Halley (Partner/Associate)[3]	$800.00	1,377.30	$1,101,840.00
Kaminsky, Alex (Staff Attorney)	$400.00	27.50	$11,000.00
Kirkpatrick, Ryan C. (Partner)	$1,000.00	111.40	$111,400.00
Lewis, Frances (Associate)	$800.00	74.80	$59,840.00

[2] Mr. Bridgman spent time on this case as a partner and as an associate; he worked on the case starting in December 2015 and was promoted to partner in January 2022.
[3] Ms. Josephs spent time on this case as a partner and as an associate; she worked on the case starting in May 2018 and was promoted to partner in January 2023.

Attorneys	Current Rate	Hours	Value
Musico, Mark (Partner/Associate)[4]	$800.00	1,859.20	$1,487,360.00
Nath, Rohit (Partner/Associate)[5]	$800.00	7,003.70	$5,602,960.00
Page, Kim (Of Counsel)	$800.00	47.70	$38,160.00
Sklaver, Steven G. (Partner)	$1,300.00	2,168.70	$2,819,310.00
Zerda, Jeffrey (Staff Attorney)	$400.00	95.30	$38,120.00
Paralegals	**Current Rate**	**Hours**	**Value**
Abalos, Jianna	$325.00	59.80	$19,435.00
Bruns, Mandi R.	$175.00	21.20	$3,710.00
Gheen, Kate	$350.00	1,397.90	$489,265.00
Marron, Sara	$325.00	82.70	$26,877.50
Tan, Joel	$400.00	42.10	$16,840.00
		22,392.70	**$17,868,215.00**

43. The total number of hours expended on this litigation by attorneys and paralegals is 22,392.70 hours through August 11, 2023. The total lodestar value, derived by multiplying each professional's hours by his or her current hourly rate, is $17,868,215 through August 11, 2023. All time spent litigating this matter was reasonably necessary and appropriate to prosecute the action, and the results achieved further confirm that the time spent on the case was proportionate to the amounts at stake.

44. The hourly rates for Susman Godfrey's attorneys and professional support staff are the firm's standard hourly rates. The hourly rates of Class Counsel's attorneys range from $350 to $1,300 and the hourly rates of paralegals range from $175 to $400.

45. In a nationwide survey of AmLaw 50 law firms performed by PwC Product Sales, LLC and issued in June 2022, the median standard billing rate for equity partners was $1,374, the 1st quartile standard billing rate was $1,531, and the 3rd quartile standard billing rate was $1,248.

[4] Mr. Musico spent time on this case as a partner and as an associate; he worked on the case starting in October 2016 and was promoted to partner in January 2020.
[5] Mr. Nath spent time on this case as a partner and as an associate; he worked on the case starting in April 2016 and was promoted to partner in January 2023.

Here, four of the six SG partners (all of whom are based in New York or Los Angeles) working on this matter have billing rates of $800—below the median standard billing rate for *associates*.[6] All of them bill at rates below the 2022 median standard billing rate for equity partners.

46. The same survey stated that the median standard billing rate for associates was $895, the 1st quartile standard billing rate was $944, and the 3rd quartile standard billing rate was $779. The billing rates of all the associates who have worked on this case are below the 2022 median standard billing rate for associates.

47. Based on the reported lodestar of $17,868,215, the requested award of $101,076,853 yields a multiplier of 5.66. That multiplier will only decrease as Susman Godfrey invests additional attorney time into preparing to move for final approval, managing Class Member inquiries about the settlement, and administering the Settlement if it obtains final approval from the Court.

48. As detailed and categorized in the below schedule, Susman Godfrey has advanced a total of $4,136,203.53 in un-reimbursed expenses in connection with the prosecution of this litigation. These expenses were reasonably necessary to the prosecution of this action and are of the type that Susman Godfrey normally incurs in litigation.

Expense Category	Amount
Deposition Expenses/Witness Fees/Client Charges	$111,963.56
Document Review Hardware/Hosting	$360,475.02
Expert/Consultants	$3,141,114.64
Filing/Service/Court Reporter Fees/Transcripts	$58,401.18
Mediation Fees and Expenses	$126,622.50
Mock Trial Expenses	$3,653.75
Photocopies/Reproduction/Messenger Services/Postage	$54,337.04
Research Expenses	$114,287.62
Secretarial Overtime	$3,325.50

[6] All four of those partners—Mark Musico, Glenn Bridgman, Rohit Nath, and Halley Josephs—were associates when this case began, and have continued working on the matter since their respective promotions to partner. Their current rates are still under the median standard billing rate for associates.

Telephone/Postage	$795.80
Travel/Meals/Hotels/Transportation	$161,226.92
	$4,136,203.53

49. The amount of expenses incurred by Settlement Administrator JND Legal Administration LL is $133,236.75 through July 31, 2023. This includes $93,871.59 in connection with the 2021 class notice, and $39,365.16 in expenses in connection with settlement administration, including the 2023 supplemental class notice. Class Counsel seeks continued permission to reimburse the foregoing Settlement Administration Expenses pursuant to Section 7.5 of the Settlement Agreement, and the Court's Preliminary Approval Order, Dkt. 705 ¶ 5, and such additional expenses as may be incurred by the Settlement Administrator.

50. The Classes consist of several sophisticated investors, high-net worth individuals, and other entities. By AXA's estimates, more than two thirds of the policies in the Classes are life insurance investors who purchased their policies on the secondary market. Dkt. 364 at 2. These investors include private equity firms and asset managers with over $1 billion in assets under management, a major investment bank, and a number of other sophisticated trusts and financial institutions. Even the non-investor Class Members are largely sophisticated. Among them are: a Fortune 500 food and beverage company, an international automotive parts distributor, a privately-held manufacturer with hundreds of employees, a billionaire owner of a professional sports franchise, and many other wealthy individuals, families, and corporations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: September 11, 2023

/s/ Seth Ard
Seth Ard

EXHIBIT 1

Insurance

Susman Godfrey has a long history of litigating and winning significant insurance matters on both sides of the "v." For plaintiffs, this includes representing insureds, policy owners, and businesses in national class actions, life insurance disputes and business interruption matters against some of the nation's largest insurers. For the insurance industry, this includes defending companies such as ACE Limited and ACE Bermuda (now Chubb), Equitas, and the members of the London Insurance Market against millions of dollars of potential exposure when litigation arises.

Insurance Class Actions

- ***Leonard et al. v. John Hancock Life Insurance Co. of New York et al.*** Secured a settlement valued at $143 million, before fees and expenses, including a cash fund of over $93 million and an agreement by John Hancock Life Insurance Company not to impose a higher cost of insurance rate scale for 5 years (even in the face of a worldwide pandemic), on behalf of a class of approximately 1,200 policyholders who alleged that Hancock breached the terms of their respective life insurance policies and overcharged them for life insurance. When granting final approval, the Court held that the settlement provided an "absolutely extraordinary" recovery rate for the class, and lauded Susman Godfrey's "extraordinary work."
- ***Helen Hanks v. Voya Retirement Insurance and Annuity Company.*** Negotiated settlement worth $118 million, before fees and expenses, including a cash fund of over $92 million and an agreement by Voya not to impose a higher rate scale for 5 years, on behalf of a certified class of 46,000+ policyholders over allegations that Voya improperly raised cost-of-insurance charges. Over the course of litigation, the team from Susman Godfrey secured certification of the nationwide class and defeated summary judgment. The Court recognized the quality of the work, stating: "I want to commend you all for the work done on the pretrial order and motions in limine . . . I'm very happy to have you as lawyers appearing before me."
- ***37 Bensen Parkway v. John Hancock Life Insurance Company.*** Secured a $91.25 million settlement all-cash, non-reversionary settlement (before fees and expenses) for insurance policy owners against John Hancock Life Insurance Company. The Honorable Paul Gardephe described the settlement as a "quite extraordinary . . . result achieved on behalf of the class."
- ***Fleisher v. Phoenix Life Insurance.*** Served as lead counsel to plaintiffs in a case that challenged Phoenix Life Insurance Company's and PHL Variable Insurance Company's decision to raise the cost of insurance ("COI") nationwide on life insurance policy owners. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final pretrial conference—less than two months before trial with terms that included: a $48.5 million cash fund ($34 million after fees and expenses), a COI freeze through 2020, and a covenant by Phoenix not to challenge the policies, worth $9 billion in face value, when the policies mature on the grounds of lack of insurable interest or misrepresentations in the application. At the final approval hearing, the Court concluded: "I want to say publicly that I think this is an excellent settlement. I think this

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is a superb—this may be the best settlement pound for pound for the class that I've ever seen."

- ***Brach Family Foundation et al. v. AXA Equitable Life Insurance.*** Serving as lead counsel in a case challenging AXA's decision to raise cost of insurance rates on life insurance policies nationwide, and alleging that AXA made misrepresentations to policyholders in its insurance illustrations leading up to the cost of insurance increase. The Court certified two nationwide classes, one for policy-based claims and one for misrepresentation-based claims.
- ***Hanks et al. v. The Lincoln Life & Annuity Company of New York, et al.*** Serving as lead counsel in a case challenging Voya Life Insurance Company's decision to raise cost of insurance rates on life insurance policies nationwide. The Court certified a nationwide breach of contract class.
- ***In re Lincoln National COI Litigation.*** Serving as co-interim-lead counsel in two cases challenging Lincoln National's decision to raise cost of insurance rates nationwide.
- ***Brighton Trustees et al. v. Genworth Life and Annuity Insurance Company.*** Serving as interim lead class counsel in a case challenging Genworth's decision to raise cost of insurance rates nationwide.
- ***AvMed Inc. et al. v. BrownGreer, US Bancorp, and John Does.*** Represented a group of more than forty health plans (who between them comprise more than 70% of the US market for private health insurance) asserting healthcare reimbursement liens against claimants to the $4.85 billion Vioxx compensation fund. Susman Godfrey reached a groundbreaking settlement with the Vioxx Plaintiffs' Steering Committee, guaranteeing them certain payouts on their liens covering participating plaintiffs. *American Lawyer* magazine featured this settlement in the "Big Suits" column at the time of this decision

Life Insurance

- ***The Lincoln Life and Annuity Company of New York v. Berck;*** and ***Berck v. The Lincoln Life and Annuity Company of New York.*** Won a reversal in a $20 million life settlement rescission lawsuit against Lincoln Life & Annuity Company of New York as trial and appellate counsel for a group of investors. Lincoln's lawsuit was based on allegations that the insurance policies lacked an insurable interest because they were procured by third-parties for investment purposes and because there was net worth and other misrepresentations in the applications. The appellate court ordered that the trial court enter judgment in favor of the trust affirmed the trial court victory that Lincoln's fraud claim was time barred because the policies were incontestable. The $20 million policy matured before the trial court entered judgment in favor of the policy owner. We then sued the insurance carrier to effectuate payment of the $20 million policy. The case was the feature cover story in the publication, *California Lawyer*, at the time of this decision.
- ***The Lincoln Life and Annuity Company of New York v. Janis and Berck.*** Represented Jonathan Berck, as Trustee of the Rosamond Janis Insurance Trust, in a $5 million rescission claim brought by the Lincoln Life and Annuity Company of New York for alleged violations of

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New York's insurable interest laws and other "STOLI" (stranger originated life insurance) related claims. In this matter summary judgment was granted in favor of our client.

- ***In re James V. Cotter, Living Trust, Ellen Marie Cotter, Margaret Cotter, Petitioners, v. James J. Cotter, Jr., Respondent.*** Achieved a successful verdict invalidating a will on grounds of both undue influence and incapacity in this trust and estates case in Los Angeles Superior Court.

Other Significant Insurance Caces

- ***Universal Cable Productions v. Atlantic Specialty Insurance.*** Represented Universal Cable Productions (UCP)—a subsidiary of NBC Universal—in its dispute with insurance carrier, Atlantic, which claims it was not required to provide coverage when Hamas bombing forced UCP to relocate filming of the TV miniseries "Dig" out of Jerusalem. After a successful appeal to the Ninth Circuit by Susman Godfrey on the scope of the exclusions, UCP then received a full win in the district court which found in its favor on all remaining liability issues. The case—which was set for trial on the amount of damages Atlantic owed to UCP for the relocation, whether Atlantic's denial of coverage was done in bad faith and the amount of punitive damages owed to UCP—was settled favorably on the eve of trial.
- ***Alley Theater v. Hanover Insurance.*** Secured a partial summary judgment win for Houston's historic Alley Theatre in an insurance coverage lawsuit the firm handled pro bono. The suit claimed the theatre was not properly reimbursed by Hanover Insurance Company for claims related to business interruption losses sustained during Hurricane Harvey. The firm later scored its second victory for the theater when they settled the final piece of the litigation–terms of this settlement are confidential.
- **Insurance Litigation for Walmart.** Lead counsel for Walmart on insurance coverage claims against certain of its insurers, regarding the settlement of claims arising out of an accident on the NJ Turnpike that injured comedian Tracy Morgan and others.
- ***LyondellBasell v. Allianz Insurance.*** Secured a confidential recovery (ultimately disclosed in an SEC filing as more than $100 million) for LyondellBassell Industries in a London arbitration over business interruption losses arising from Hurricane Ike. Lyondell sought coverage for losses caused by a hurricane, but faced a $200 million deductible self-insured retention, which the insurers claimed exceeded any losses. We handled all coverage, accounting, and engineering issues (which included significant damage to refinery equipment and delays to turnaround construction projects). The case settled on the eve of the final evidentiary hearing after we won key disputes regarding certain insurance coverage and claim quantification issues.
- **Confidential Private Transportation Company Litigation.** Hired to represent a private transportation company against its insurer for bad-faith failure to settle. The firm was engaged after a South Texas jury returned a $25+ million verdict on personal injury claims against our client, far in excess of the insurance policy limits. The matter was resolved without the need to file a lawsuit, and without the client paying anything out of pocket on the verdict.

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- ***Sabre v. The Insurance Company of the State of Pennsylvania.*** Hired months before trial to represent the worldwide travel technology leader in a $100 million insurance coverage dispute. Successfully settled the case on the eve of trial.
- ***Aetna v. Ace Bermuda.*** Represented Ace Bermuda Insurance (now part of Chubb) in a $25 million coverage claim brought by the bankruptcy estate of Boston Chicken in bankruptcy court in Phoenix, Arizona. The case raised novel issues of bankruptcy procedure, international law, and the enforcement of arbitration agreements involving a bankruptcy trustee.
- **London Insurance Market Asbestos Cases.** Defended insurance groups in the London Insurance Market including Equitas, a Lloyds of London runoff company, in litigation regarding asbestos insurance coverage, including bankruptcy adversary proceedings regarding Dresser Industries, a Halliburton subsidiary; Babcock & Wilcox Co., a McDermott International subsidiary; and Pittsburgh Corning Corp., a PPG Industries subsidiary. The firm tried the Babcock & Wilcox matter to the bench for many weeks and won. In both the Dresser Industries and the Babcock & Wilcox matters, our team ultimately achieved settlements for the London Market at very large discounts from the exposed policy limits, saving the firm's clients hundreds of millions of dollars. Pittsburgh Corning ultimately withdrew the bankruptcy plan to which our clients were objecting.
- ***City of Houston v. Hertz.*** Won a no liability verdict for The Hertz Corporation in a high-profile jury trial in which the plaintiff alleged violations of state insurance licensing laws and unfair and deceptive practices. In less than an hour of deliberations, the jury found for Hertz on all issues and rejected plaintiff's claims for attorneys' fees.

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SUSMAN GODFREY L.L.P.

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Overview

Named one of *Lawdragon's* 500 Leading Lawyers since 2020, a recipient of the California Lawyer Attorneys of the Year award in 2017 and selected as "Top Plaintiff Lawyers in all of California" in 2016 and 2017 by *The Daily Journal;* Steven Sklaver has secured substantial litigation victories for both plaintiffs and defendants. For plaintiffs, Sklaver was lead counsel for a certified class of insurance policy owners, helping them achieve what the Court in the Southern District of New York described as "the best settlement pound for pound for the class that I've ever seen." You can read the Court's statement in full here. You can also read more about the case in The Deal's profile on the litigation here. Sklaver was also lead trial and appellate counsel for investors against an insurance company that resulted in a complete victory and full pay-out of a $20 million life insurance policy. A copy of the appellate court decision is available here. To listen to Sklaver's appellate oral argument, click here. That matter was the feature cover story of the April 2012 California Lawyer.

Sklaver also represents the former members of the legendary rock group The Turtles in ***Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*** (C.D. Cal.) in a certified class action lawsuit against Sirius XM that settled less than 48 hours before the jury trial was scheduled to begin. Sirius XM agreed to pay at least $25.5 million (over $16 million after fees and expenses) and royalties under a 10-year license that is valued up to $62 million (over $41 million after fees and expenses) as compensation for publicly performing without a license Pre-1972 sound recordings. The settlement was approved by the Court, and has received widespread media coverage from publications such as The New York Times, Billboard, The Hollywood Reporter,Law360, Rolling Stone, Variety, Reuters and Managing IP.

Within six months after the Sirius XM class action settled, so did Sklaver's copyright class action brought on behalf of artists owed mechanical royalties for compositions made available by Spotify, the leader in digital music streaming. Spotify agreed to a class action settlement valued at over $112 million (over $95 million after fees and expenses), a settlement for which the district court granted final approval and remains subject to a pending appeal. You can read more about this matter in *Billboard*.

Sklaver's many significant and widely covered class action results in 2016 helped secure Susman Godfrey's recognition as *Law360*'s "Class Action Group of the Year" in early 2017. You can read that article announcing the award here.

For defendants, Sklaver has handled numerous employment class actions across the country. He served, along with the Managing Partner of Susman Godfrey, as trial counsel for Wal-Mart, the world's largest retailer, trying a large employment class action in California. He also successfully defended and defeated class certification in numerous, substantial wage and hour matters for Alta-Dena Certified Dairy, LLC, dairy producers for Dean Foods, one of the leading food and beverage companies in the United States. Copies of the pro-employer decisions are available here, here, and here.

Sklaver has tried complex commercial and class action disputes — including jury trials and bench trials in federal and state court, as well as arbitrations. Sklaver graduated cum laude from Dartmouth College, magna cum laude and Order of the Coif from Northwestern University School of Law, and clerked for Judge David Ebel on the United States Court of Appeals for the Tenth Circuit. Sklaver also won the National Debate Tournament for Dartmouth College, and is just one of four individuals in debate history to win three national championships at the high school and collegiate level. From 2010-2022, Sklaver has been recognized every year as a "Super Lawyer" in Southern California, awarded to no more than the top 5% of the lawyers in the state of California (Law & Politics Magazine, Thomson Reuters).

Sklaver currently serves on the Board of Directors for the Western Center on Law & Poverty, the Los Angeles Metropolitan Debate League, and the Association of Business Trial Lawyers. Sklaver was also selected as the 2016-2017 Ninth Circuit Judicial Conference Lawyer Representative.

Education

- Dartmouth College (B.A., *cum laude*)
- Northwestern University School of Law (J.D., *magna cum laude* and Order of the Coif)

Clerkship

Law Clerk to the Honorable David M. Ebel, United States Court of Appeal for the Tenth Circuit

Honors and Distinctions

- *Lawdragon* 500 Leading Litigator (2022)
- Litigation Star, Benchmark Litigation (2022, Euromoney)
- Recommended Lawyer – Litigation – Labor and Employment, Best Lawyers in American (2020 – 2023, Woodward White, Inc.)
- Southern California California Super Lawyer (2010 – 2022, Thomson Reuters)
- *Lawdragon* 500 Leading Lawyers in America (2020, 2021, 2022, 2023)
- *Lawdragon* 500 Leading Plaintiff Financial Lawyers (2019, 2020, 2021, 2022)
- Outstanding Antitrust Litigation Achievement in Private Law Practice by the American Antitrust Institute (2019) for work on *In re: Automotive Parts Antitrust Litigation*.
- California's Lawyer Attorneys of the Year in 2017 by *The Daily Journal.* Click here for a photo of Sklaver, along with co-counsel, receiving the award.
- Top 30 Plaintiff Lawyers in all of California in 2016 by *The Daily Journal*
- Southern California "Super Lawyers" awarded to no more than the top 5% of the lawyers in the state of California (2010 – 2021, *Law & Politics Magazine*, Thomson Reuters)
- Northwestern Law Review member and editor
- National Debate Tournament (NDT) collegiate championship winner

Articles and Speeches

"Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism," 32 Ind. L.

Rev. 71 (1998) (with Martin H. Redish, Professor, Northwestern University School of Law).

Speaking Engagements

- "Compliance Track: Cost of Insurance Litigation Overview" – The 24th Annual Fall Life Settlement and Compliance Conference (Orlando, Florida)
- "Cost of Insurance" – The Life Settlements Conference 2018 (New York City, NY)
- "Cost of Insurance: What Has Been Filed and Decided and What Will Happen Next?" Anticipating Tomorrow – A Symposium on Emerging Legal Issues in Life Insurance. (Philadelphia, PA)
- "Current COI Increases – What's it All About? The Legal Perspective." ReFocus2017 Conference (Las Vegas, NV)
- "Litigation Update: Will the Arthur Kramer Insurable-Interest Decision Lift the Cloud Over Much of the Litigation in the Market?" The 2011 International Life Settlements Conference (London, England)
- "Seeking Interlocutory Appellate Review of Class-Certification Rulings: Tactics, Strategies, and Selected Issues." Bridgeport 10th Annual Class Action Litigation Conference (Los Angeles, CA)
- PwC 2010 Securities Litigation Study Luncheon. (Los Angeles, CA)
- Life Settlement Litigation Update. 2010 Life Settlement Compliance Conference and Legal Round Table (Atlanta, GA)
- "Litigation: What are the Legal Trends Affecting the Market?" The Life Settlements Conference 2010 (Las Vegas, NV)

Professional Associations and Memberships

- United States Supreme Court
- United States Court of Appeals for the Ninth and Tenth Circuits
- United States District Courts for the Central, Southern, Northern, and Eastern Districts of California and District of Colorado
- Admitted to state bars of Illinois, Colorado, and California
- Board of Directors, Los Angeles Metropolitan Debate League
- Board of Directors, Western Center on Law & Poverty

Notable Representations

Class Actions

- ***Copyright Infringement:*** Sklaver serves as co-lead counsel with the Gradstein & Marzano firm representing Flo & Eddie (the founding members of 70's music group, The Turtles) along with a class of owners of pre-1972 sound recordings for copyright violations by music provider Sirius XM. The day before trial was to commence before a California jury in federal court in late 2016, Flo & Eddie reached a landmark settlement with Sirius XM on behalf of the class in a deal potentially worth $99 million. The Court granted final approval of the settlement in May 2017. Click here for more. Sklaver with his co-leads were recently named "California Lawyer Attorneys of the Year" by *The Daily Journal* for their outstanding legal work on this case.
- In May 2017, Sklaver, as co-lead counsel with Gradstein Marzano, secured a deal valued at$112 million to settle a class-action lawsuit with Spotify brought on behalf of music copyright owners. The suit alleged that Spotify made music available online without securing mechanical rights from the tracks' composers. Under the terms of the deal, Spotify will pay songwriters $43.45 million for past royalties, as well as commit

to pay ongoing royalties that are valued at $63 million. Read more about the case here and see Billboards coverage of it here.

- ***Insurance***: In a seminal insurance class action filed in the Southern District of New York, resolved in September 2015, Mr. Sklaver served as lead counsel in a case that challenged Phoenix Life Insurance Company's and PHL Variable Insurance Company's decision to raise the cost of insurance ("COI") nationwide on life insurance policy owners. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final Pretrial Conference — less than two months before trial. Settlement terms included: $48.5 million cash fund ($34 million after fees and expenses), COI freeze through 2020, and a covenant by Phoenix not to challenge the policies, worth $9 billion in face value, when the policies mature on the grounds of lack of insurable interest or misrepresentations in the application. At the final approval hearing, the Court concluded, ***"I want to say publicly that I think this is an excellent settlement. I think this is a superb – this may be the best settlement pound for pound for the class that I've ever seen."*** You can read the statement in full on page 3 here. You can also read more about the case in *The Deal's* feature on the matter here.

- ***Antitrust:*** *In In re Automotive Parts Antitrust Litigation.* In the largest price-fixing cartel ever brought to light, Mr. Sklaver and a team of Susman Godfrey lawyers run a massive MDL litigation in which the firm serves as co-lead counsel for a class of consumer plaintiffs in multidistrict price-fixing cases pending in a Detroit, Michigan federal court. The actions, alleging anti-competitive conduct, were brought by indirect purchasers of component parts included in over 20 million automobiles, and involve parts such as wire harnesses, instrument panel clusters, fuel senders, heater control panels and alternators.The Department of Justice has imposed fines exceeding $2.6 billion pursuant to guilty plea agreements with some of the defendants, and its investigation is still ongoing. The Susman Godfrey team together with its co-lead counsel has defeated multiple motions to dismiss. Settlements have been reached with a certain defendants for a combined $620 million thus far. Final settlement (after fees and expenses) has not yet been determined. The case remains ongoing against the remaining defendants.

LIFE SETTLEMENTS

- Represented Jonathan Berck, as Trustee of the Rosamond Janis Insurance Trust in a $5 million rescission claim brought by the Lincoln Life and Annuity Company of New York for alleged violations of New York's insurable interest laws and other "STOLI" (stranger originated life insurance) related claims. RESULT: Summary judgment granted in favor of my client. A copy of the summary judgment order is available here.
- Won reversal in a $20 million life settlement rescission lawsuit against Lincoln Life & Annuity Company of New York. Lincoln's lawsuit was based on allegations that the insurance policies lacked an insurable interest because they were procured by third-parties for investment purposes and because there were net worth and other misrepresentations in the applications. The appellate court ordered that the trial court enter judgment in favor of the trust. The appellate court also affirmed our trial court victory that Lincoln's fraud claim was time barred because the policies were incontestable. The case is Lincoln Life & Annuity Co. of New York v. Jonathan Berck, as Trustee of the Jack Teren Insurance Trust, Court of Appeal Case No. D056373 (Cal. Ct. App. May 17, 2011). A copy of the appellate court decision is available here. To listen to Mr. Sklaver's appellate oral argument, click here. The *Teren* case was the feature, cover story of the April 2012 *California Lawyer*.
- Represents investors, trusts, trustees, brokers, and insureds in life settlement and STOLI litigation across the country against insurance companies seeking to rescind policies with face values worth more than $125 million. Mr. Sklaver is also a frequent speaker and commentator on life settlement and STOLI litigation, in both trade publications and conferences.

FINANCIAL FRAUD

- Represented Royal Standard Minerals, which was the plaintiff in a federal securities lawsuit against a "group" of more than ten dissident shareholders for failing to file Schedule 13-D disclosures. RESULT: Preliminary injunction granted and final judgment entered that, among other things, required for three years

the votes of all shares owned by any of the defendants to be voted as directed by the Board of Directors of my client.

- Represented plaintiff who held millions of WorldCom shares as an opt-out to the class in In re WorldCom Securities Litig. RESULT: Settled on confidential terms.
- Represented plaintiff Accredited Home Lenders in a TRO and breach of contract action over a wrongful default declared by Wachovia in a credit re-purchase agreement. RESULT: The case was resolved favorably, following the entry of a TRO.
- Represented Walter Hewlett in his challenge to the Hewlett-Packard/Compaq merger. In preparation for that trial, Mr. Sklaver deposed Compaq's former CEO Michael Capellas about his famous handwritten journal note which, describing the merger, stated "at our course and speed we will fail." Mr. Capellas was right.

EMPLOYMENT

- Represented one of the world's largest retailers in the defense of a four month long jury trial, wage and hour class action pending in California. One of the world's largest retailers appointed Susman Godfrey L.L.P. to be its national trial counsel for wage and hour litigation.

ANTITRUST

- Lead day-to-day lawyer for the class in White, et al. v. NCAA, a certified, antitrust class action alleging that the NCAA violated the federal antitrust laws by restricting amounts of athletic based financial aid. ESPN Magazine coverage of the lawsuit may be found here. RESULT: The NCAA settled and paid an additional $218 million for use by current student-athletes to cover the costs of attending college, paid $10 million to cover educational and professional development expenses for former student-athletes, and enacted new legislation to permit Division I institutions to provide year-round comprehensive health insurance to student-athletes.

ENTERTAINMENT

- Represented NAACP image award winner Morris Taylor "Buddy" Sheffield in his breach of contract lawsuit against ABC Cable Networks Group regarding the creation of Hannah Montana. RESULT: Defendant settled less than four weeks before trial.

PRO BONO

- Appointed to represent Carl Petersen, who was charged by the United States Attorney's Office with being a felon in possession of a firearm — a charge that carries a five-year prison sentence and an 89% conviction rate. RESULT: Acquittal. Jury deliberation lasted less than four hours.Appointed by the United States Court of Appeals for the Tenth Circuit as appellate counsel in five cases, including: United States v. Petersen; United States v. Blaze (specifically noting Mr. Sklaver's "good workmanship"); and Sorrentino v. IRS (appointed as amicus curiae by and for the Court)

SUSMAN GODFREY L.L.P.

Seth Ard

Partner

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Overview

Seth Ard, a partner in Susman Godfrey's New York office and a member of the firm's Executive Committee, has secured substantial litigation victories for both plaintiffs and defendants. For plaintiffs, Ard was co-lead counsel for a certified class of insurance policy owners, helping them achieve what the Court in the Southern District of New York described as "the best settlement pound for pound for the class that I've ever seen." For defendants, Ard has obtained take-nothing judgments for NASDAQ and Dorfman Pacific in contract and intellectual property actions seeking tens of millions of dollars. Since 2019, Mr. Ard has been named one of the country's Leading Plaintiff Financial Lawyers by *Lawdragon*.

Before joining the firm, Mr. Ard clerked for the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York, and for the Honorable Rosemary S. Pooler of the United States Court of Appeals for the Second Circuit. Mr. Ard graduated magna cum laude from Harvard Law School and completed his undergraduate work first in his class with a perfect GPA from Michigan State University, with dual degrees in philosophy and French literature. For the past three years, Ard has been recognized as a "Rising Star" in New York by Super Lawyers magazine.

Education

- Michigan State University, first in class, highest honors (B.A., Philosophy & French Literature, 1997)
- Northwestern University (M.A., A.B.D., Philosophy, 2003)
- Harvard Law School, magna cum laude (J.D. 2007)

Clerkship

Law Clerk to the Honorable Shira A. Scheindlin, United States District Court for the Southern District of New York, 2008-2009

Law Clerk to the Honorable Rosemary S. Pooler, United States Court of Appeals for the Second Circuit, 2007-2008

Honors and Distinctions

- *Lawdragon* 500 Leading Litigator (2022)
- *Lawdragon* 500 Leading Plaintiff Financial Lawyers (2019, 2020, 2021 2022)

- New York Super Lawyer (2022, Thomson Reuters)
- New York Rising Star (2013-2018, Thomson Reuters)
- Teaching and Research Assistant for Professor Arthur Miller (Harvard Law School)
- Teaching Assistant for Professor Jon Hanson (Harvard Law School)
- Editorial Board, Harvard Civil Rights/Civil Liberties Law Review

Professional Associations and Memberships

State of New York

Notable Representations

In re LIBOR-Based Financial Instruments Litigation (SDNY) Along with Bill Carmody, Marc Seltzer, and Arun Subramanian, Ard serves as co-lead counsel for the class of over-the-counter purchasers of LIBOR-based instruments, directly representing Yale University and the Mayor and City Council of Baltimore as named plaintiffs. We reached a $120 million settlement with Barclays, and pursue claims against the rest of the 16 LIBOR panel banks.

In re Municipal Derivatives Litigation (SDNY) Along with Bill Carmody and Marc Seltzer, Ard serves as co-lead counsel to a class of municipalities suing 10 large banks and broker for rigging municipal auctions. On behalf of the class and class counsel, Ard argued final approval and fee application motions approving cash settlements in excess of $100 million, as well as several key discovery motions against defendants and the DOJ that paved the way for those settlements.

Fleisher et al. v. Phoenix Life Insurance Company (SDNY) Along with Steven Sklaver and Frances Lewis, Ard served as class counsel in a seminal action challenging 2 cost of insurance increases by Pheonix. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final Pretrial Conference in a settlement valued by the Court at over $140 million. Judge Colleen McMahon praised Susman Godfrey's settlement of the case as "an excellent, excellent result for the class," which "may be the best settlement pound for pound for the class that I've ever seen."

Globus Medical v. Bonutti Skeletal (EDPA) Along with Jacob Buchdahl and Arun Subramanian, Ard represents defendant Bonutti Skeletal in patent litigation brought by Globus Medical. Ard successfully argued a partial motion to dismiss the patent complaint, defeating claims of indirect infringement, vicarious liability and punitive damages.

Sentius v. Microsoft (NDCA) Along with Max Tribble and Vineet Bhatia, Ard represented plaintiff Sentius in a patent infringement suit against Microsoft. A few weeks before trial, Ard successfully argued a Daubert motion that sought to exclude plaintiff's survey expert. The case settled on highly favorable terms within 24 hours of that motion being denied. Previously, Ard had successfully argued an early summary judgment motion and supplemental claim construction, both of which would have gutted plaintiff's claims.

Jefferies v. NASDAQ Arbitration (New York) Along with Steve Susman and Steve Morrissey, Ard represented NASDAQ and its affiliate IDCG in an arbitration in New York. The plaintiff, Jefferies & Co., sought tens of millions of dollars in damages based on a claim that it was fraudulently induced to clear interest rate swaps through the IDCG clearinghouse. After a one week arbitration trial in the fall of 2012, at which Ard put on NASDAQ's expert and crossed Jefferies' expert, the Panel issued a decision in January 2013 denying all of Jefferies' claims and awarding no damages. The arbitrators were former Judge Layn Phillips, Judge Vaughn R. Walker, and Judge Abraham D. Sofaer.

GMA v. Dorfman Pacific (SDNY) Along with Bill Carmody and Jacob Buchdahl, Ard obtained a complete defense victory on summary judgment in a trademark infringement dispute before Judge Forrest in SDNY.

We were hired after the close of discovery and after our client had suffered significant discovery sanctions that threatened to undermine its defense. We were able to overturn those sanctions, reopen discovery and obtain key admissions during a deposition of Plaintiff's CEO, and win on summary judgment (without argument and based on briefing done by Ard).

Washington Mutual Bankruptcy (Bkrtcy. Del.) Along with Parker Folse, Edgar Sargent, and Justin Nelson, Ard represented the Official Committee of Equity Holders in Washington Mutual, Inc. at two trials contesting $7 billion reorganization plans that would have wiped out shareholders stemming from the largest bank failure in American financial history. Both plans were supported by the debtor and all major creditors. After the first trial, at which Ard put on the Equity Committee's expert and crossed the debtor's expert, the Judge denied the plan of reorganization. The debtors and creditors negotiated a new reorganization plan that again would have wiped out shareholders. After the second trial, at which Ard put on the Equity Committee's expert, crossed the debtor's expert, and conducted a full-day cross examination of hedge fund Appaloosa Management that held over $1 billion in creditor claims and that was accused of insider trading, the Court again denied the plan of reorganization, finding that the Equity Committee stated a viable claim of insider trading against the hedge funds. The Equity Committee then negotiated with the debtor and certain key creditors a resolution that provided shareholders with 95 percent of the post-bankruptcy WaMu plus other assets in a package worth hundreds of millions of dollars – an outstanding result especially given that when we were appointed counsel, the debtor tried to disband the equity committee on the ground that equity was "hopelessly out of the money" without any chance of recovery.

Lincoln Life v. LPC Holdings (Supreme Court Onandaga, New York) Along with Steven Sklaver and Arun Subramanian, Ard represented an insurance trust in STOLI litigation against an insurance company seeking to rescind a life insurance policy with a face value of $20 million. After Ard argued and won a hotly contested motion to compel in which the Court threatened to revoke the pro hoc license of opposing counsel, Lincoln settled the case on very favorable terms.

SUSMAN GODFREY L.L.P.

Mark Musico

Partner

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Overview

Mark Musico is a trial and appellate lawyer in Susman Godfrey's New York Office. His clients include the country's leading lights in finance, technology, and industry, including: international sports betting and gaming giant, Flutter Entertainment; Fortune 500 conglomerate, General Electric; pioneering satellite communications company, Loral Space & Communications; and prominent hedge fund, Saba Capital.

Musico's trial wins have generated billions in value for his clients. Most recently, Musico won a favorable award for Flutter Entertainment in a high-profile, multi-billion dollar dispute with FOX Corporation, convincing an arbitrator in New York to nearly double the exercise price FOX sought for its option to acquire a portion of Flutter's portfolio company, FanDuel. Musico has also secured several victories for hedge fund Saba Capital in disputes with entrenched and underperforming management of funds in which Saba invested, including winning an injunction that allowed Saba to win the vote for board control of a $701 million closed-end fund, as reported by the *Wall Street Journal.*

After graduating first in his class from Columbia Law, Musico started his legal career clerking at every level of the federal judiciary—for Justice Ruth Bader Ginsburg on the United States Supreme Court, Judge Michael Boudin on the U.S. Court of Appeals for the First Circuit, and Judge Douglas P. Woodlock on the U.S. District Court for the District of Massachusetts. These experiences equipped Musico with a unique understanding of the workings of the bench.

Clients, both plaintiffs and defendants, look to Musico for winning insights in high-stakes disputes involving intellectual property, defamation and the First Amendment, the False Claims Act, the Investment Company Act, antitrust, securities, insurance, breach of contract, breach of fiduciary duty, and fraud.

Education

- Columbia Law School (J.D., 2011)
- Harvard University (B.A., *magna cum laude*, 2007)

Clerkship

Law Clerk to the Honorable Ruth Bader Ginsburg, Supreme Court of the United States

Law Clerk to the Honorable Michael Boudin, United States Court of Appeals for the First Circuit

Law Clerk to the Honorable Douglas P. Woodlock, United States District Court for the District of

Massachusetts

Notable Representations

Fox Sports Group v. Flutter Entertainment **(Southern District of New York)**

In 2022, alongside firm managing partner Vineet Bhatia and a lean team of SG attorneys, Musico won a favorable award for Flutter Entertainment when an arbitrator in New York nearly doubled the exercise price its opponent, a subsidiary of FOX Corporation, sought for its option to acquire 18.6% of Flutter's portfolio company, FanDuel Group.

This high-stakes, high-profile arbitration resulted from FOX's assertion that it should be entitled to the same price Flutter paid for its share of FanDuel two years before the arbitration took place—$2.1 billion, with an implied company valuation of $11.2 billion. The arbitrator, however, found that FOX's payment must be based on a substantially higher FanDuel valuation of $20 billion it was hoping for, plus an additional 5% interest per year. At the time of the decision, this equated to a valuation for FanDuel of $22 billion and an option exercise price of $4.1 billion for FOX—nearly twice the amount that FOX argued it should be required to pay. The arbitrator also rejected FOX's claim that Flutter had not provided commercially reasonable resources to the Fox Bet business.

Musico handled several witnesses at trial, including cross-examining FOX's in-house counsel who negotiated the contract in dispute regarding the parties' intent with respect to key terms in dispute. Musico also spearheaded Flutter's pre- and post-trial briefing.

Saba Capital CEF Opportunities 1 Ltd. v. Voya Prime Rate Trust **(Arizona Superior Court)**

In 2020, Musico secured a preliminary injunction that allowed his client, Saba Capital, to win the vote for board control of a $701 million closed-end fund, as reported by the Wall Street Journal. The injunction prevented the fund from enforcing a bylaw that substantially raised the voting threshold required to elect board trustees. At a full-day evidentiary hearing, held "virtually" due to the Covid-19 pandemic, Musico presented the proxy solicitation expert whose testimony the Court called "persuasive, if not compelling" evidence in support of Saba's case. *Saba Capital CEF Opportunities 1 Ltd v. Voya Prime Rate Trust*, No. CV 2020-005293, 2020 WL 5087054 (Ariz. Super. June 26, 2020). Musico also beat back several rounds of emergency appeals seeking to stay the injunction.

Wellstat Pharmaceuticals v. BTG **(Delaware Chancery Court)**

In 2017, Musico won a $70 million verdict for his client, Wellstat Pharmaceuticals (which received $58 million net of fees), in a bet-the-company lawsuit against the distributor of its leading product. He tried the case in Delaware Chancery Court alongside firm founder, Steve Susman. Musico played an instrumental role in maximizing the client's recovery by presenting Wellstat's damages expert at trial, convincing the court to exclude key testimony from defendant's damages expert, cross-examining defendant's expert who tried to understate the market for Wellstat's life-saving drug, and cross-examining a defense witness who tried to shift the blame to Wellstat. Musico then wrote the brief that convinced the Delaware Supreme Court to summarily affirm the judgment on appeal.

Public Sector Pension Investment Board v. Saba Capital **(New York Supreme Court)**

Musico, together with Jacob Buchdahl and Arun Subramanian, represented hedge fund Saba Capital, and its founder, Boaz Weinstein, in an asset valuation dispute with its investor, PSP. Musico led the strategic effort to chip away at plaintiff's claims against Saba, and successfully briefed motions leading the court to dismiss three of the four claims at issue. The case settled while Saba's summary judgment motion to knock out plaintiff's one remaining claim was pending. Read Forbes' reporting on the settlement of this high-stakes case: "A $116B Pension Fund Is Walking Back Incendiary Claims Against Boaz Weinstein's Saba Capital."

ViaSat v. SpaceSystems/Loral **(Southern District of California)**

In 2014, Musico went to trial to defend Loral Space & Communications and its subsidiary, Space

Systems/Loral, against allegations of patent infringement and breach of contract. Working with a team of SG lawyers from around the country, Musico's active role at trial included preparing and arguing the jury instructions and presenting a defense witness. Musico also helped write the post-trial briefs that resulted in the court ordering a new trial on damages. The Court called the original damages award against the defendants a "miscarriage of justice."

Honors and Distinctions

Fellow, American Bar Foundation

Rising Star of the Plaintiffs Bar, *National Law Journal's* Elite Trial Lawyers (2021, ALM)

How I Made Partner, Law.com (2020, ALM)

John Ordronaux Prize, Columbia Law School 2011 (First in Class)

James Kent Scholar, Columbia Law School 2009-2011

Articles Editor, *Columbia Law Review*

Professional Associations and Memberships

United States Supreme Court

Second Circuit Court of Appeals

United States District Court for the Southern District of New York

United States District Court for the Eastern District of New York

State of New York

LeGaL (LGBT Bar Association of Greater New York)

SUSMAN GODFREY L.L.P.

Rohit Nath

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Overview

Rohit Nath represents plaintiffs and defendants in high stakes litigation. He has taken on industry leaders such as the country's biggest insurers, major media and technology companies, and international wireless carriers in courts across the United States. Nath has handled disputes in an array of practice areas, including insurance, copyright, patent, breach-of-contract, and real estate.

In *37 Besen Parkway LLC v. John Hancock Life Insurance Co,* Nath was a significant part of a team of Susman Godfrey lawyers that secured a settlement of $91.25 million (before fees and expenses) for a certified class of insurance policy owners against John Hancock Life Insurance Company. In the final approval order, Judge Paul Gardephe described the settlement as a "quite extraordinary . . . result achieved on behalf of the class." You can read more about the case here (subscription required).

Nath is currently prosecuting similar class actions against a number of other insurance companies, including Equitable, Voya Retirement & Annuity Company, and ReliaStar Life Insurance Company. More information on the Voya class action, which was certified in 2019, can be found here.

On the defense side, Nath was hired by Lighting Science Group Corporation after it was sued by its former patent broker. Serving as lead counsel for Lighting Science, Nath successfully compelled arbitration, took and defended key depositions, and briefed and argued critical motions. The parties reached a confidential settlement on the eve of the plenary arbitration hearing.

In addition to the cases above, Nath also:

- Represents a putative class of professors and textbook authors in a lawsuit against one of the world's largest textbook publishers, Cengage Learning, related to underpayment of royalties for electronic textbook offerings.
- Represents Flo & Eddie–the founding members of the 70's music group, the Turtles—against Pandora and SiriusXM in litigation concerning the unlicensed use of pre-1972 sound recordings.
- Represents SAJE and ACCE Action, two tenant advocacy groups, as proposed intervenors to help defend the City of Los Angeles's eviction and rent-freeze ordinances enacted in the wake of the COVID-19 pandemic.

Nath is active in the Los Angeles legal community. He received a Public Counsel Pro Bono award for his legal work to help the troubled LA housing situation. The *Daily Journal* and *Law360* also profiled Nath and his colleagues for their significant pro bono work in this area. He is a longtime board member of the South Asian Bar Association of Southern California and served as co-president during the 2021-2022 term. Nath is also a member of the Executive Committee of the Litigation Section of the Los Angeles County Bar Association.

Nath joined Susman Godfrey after working as a trial attorney at the U.S. Department of Justice and as a law clerk on the U.S. Court of Appeals for the Ninth Circuit. He graduated with high honors from The University of Chicago Law School, where he served as editor-in-chief of *The University of Chicago Law Review*. Before law school, he taught eighth-grade math in Oklahoma as a Teach for America corps member.

Education

The University of Chicago Law School (J.D., high honors and Order of the Coif, 2014)
Wake Forest University (B.A., *magna cum laude*, 2009)

Clerkship

Law Clerk to the Honorable Alex Kozinski, United States Court of Appeals for the Ninth Circuit

Notable Representations

Insurance

- ***37 Besen Parkway LLC v. John Hancock Life Insurance Co***. (S.D.N.Y.) Secured a $91.25 million all-cash, non-reversionary settlement (before fees and expenses) for a certified class of insurance policy owners. The class alleged that John Hancock breached the life insurance contracts of the class by failing to charge cost-of-insurance rates that were "based on [John Hancock's] expectations of future mortality experience." Nath had a critical role in achieving what Judge Paul Gardephe described as a "quite extraordinary" result for the class.
- ***Brach Family Foundation v. AXA Equitable Life Insurance Company*** (S.D.N.Y.) Represent a putative class of insurance policyholders suing AXA for a cost-of-insurance increase on the Athena Universal Life II product, claiming breach of contract and violations of New York Insurance Law Section 4226.
- ***Helen Hanks vs. The Lincoln Life & Annuity Company of New York***; ***Voya Retirement Insurance and Annuity Company*** (S.D.N.Y.) Litigating an insurance matter against Voya Life Insurance Company. The class was recently certified by the court. The *Wall Street Journal* wrote about this case here (subscription required).
- ***Advance Trust & Life Escrow Services, LTA v. ReliaStar Life Insurance Company*** (D. Minn.) Represents a putative class of life insurance policyholders against ReliaStar Life Insurance Company related to ReliaStar's failure to charge cost-of-insurance rates in accordance with the terms of its policies. The case is in discovery.

Breach of Contract

- ***Rui Zhi Ventures, Ltd. v. Lighting Science Group Corporation***, (C.D. Cal. and JAMS Arbitration) Represented Lighting Science Group Corporation in a fee dispute with its former patent broker. After successfully compelling arbitration, the parties reached a confidential settlement on the eve of the plenary arbitration hearing.
- ***Bernstein, et al. v. Cengage Learning, Inc.*** (S.D.N.Y.) Represents a putative class of textbook authors against one of the world's largest textbook publishers. Plaintiffs allege that Cengage has breached its publishing agreements with authors by manipulating the royalty base used to calculate royalties for Cengage's online textbook offerings.

Intellectual Property

- ***Flo & Eddie Inc. v. Pandora*** (C.D. Cal.) Serve as co-lead counsel representing Flo & Eddie (the founding members of 70's music group, The Turtles) in this putative class action alleging infringement of the public performance right in sound recordings, copying, and misappropriation. The case is before the district court,

following remand from an appeal to the Ninth Circuit Court of Appeals. This case follows the similar, *Flo & Eddie v. Sirius XM*, in which Susman Godfrey secured a settlement for the class valued at up to $73 million. The Court granted final approval of that settlement in 2017.

- ***Personalized Media Communications, LLC Cases*** (E.D. Tex.) Represented Personalized Media Communications (PMC) in a series of patent infringement cases against Vizio, Samsung, and Funai. Nath played a key role in these cases, which included taking and defending key depositions and briefing claim construction motions. PMC reached favorable, confidential settlements with each defendant.

Honors and Distinctions

- California Lawyer Attorney of the Year, *Daily Journal* (2023)
- Rising Stars of the Plaintiffs Bar, *National Law Journal's* Elite Trial Lawyers (2022, ALM)
- Public Counsel Pro Bono Award (2020)
- Named a Sports and Entertainment Litigation Trailblazer by *National Law Journal* (2020, ALM)
- Rising Star, Southern California (Thomson Reuters, 2020, 2021, 2022)
- Editor-in-Chief, *The University of Chicago Law Review*
- Order of the Coif
- Kirkland & Ellis Scholar: Awarded to top 5 percent of the 1L class
- 2011 Teacher of Today Award
- Wake Forest University Debate Team

Publications

Corruption Clarified: Defining the Reach of "Agent" in 18 U.S.C. § 666, 80 U. Chi. L. Rev. 1391 (2013)

SUSMAN GODFREY L.L.P.

Glenn Bridgman

Partner

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Overview

Glenn Bridgman is a trusted resource, valued trial lawyer, and relied upon legal counsel to his clients and colleagues. Glenn represents both plaintiffs and defendants in high stakes commercial litigation, trying cases successfully across practice areas and industries such as insurance, antitrust, intellectual property, securities, and breach of contract. In 2023 Mr. Bridgman was recognized as a California Lawyer Attorney of the Year by *The Daily Journal*. In 2019, Mr. Bridgman was named a California Trailblazer by *The Recorder* (ALM) and a Rising Star in Insurance Litigation by *Law360*. In 2020 he was named a Rising Star in General Commercial Litigation by *The Legal 500*.

In *37 Besen Parkway, LLC v. John Hancock Life Insurance Company*, Glenn was a critical part of a legal team that secured a $91.25 million settlement (before fees and expenses) for insurance policy owners against John Hancock Life Insurance Company. The Honorable Paul Gardephe described the settlement as a "*quite extraordinary . . . result achieved on behalf of the class*." Glenn started on this case at inception and quickly assumed the role of running the case on a day–to-day basis – from filing of the complaint, combing through over 340,000 pages of documents, taking and defending more than 15 highly technical depositions involving highly complex subjects, and filing a motion for class certification and supporting expert report – all of which resulted in the successful settlement that was struck two and a half years later. Glenn was quoted about the case and the enormous result for the Class in an article by *Law360*.

In TVPX ARS, Inc., v. Genworth Life and Annuity Insurance Company, Glenn represented life settlement fund, TVPX, in its breach of contract action against Genworth Insurance Company. After Genworth secured an injunction based on a 2004 settlement of a prior case, Glenn took over the appellate argument before the Eleventh Circuit Court of Appeals and persuaded the Eleventh Circuit to vacate the district court's injunction. The opinion can be read here and you can listen to Glenn's argument before the court here (start at 3:15).

However, Glenn's litigation savvy is not limited to insurance matters. Glenn is well-versed in all types of high stakes litigation. He has:

- Represented Australian solar energy company, Jasmin Solar Pty Ltd., in its breach of contract action against a Chinese equipment supplier. After the solar company suffered defeats with prior counsel before both an arbitrator and the district court, Glenn and a team from Susman Godfrey took over the appeal at the Second Circuit Court of Appeals. Glenn's briefing persuaded the Second Circuit to not only overturn the district court's previous order confirming the arbitration award, but also to vacate entire judgment against Jasmin.
- Defeated a trademark-infringement preliminary injunction sought against one of the world's largest technology companies;
- Litigated the LIBOR OTC class action currently pending in the Southern District of New York, which has

already produced $590 million in settlements (fees and expenses not yet determined) and a certified class against additional defendants; and

- Secured favorable settlements on behalf of, among other clients, a large telecommunications company, lease-financing companies, and defrauded individual entrepreneurs in both federal and state court.

Glenn also maintains an active pro bono practice. He currently represents a tenant advocacy group helping defend the constitutionality of eviction protections for renters enacted by the City of Oakland and Alameda County in the wake of the COVID-19 pandemic. The *Daily Journal* and *Law360* profiled Glenn and his colleagues for their work in this area.

Glenn attended Yale Law School where he was the Notes Editor for the Yale Law Journal and served the Jerome N. Frank Legal Services Organization as both a Board Member and the Clinic Director. Glenn also received the William K.S. Wang Prize for Excellence in Corporate Law, the Thomas I. Emerson Prize for Best Paper on Legislation, and the C. LaRue Munson Prize for Excellence in the Presentation of a Clinical Case. Glenn also directed the Yale Landlord Tenant Clinic.

Before attending law school, Glenn was a Peace Corps Volunteer in rural Bulgaria. Before starting his practice at Susman Godfrey, Glenn clerked for Chief Judge Robert A. Katzmann of the Second Circuit Court of Appeals and Judge Christina A. Snyder of the Central District of California.

Education

- Dartmouth College (B.A., Physics & Philosophy, minor in Mathematics, *magna cum laude*, 2008)
- Yale Law School (J.D., 2013)

Clerkship

Law Clerk to Chief Judge Robert A. Katzmann, United States Court of Appeals for the Second Circuit (2014-15)

Law Clerk to Judge Christina A. Snyder, United States District Court for the Central District of California (2013-2014)

Notable Representations

INSURANCE LITIGATION

37 Besen Parkway LLC v. John Hancock Life Insurance Co., Glenn helped secure a $91.25 million all-cash, non-reversionary settlement for insurance policy owners (amount after fees and expenses to be determined) in this certified class action against John Hancock Life Insurance Co. Glenn's efforts over the course of two and a half years led to a successful settlement at mediation before Judge Theodore H. Katz (Ret.). Bridgman was quoted about the case and the enormous result for the Class in this article by *Law360*.

TVPX ARS, Inc., v. Genworth Life and Annuity Insurance Company, Glenn represented life settlement fund, TVPX, in their breach of contract action against Genworth Insurance Company. After Genworth secured an injunction based on a 2004 settlement of a prior case, Glenn took over the appellate argument before the Eleventh Circuit Court of Appeals and persuaded the Eleventh Circuit to vacate the district court's injunction. The opinion can be read here and you can listen to Glenn's argument before the court here (start at 3:15).

In Re: James V. Cotter, Living Trust, Ellen Marie Cotter, Margaret Cotter, Petitioners, vs. James J. Cotter, Jr., Respondent, Glenn was instrumental in achieving a successful verdict invalidating a will on

grounds of both undue influence and incapacity in this trust and estates case in Los Angeles Superior Court. At trial, Glenn examined witnesses and delivered closing argument on the successful undue influence claim.

Brach Family Foundation, et al. v. AXA Equitable Life Insurance Company*,* Glenn is an integral part of a team of lawyers who represent a putative class of plaintiffs in an insurance action pending in the Southern District of New York. The putative class is challenging AXA's 2016 hike of cost on insurance rates on hundreds of elderly insureds, claiming AXA has unfairly increased the cost of insurance for certain flexible-premium universal life insurance policies.

Helen Hanks on behalf of herself and all others similarly situated, vs. The Lincoln Life & Annuity Company of New York; Voya Retirement Insurance and Annuity Company*,* Glenn is litigating an insurance matter against Voya Life Insurance Company. He has taken the lead on the depositions in this matter, which was recently certified by the court, and is currently preparing for trial. More information on the Voya class action, a certified class with over 45,000 members, is available here.

ANTITRUST

In Re: LIBOR-Based Financial Instruments Antitrust Litigation, Glenn, together with a legal team of senior partners from Susman Godfrey, served as co-lead counsel to a certified class of 16 plaintiffs, including cities, pension funds and others known as the "OTC" investors, who sued a number of investment banks for conspiring with rivals to rig LIBOR. The team has helped secure $590 million in settlements for the class against defendant banks, Barclays, Citigroup, HSBC and Deutsche Bank. The class was certified in 2018 by the court, the only class in the coordinated LIBOR litigation to receive class certification.

INTELLECTUAL PROPERTY

Confidential Patent Infringement Matter on Behalf of Bitdefender, Glenn defended cybersecurity company, Bitdefender, in patent action filed by a well-known non-practicing entity. Bridgman took the lead on the damages portion of the case and handled Daubert briefing seeking to exclude plaintiffs' entire damages case, briefing which shortly preceded a favorable settlement of the entire matter.

Confidential Trademark Dispute on behalf of Amazon, Glenn defended online retail giant, Amazon, in a complex trademark dispute. After defeating plaintiff's request for a preliminary injunction, the case settled confidentially on favorable terms.

BUSINESS DISPUTES

Jasmin Solar Pty Ltd. V. Chinese Equipment Supplier*,* Glenn represented Australian solar energy company, Jasmin Solar Pty Ltd., in their breach of contract action against a Chinese equipment supplier. After suffering defeats with prior counsel before both an arbitrator and the district court, Bridgman and a team from Susman Godfrey took over the case at the Second Circuit Court of Appeals. A briefing written by Bridgman persuaded Second Circuit to not only overturn the district court's previous order confirming arbitration award, but also to vacate entire judgment against Jasmin.

Winthrop Resources v. Ventura County, Glenn represented longtime Susman Godfrey client, Winthrop Resources, in a breach of contract dispute with Ventura County. The matter successfully resolved after multiple mediations led by Glenn.

Honors and Distinctions

- California Lawyer Attorney of the Year, *Daily Journal* (2023)
- Rising Star in General Commercial Litigation, *The Legal 500* (2020)
- Rising Star – Insurance, *Law360* (2019)
- California Trailblazer, *The Recorder* (ALM, 2019)

Professional Associations and Memberships

State Bar of California

Los Angeles County Bar Association

Association of Business Trial Lawyers Los Angeles

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Halley Josephs

Partner

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Overview

Halley Josephs is an accomplished trial lawyer and trusted adviser who represents clients in complex business disputes and high-stakes litigation. Her experience covers a wide range of practice areas, such as breach of contract, consumer protection, intellectual property, and False Claims Act litigation. She regularly advocates for clients before state and federal courts around the country, including in California, New York, the District of Columbia, Colorado, Oklahoma, Pennsylvania, and Texas. Beyond her active trial court practice, she has argued appeals in the Third and Ninth Circuits.

Ms. Josephs' recent notable representations include:

- Defending Uber Technologies, Inc. in the "Tech Trial of the Century," in which Waymo (the self-driving car subsidiary of Google's parent company, Alphabet Inc.) claimed more than $2 billion in damages for alleged trade secret theft. Susman Godfrey was hired by Uber only months before the jury trial in the Northern District of California was scheduled to begin. Susman Godfrey's team successfully argued for the exclusion of Waymo's expert damages opinions, and the case settled during the first week of trial.
- Representing universal life insurance policyholders in *In re AXA Equitable Life Insurance Company Litigation*, a breach of contract and consumer protection class action lawsuit pending in the Southern District of New York that challenges increases to cost-of-insurance charges for certain flexible-premium life insurance policies covering elderly insureds. In 2020, Ms. Josephs and her team secured class certification of breach-of-contract claims and claims under New York General Business Law § 349 and New York Insurance Law § 4226.
- Representing a major sports agency in a confidential arbitration concerning the departure of agents to a competing agency.
- Arguing and winning an appeal before the U.S. Court of Appeals for the Third Circuit in *Plavin v. Group Health Inc.*, where Ms. Josephs represents a retired NYPD officer, the named plaintiff for a putative class of hundreds of thousands of NYC employees and retirees, alleging the employees' health insurer violated New York's consumer protection laws. You can listen to her oral argument here and read the Court's opinion here.
- Representing a *qui tam* whistleblower in ongoing False Claims Act litigation against Walgreens and its affiliates concerning their failure to pass on "usual and customary" generic prescription drug prices to Medicaid and Medicare Part D programs. Ms. Josephs successfully opposed multiple motions to dismiss in this case in the Northern District of Oklahoma, enabling her client to proceed to discovery on his claims. Read about the district court's opinion denying defendants' motions to dismiss here.
- Representing an international aviation financing and leasing company in actions seeking to recover more than $40 million in damages from various lessees. Ms. Josephs led mediations which resulted in

confidential settlements in several of the actions.

Ms. Josephs also dedicates a significant portion of her docket to pro bono matters. She currently represents SAJE, ACCE Action, and CES, tenant advocacy groups, as intervenors to help defend the constitutionality of eviction moratoria enacted in the wake of the COVID-19 pandemic by the City of Los Angeles and County of San Diego. In February 2022, Ms. Josephs argued an appeal before the Ninth Circuit on behalf of ACCE Action, urging the court to affirm the denial of a preliminary injunction targeting the County of San Diego's expired eviction ordinance. Click here to watch her argument. The *Daily Journal* and *Law360* profiled Josephs and her colleagues for their work in this area.

Ms. Josephs joined Susman Godfrey after clerking for Judge Patty Shwartz of the U.S. Court of Appeals for the Third Circuit and Judge Anita B. Brody of the U.S. District Court for the Eastern District of Pennsylvania. She earned her J.D. from Yale Law School and graduated Phi Beta Kappa and with distinction from the University of Virginia.

Education

Yale Law School (J.D., 2014)

University of Virginia (B.A., with distinction, Phi Beta Kappa, 2011)

Clerkship

Law Clerk to the Honorable Patty Shwartz, United States Court of Appeals for the Third Circuit

Law Clerk to the Honorable Anita B. Brody, United States District Court for the Eastern District of Pennsylvania

Honors and Distinctions

- California Lawyer Attorney of the Year, Daily Journal (2023)
- Rising Stars of the Plaintiffs Bar, *National Law Journal's* Elite Trial Lawyers (2022, ALM)
- Recipient of National Impact Case of the Year Award by Benchmark Litigation (2019)
- Coker Fellow, Torts, Professor Douglas Kysar
- Teaching Assistant to the Honorable Stefan R. Underhill (D. Conn.), Complex Civil Litigation
- Articles Editor, *Yale Journal on Regulation*
- Phi Beta Kappa
- Raven Society

Professional Associations and Memberships

- California State Bar
- New York State Bar
- United States Court of Appeals for the Second Circuit
- United States Court of Appeals for the Third Circuit
- United States District Court for the Eastern District of New York

- United States District Court for the Southern District of New York

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CHRISTOPHER Y. MEEK, *Individually and On Behalf of All Others Similarly Situated,*	)	No. 19-00472-CV-W-BP
Plaintiff,	)	April 28, 2023
V.	)	Kansas City, Missouri
KANSAS CITY LIFE INSURANCE COMPANY,	)	CIVIL
Defendant.	)	

TRANSCRIPT OF INTERIM PRETRIAL CONFERENCE

BEFORE THE HONORABLE BETH PHILLIPS
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

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APRIL 28, 2023

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THE COURT: Good afternoon. We are here on Meek versus Kansas City Life Insurance Company, Case No. 19-472.

Could counsel please enter their appearance?

MR. STUEVE: Good afternoon, Your Honor. Patrick Stueve here on behalf of the plaintiffs. Along with me is my partner Brad Wilders, Ethan Lange, and Lindsay Perkins, and co-counsel Matt Lytle.

THE COURT: Thank you.

MR. DELNERO: Good morning, Your Honor. Daniel Delnero on behalf of the defendant, Kansas City Life, with my partner Randy Evans, co-counsel John Shaw and Lauren Tallent, and our paralegal, Lauren Gleason.

THE COURT: Okay. Thank you. So I have a number of topics I'd like to discuss with the parties today. I'm not confident that I'm going to be able to resolve all of the issues that the parties would wish to be resolved before the mediation next week, but I'm going to endeavor to at least give some -- if not make some rulings, give some direction as to the way that I am leaning on some issues, take up as many issues as we can. I will then open up the floor at the end of the hearing for any remaining topics that the parties would like to discuss, questions that you may have, topics that, if, heaven forbid, the mediation isn't successful, we need to take up at

the next pretrial conference. So that's kind of how I expect to proceed today.

I don't have a strong feeling about the order of the topics which I take up. The three main topics that I would like to make sure to discuss is a discussion of the experts, the paragraphs in the expert reports that I referenced in the order on the motion to strike.

Discuss the equitable estoppel issue. That's one where I'm not confident I'm going to be able to give you a ruling. I will tell you, and I'll go into more detail when we get to that topic, I did find the additional briefing helpful, and it actually made, when I went back to the original briefing, the original briefing a little bit more helpful. And I'll be honest. I think I was incorrect to put as much emphasis on the *Ruth Fawcett* case as I did in the order that I entered. With the additional briefing, I understand now a little bit more about why you relied on some of the cases that you relied on in your original briefing on this topic.

And then the request of the plaintiffs to enter partial summary judgment on Count III.

Those are the three main topics that I'd like to discuss today. To the extent we have time, I know that the plaintiffs would like to discuss the disclosure, or failure to disclose the mortality study in Milton's rebuttal report; and then some expert issues that the defendants have raised and

whether or not the experts -- plaintiff's experts need to review their calculation.

So that's my goal today is to get through those topics. To the extent there are other topics and we have time, I'm happy to discuss those with you. Do the parties have any strong feelings as to which order it would make most sense to go through the topics that I just listed?

MR. STUEVE: Plaintiffs don't, Your Honor.

MR. DELNERO: No.

THE COURT: Okay. Well, let's start with the experts, then.

What I have done is gone through the order that I entered on the motion to strike and highlighted the paragraphs in which I thought that the testimony was not relevant in light of the rulings, but left open the possibility that I was missing something. I understand from the briefing plaintiff's position on these.

But I will be honest, from defendants, I didn't find the brief -- the additional briefing that enlightening; and so to the extent you have any additional arguments on the paragraphs, what I would suggest is that we start with Pfeifer's report, and the first paragraph that I see is Paragraphs 20 and 21.

Again, to reiterate the statements I made on the telephone conference, I wouldn't normally go through these with

this level of detail, especially this early, but I feel very strongly that these issues need to be hashed out before the trial starts, most certainly when a jury is not present in the courtroom. This is just not the type of issue that we should be wasting a jury's time on, and I really think that this trial needs to be concluded in three days. And so those are the reasons that I'm taking a slightly different tack than I do oftentimes with respect to these issues and think that maybe we can push them down the road a bit.

So with that, in Mr. Pfeifer's report, which I have in front of me as Document 221-4, it seems to me under the rulings that Paragraphs 20 and 21 are not relevant. Does counsel for defendant -- do you have any additional argument you'd like to make on that issue?

MR. DELNERO: Yes, Your Honor, briefly. Do you prefer the podium or here?

THE COURT: Wherever you're most comfortable. It's most important that you speak up, which you're doing, so that both I and the court reporter can hear you.

MR. DELNERO: Okay. That's usually not an issue for me, regardless of where I'm standing.

Your Honor, I actually had -- I believe in the initial e-mail, you raised a question about Paragraph 10, as well, from Mr. Pfeifer's report.

THE COURT: I may have, and I may have just missed

that in my notes. Yes. Yes. So proceed with your argument, whatever is the most efficient.

MR. DELNERO: Sure. So I'll start with Paragraph 10.

And, Your Honor, I believe the portions of Paragraph 10 that are relevant and appropriate for the jury to hear, at least topic-wise, are the inappropriateness of using mortality rates drawn from GAAP and, more specifically, deferred acquisition -- yes, deferred acquisition costs accounting and unlocking, and cash-flow testing, and a pricing or damages model.

Paragraph 10 in Mr. Pfeifer's report addresses why those unique metrics for the purpose of financial reporting and for cash-flow testing are not appropriate metrics on -- as far as pricing or, in this situation, as far as saying the price that Kansas City Life should have charged under the Court and plaintiff's interpretation of the contract.

So we are not seeking to introduce that testimony and that evidence to counteract contractual interpretation. We understand the Court has already ruled on that issue and ruled as to the appropriate interpretation of the agreement. But as far as the measure of damages and the rates used in plaintiff's damages model, I believe the Court's Daubert order said that that was appropriate for cross and appropriate for testimony.

THE COURT: And I agree with that. I don't see

where in the order I excluded Paragraph 10, although, again, I may be wrong.

Generally speaking, I agree that it is appropriate to cross-examine Mr. Witt on his damages calculation based upon the fact that he used mortality factors or rates that, in your client's opinion, are only proper for purposes of cash-flow analysis, damages, things of that sort.

So which counsel for -- Mr. Wilders?

MR. WILDERS: Good afternoon, Judge. We understand that to be the Court's order, and we're not objecting to that issue.

I think the only part of Paragraph 10 that we would really be objecting to is the statement that insurers do not set COI rates equal to pricing mortality. To the extent that they want to introduce industry standards or what other insurance companies have done, we don't think that's consistent with the obligation that here we're calculating damages based on this Court's interpretation of this policy.

THE COURT: I do agree that any industry standards are not appropriate; but to the extent, again, his testimony is simply that it is not appropriate to use mortality rates from other calculations, then that testimony will be permitted.

MR. DELNERO: The only, I think, caveat to what they said is if equitable estoppel -- I know we're addressing that later, but if equitable estoppel is going to the jury or is

part of the trial, then industry standards are relevant for state of mind for intent to deceive and for the extent of any duty to disclose the manner in which the COI rate is determined.

THE COURT: Okay. Let's table that issue because I think there's an argument that you don't need to establish intent to deceive under Kansas law. But let's table that issue. We'll take that up later.

Let's move, then, to Paragraphs 20 and 21 of Mr. Pfeifer's report.

MR. DELNERO: Thank you, Your Honor. And on Paragraph 20, I think it's admissible to the extent that it's appropriate for Mr. Pfeifer to explain the manner in -- the background of UL policies and the manner in which they operate so the jury has an understanding.

That is potentially something that could be handled through a court instruction, but if the jury does not have a full understanding of what these policies are and how they operate, I think it will be difficult for them to understand some of the other actuarial issues at play that go to damages.

So, again, not admissible to the extent it's seeking to disagree with or enlighten contractual interpretation, but it's the *Old Chief* issue of the jury needing a narrative and not have everything slashed and stipulated to the point of it not being comprehensible.

THE COURT: Mr. Wilders, do you agree that a background is appropriate to be said?

MR. WILDERS: I think some background about how the policy operates is appropriate. What my concern with 20 and 21 is, is it focuses on this distinction between guaranteed and nonguaranteed pricing elements of the policy. And because the Court has already determined that the cost of insurance rate has to be set in a specific manner, referring to it as a nonguaranteed element and emphasizing that point will be confusing to the jury.

THE COURT: I think I'm going to have to hear the testimony. I'm not confident that I think that it's going to be any more confusing to the jury than a number of aspects of this whole litigation are going to be. So generally speaking, it's appropriate for both sides to lay some background, explain the difference in the policies. Whether or not it is confusing to talk about guaranteed or nonguaranteed elements, I'll just have to hear some testimony on that one.

Moving on, then, to Paragraphs 69 through 72. Again, these are paragraphs that contain some information regarding contract interpretation, which, obviously, I've excluded, but also contain information that I'm open to an argument that they could also be used to properly criticize Mr. Witt's testimony. And in these, I was trying to give the defendant the benefit of the doubt that, you know, maybe there

is some valid use of these paragraphs.

Do you have any argument as to why Paragraphs 29 through -- 69 through 72 should be used to criticize Mr. Witt?

MR. DELNERO: Yes, Your Honor. I think it's -- to me, it's three points contained in those paragraphs that are relevant.

The first is those paragraphs contain testimony that Mr. Meek was actually better off, did not suffer damages as a result of the manner in which Kansas City Life set the COI rate, as opposed to the manner in which plaintiff's expert calculated the rate. And that goes -- I think it was Footnote 11 or 12 of the Court's summary judgment order where you said that that specific issue, whether plaintiff was better off or worse off, is one for the jury, not for the Court. So the paragraphs are relevant to that, whether Mr. Meek and other class members actually did not suffer any damages by consideration of the broader factors than age, sex, risk class.

The other point which we discussed earlier was inappropriateness of using DAC and cash-flow testing. That's contained in those paragraphs and some of the others, as well, but it's contained within those paragraphs.

The final point is the one where Mr. Pfeifer opines that Mr. Witt, plaintiff's expert, did not set his alternative rate damages calculation, whatever you want to call it, strictly equal to mortality is relevant. The fact that he

derived a smoker-distinct rate from the unismoke rate, and there were some other calculations in there, rather than just performing a simple addition and subtraction, go to the appropriateness, accuracy, and ability to challenge Mr. Witt, as well.

So, in our view, topics along the lines of those paragraphs are admissible for those three purposes, not contract interpretation.

THE COURT: Mr. Wilders, I think in my order, I made it clear that this dispute between the experts as to whether or not Mr. Meek and class members were -- suffered any damages is something that the jury is going to have to decide.

Furthermore, as I've also said, to the extent that the defendant's experts believe that the calculations or the mortality rates used by Mr. Witt are inappropriate because they should only be used for cash-flow testing and other reasons is something that the jury is able to hear.

I don't fully understand, I'll be honest, your argument and Mr. Witt's testimony regarding the smoker/nonsmoker calculations and alternative damages. And so what's your position with respect to defense counsel's argument that these paragraphs, to the extent they touch on that topic, should be admitted?

MR. WILDERS: So let me start with the "some class members are better off or not better off" as it's laid out in

the expert report here. The criticism being levied at Mr. Witt was that he found one of his damages calculations accrued damages only where the mortality rate was lower than the cost of insurance or higher than the cost -- or lower. Let me back up.

THE COURT: You're not helping me.

MR. WILDERS: When the mortality rate -- I apologize. When the mortality rate was lower than the cost of insurance.

THE COURT: Okay.

MR. WILDERS: And that produces positive damages, for lack of a better word.

THE COURT: Right.

MR. WILDERS: There was also, because our theory of the case was in months where the mortality rate was higher but Kansas City Life elected voluntarily to charge a lower cost of insurance rate, there would be no breach in that situation. And so the appropriate, for that month, damages would be zero, rather than a negative amount of damages that would reduce the overall damages.

As we understand the Court's orders to date, the Court believes that when you do account for both so that there is what the Eighth Circuit characterized in the *Vogt* case as an offset -- so if you have positive damages in one month and negative damages ten years down the line, it offsets to zero.

Because of, as we understand the Court's orders, we don't plan to present that calculation to the jury. We plan to present Mr. Witt's calculation that shows the -- it incorporates the offset. And so if they want to criticize Mr. Witt for adopting what the Court has determined is the appropriate way to calculate damages, we think that would be inappropriate in front of the jury because he's following what we understand the Court's interpretation of the contract to be.

THE COURT: Right. And so do you disagree with that?

MR. DELNERO: With that stipulation, no --

THE COURT: Okay.

MR. DELNERO: -- as long as -- but the paragraph does go broader than that and addressed -- more than just the undercharges was addressed in those paragraphs of Mr. Pfeifer. He also took out the GAAP and took out the CFT improvements to show that Mr. Meek did not actually suffer damages.

So I think the testimony as a whole related to Mr. Meek not suffering damages under Pfeifer's report is proper, as the Court alluded in the footnote in the summary judgment order. But we're not -- if they're not introducing the model that does not have the undercharges, then there's no reason for that to be brought up. I think that takes care of 78, as well.

THE COURT: Okay. I think we're on the same page on

that topic.

And so, then, Mr. Wilders, I was also curious about the defendant's argument regarding the -- well, does that issue, then, address his Point 3, that Mr. Witt did not set the alternatives strictly from mortality, he used the smoker/nonsmoker?

MR. WILDERS: My understanding is that Mr. Witt -- or Mr. Witt has calculated a smoker distinct set of rates from the pricing mortality rates that were produced by Kansas City Life. We understand that they are going to criticize him on the fact that he split those rates from smoker/unismoke, one rate for smoker or nonsmoker and smoker distinct, one rate for not -- for both of them.

THE COURT: Okay. So you don't have any problem with the paragraphs related to that topic?

MR. WILDERS: Yeah. I mean, I wasn't sure where that was in here, but we don't have an issue with him bringing that up at trial.

THE COURT: Okay. It appears as though, then, the previous discussion addressed Paragraph 78, so let's talk about Paragraph 85.

Again, it appears now, based upon our previous conversation, that some of this would -- this paragraph would criticize, would constitute criticism of Mr. Witt for, again, his failure to use -- or for his use of mortality rates that,

in the defendant's opinion, should be limited to cash flow and other uses. Is there any other reason that you believe sections of 85 would be relevant?

MR. DELNERO: 85 through 90, no.

THE COURT: Okay.

MR. DELNERO: 90 through 92 I think we should address separately because it's ASOPs related to GAAP and cash-flow testing. I know in general the Court said that industry standards, things of that nature, can't be used to necessarily attack the entirety of the concept or to alter the contractual language.

THE COURT: Right.

MR. DELNERO: In this case, though, ASOP, I believe it's 2 and 10, for sure ASOP 10, are being used to explain what GAAP and DAC accounting methods are, how they're created, what they're used for; and what the cash-flow testing assumptions are, what they're used for; and when Kansas City Life performs those calculations and those functions, they're guided and essentially bound by those. So it's -- they're proper in that sense to show why these are not appropriately to pull aside and plug into a pricing damages model.

THE COURT: So this seems to me to be relevant because, No. 1, I could use some education on this; and to the extent I permitted them to cross-examine Mr. Witt on this, it seems as though if the ASOPs are necessary to provide

background to his testimony, then -- and not to engage in contract interpretation, then these ASOPs would be admissible.

MR. WILDERS: Well, the objection that we have to the use of the ASOP that they want to rely upon is that it is an ASOP that was from 1992. And that's before we started -- that precedes the rates we're using from the GAAP and the DAC testing. And in 1992, the ASOP language that they're relying on was taken out of the ASOP, the language that says that this is only relevant to GAAP and DAC pricing. So from our perspective, the expert shouldn't be able to rely on a standard that wasn't in place at the time that these prices -- these rates should have been changed.

THE COURT: So why do you think an ASOP that was not in place at the time that the pricing was set is relevant?

MR. DELNERO: That's not accurate. Their damages model runs, includes periods when those ASOPs were in place. The ASOPs that were in place at the time of the DAC and CFT are the versions that should be used. We agree that the versions that were in place at the time of the exercise is the ones that the witness should reference on the stand.

THE COURT: Okay. It seems to me that this is generally admissible, but I do agree that the ones that were in effect at the time that the decisions are made are the ones that should be used in cross-examination. And to the extent the parties are not on the same page as to what was in effect

at the time that the decision was made, I would ask that you meet and confer; and if there continues to be a disagreement as to which ASOP is proper for cross-examination, let me know. But as a general rule, I think it's admissible, but I agree, you can't use an ASOP that wasn't in effect at the time the decision was made.

I also have Paragraph 97 on my list, that it should be excluded to the extent he is discussing the impact on KCL's profitability. Do you have any other argument as to why -- do you have any argument as to why there's another reason that the information in Paragraph 97 should be used?

MR. DELNERO: Yes, Your Honor. The other reason is the appropriateness of using the credited and accumulated interest rates, which, as Mr. Pfeifer points out in Paragraph 97, at times were well over 10 percent. And it really goes to the expectation model of damages, which the Court has found is appropriate, that if the COI charge had to be lower or recalculated, then we can't just assume Kansas City Life would have continued paying, at times, 15, 16, 17, 18 percent interest.

And what Mr. Pfeifer is pointing out here is that, really, if you remove the interest from -- those extremely high interest rates from the damage model under Mr. Pfeifer's calculation in Paragraph 97, then damages are inflated by two or three times. In reality, it's closer to five times.

THE COURT: So I will be 100 percent honest, I do not understand this issue at all. But what I do understand plaintiff's arguments to be is, No. 1, this issue was not timely raised; and, No. 2, determining what the interest rates would be if the COI would have been calculated differently would be based on speculation. And so what's your response to those arguments?

MR. DELNERO: Well, it was raised here. I understand their timeliness argument about what we filed in our supplemental brief, or the April 14th brief, but it's raised in this paragraph. So even if there's a timeliness issue to what we later filed, that discussion in this paragraph was timely.

THE COURT: And so would you foresee this playing out that he would testify -- I don't see that there's a determination of what the interest rate would be. Would he just testify that had the COI been calculated differently, the interest rate would have been calculated differently, but no testimony as to what that interest rate would be?

MR. DELNERO: So in Paragraph 97, it says that the high credited interest rates inflate damages by two or three times. So the testimony would be consistent with this paragraph.

THE COURT: I have not read this entire report, but where does the two to three times --

MR. WILDERS: I think, Your Honor, what he says is

that the impact of Mr. Witt's use of historical credited interest rates is large, overall damages could be doubled or tripled due to the application of these credited rates.

But there was no calculation done in the report; there was no backup material provided in which he did this analysis; and there's no evidence in the record as to the critical point, which is what would the interest rates have been, even if this was an appropriate theory for the defendants to make -- to criticize Mr. Witt for.

And I would go back to the point being that I'm not aware of how you can argue that, okay, yes, we've been found in breach of contract; but, you know, if we had known -- if we had known we were going to be found to have breached the contract, we wouldn't have given you all the interest that we gave you, you know, 10, 20, 30 years ago.

That does not seem to me to be an appropriate expectation of the plaintiff in terms of what the damages would have been under the contract because, as I understand it, the expectations form of damages is the plaintiff gets the amount you overcharged them and anything that would have been expected to accrue from that overcharge. And in this case, these are the interest rates, Mr. Witt used the interest rates that they credited the accounts at the time that the transactions occurred.

And so we don't think any of the testimony about

alternative interest rates that might have or could have or, perhaps, would have been used if they had not breached the contract should be introduced into the evidence at trial.

THE COURT: So what's your response to that?

MR. DELNERO: Your Honor, the interest rate that Mr. Pfeifer is saying would have been used is contained in Paragraph 97. He refers to this 3 percent rate, which is the guaranteed minimum under the policy that Mr. Meek has. Some of the other policies were 4.5 percent, but he's referring to the guaranteed minimum rate.

Regarding whether that's appropriate to take into account for damages, the Court's ruling is that Kansas City Life should have set the cost of insurance rate solely equal to age, sex, risk class, the mortality factors. When you're saying that the policy has to be set only according to those rates, then you can't ignore what would have happened elsewhere with the policy and say, well, if we're required to say it this way, rather than the way the company interpreted it, and other -- frankly, other courts have interpreted the policy as allowing for determination of interest rates, you can't pretend that we still would have paid 15, 16, 17, 18 percent. And so the jury is entitled to hear the other consequences of that contractual interpretation, and, frankly, they're entitled to hear testimony about the impact of interest rates on Mr. Witt's damages model.

THE COURT: So I think that I'm struggling with this for probably a variety of reasons, but one of which is I don't fully understand how interest rates are calculated in connection with the cost of insurance. And so maybe because I haven't looked at that provision of the policy, maybe because this is a whole new world for me, but can either of you give me a brief summary of how this works?

MR. DELNERO: Sure. If helpful, I can kind of take a step back and go over how the policy works.

It is a unique policy in that you have the cash value portion, which is similar but not identical to a savings account. But you have the cash value portion, which accrues interest; and then you have kind of the typical life insurance portion, which pays out a death benefit. And the cost of insurance rate, the cost of insurance charge is deducted from the cash value and applied to the policy.

THE COURT: Right.

MR. DELNERO: But that cash value, while there's cash in it, it's accruing interest rates, at times 3 percent. Remember, these have been around since Mr. Meek purchased the policy in 1984. There were periods where interest rates were higher, where they were 15, 16, 17, 18 percent.

But what Mr. Pfeifer is saying is that if you have -- if the insurer has to calculate or determine, to use the policy language, the COI rate limited to age, sex, risk

class, rather than broader market factors, competition, et cetera, it wouldn't and couldn't pay those extremely high interest rates.

THE COURT: And so how -- under the policy, how is the interest rate set?

MR. DELNERO: The interest rate under the policy is at the insured -- insurer's discretion. It doesn't -- it differs from the COI rate provision in that there's not a metric for how it needs to be determined, subject to a guaranteed minimum. And I believe the BLP plan which Mr. Meek had was 3 percent, other policies within this kind of cohort were 4.5 percent.

THE COURT: And so, Mr. Wilders, do you agree that the interest rate was set at the insurer's discretion?

MR. WILDERS: Well, for some policies. It varies by policy, but our expert has used the interest rate that they set at their discretion if it was higher than the minimum.

THE COURT: Right, other than the minimum.

MR. WILDERS: I do want to correct something. The cost of insurance rate is entirely separate from the interest rate.

THE COURT: Right.

MR. WILDERS: It's much like -- it is like a savings account. If your bank says they're going to give you, they're going to charge you $20 a month to maintain your savings

account, and then they charge -- and then they give you the interest rate of whatever the competitive interest rate is at that point, let's say it's 5 percent. And then let's say six months later you realize the bank has been charging you $50 a month, and you say, I want my $30 back for each month. And then the bank is like, well, you know, if we knew you were going to complain about us overcharging you, we only would have given you 3 percent interest instead of 5 percent interest.

In our view, this is another way of them saying, it wouldn't have been profitable for us to use these rates, so we would have adjusted other aspects of what we were providing under the policy, and the Court has ruled that the profitability is gone. That's what Mr. Pfeifer is saying, we wouldn't have been able to afford to give you these interest rates if we had been complying with the terms of the policy.

THE COURT: So I don't know that I've ever encountered a damages issue of this sort. I would assume, since the parties haven't provided any case law on this issue, that you haven't found any case law that would discuss a damages model under similar or even somewhat related circumstances.

MR. WILDERS: I've looked, Your Honor, and I haven't found any.

THE COURT: Okay. I assumed that to be the case.

I'm going to have to think about this one. I

haven't had this issue come up before, and so I'm not real sure -- I need to ponder this one for a minute. So I'm going to explicitly defer ruling on 97.

The next one I have on my list is Paragraph 121, to the extent that it is inconsistent with the summary judgment order.

MR. WILDERS: If I might go first on this, Your Honor. I think this is similar to the issue of offset, which is Mr. Witt offered two different calculations for Count II damages, one in which the damages for Count II were the same number -- was the same number as Count I, and another way of calculating what isolated under the Court's interpretation of the policy just the expense portion of the overcharge. And we plan to present the second model to the jury, and so the criticism levied here we don't think applies to that calculation.

THE COURT: Do you agree with that?

MR. DELNERO: Yes, Your Honor. We have a disagreement that is addressed in later reports about the manner in which Mr. Witt calculated the distinction for Count II, but we agree that this was before he separated those out, so it's no longer relevant.

THE COURT: Okay.

MR. DELNERO: And, Your Honor, I also had down that you raised an issue with Paragraph 98. That was GAAP, CFT, and

unismoke/smoker, so I think that's taken care of by the prior rulings.

THE COURT: Okay. Then there were a couple of paragraphs in Mr. Pfeifer's rebuttal report, specifically 40 to 41, and whether or not those paragraphs could properly be used to discuss industry standards.

MR. DELNERO: Your Honor, similar to the -- what we discussed earlier with ASOPs, and I think that was Paragraph 21, appropriate to discuss putting in context for what DAC and CFT are and why they're not appropriate for a pricing damages model.

THE COURT: Mr. Wilders, do you have any thoughts on that?

MR. WILDERS: We don't think the standards are relevant because he wasn't conducting a pricing exercise. You know, a pricing exercise would be pricing the policy in accordance with certain actuarial principles, and here the issue is calculating the damages based on the Court's interpretation of the policy.

MR. DELNERO: And to us, that's the point.

THE COURT: Right. Again, I think that, to the extent that Mr. Pfeifer is criticizing Mr. Witt because he's using mortality rates improperly, or his position being that they should only be used for other purposes, damages, cash flow and the like, I will permit that testimony.

There were a couple of paragraphs of Mr. Milton's report, 49 through 52 and 54. Again, the question is whether or not these paragraphs have any value in terms of criticizing Mr. Witt's calculation of damages. Obviously, they will be excluded to the extent that they are opining on contractual interpretation.

MR. DELNERO: Yes, Your Honor. And I also have down Paragraph 71 for Mr. Pfeifer. That was DAC, CFT, unismoke, smoker distinct. I don't think we need to discuss that one. I just want to make sure everything in your list we addressed today.

THE COURT: I think I have two lists, and, unfortunately, they're not identical. So I didn't get all of the paragraphs from both lists on my notes here. But if you don't think that paragraph needs to be raised, then that's music to my ears.

So let's move on to Milton 49 through 52.

MR. DELNERO: Sure. And so 49 to 52 you have the DAC and CFT issue, which, for the same reasons, we think are proper.

You also have that the policies contain different language. And the different language, in light of the Court's order and rulings, we believe is admissible to show why DAC and CFT metrics are not appropriate for the damages model because they include policies -- they include groupings of policies

that do not have identical COI determination language.

For example, some of the policies, like Mr. Meek's, say age, sex, and risk class. Other policies only say age and risk class and leave out the sex. Those policies, when they're priced, have unique rates, and Mr. Witt applied the unique rates when he was using the pricing mortality rate. But when you fast forward to DAC and CFT, they clump together broader groupings of policies because you're not doing it to price, you're doing it for other metrics, so it's appropriate to do so. But those groupings together would not be appropriate to just borrow the rate for pricing because the insurer is permitted to take, under the Court's interpretation of the contract, is permitted to take different metrics into account.

So the differing policy language we believe is relevant for that issue, for the appropriateness of the rates Mr. Witt used.

THE COURT: Mr. Wilders?

MR. WILDERS: Your Honor, I don't see the DAC issue being raised at all in any of these paragraphs. These paragraphs were attempting to show that there was different policy language. The Court held on the record at summary judgment that there were no material differences. We don't believe there are material differences to the policy language here. Mr. Witt used the rates that were identified in their pricing files for purposes of calculating damages; and if they

were to be allowed to put different policy forms with additional language related to the cost of insurance rates, but language which doesn't change the Court's interpretation and has never been suggested that it changes the Court's interpretation of the policies at issue here, that's going to be highly confusing to the jury and prejudicial, we think. And we think the case needs to be tried on the Court's interpretation of the policy, not an attempt -- what we would view as a backdoor attempt to offer an interpretation of other policy form language.

And I would point out, none of the language that's different here changes the fact, as the Court has found, that the policy does not permit expenses and profits to be loaded into the cost of insurance rates, nor does it change the Court's interpretation that the defendant is required to use the then-current, at the time the deduction is taken, mortality rates.

THE COURT: So what is the change in the language of some of the policies that you believe is important for the jury to know?

MR. DELNERO: So I was mistaken. The reference to DAC and CFT was in Paragraph 54, but it's one string. That's why I was kind of putting it together. So I do want to correct that.

But it's to show that, why you can't borrow those

DAC and CFT metrics. Correct, it does not alter the Court's summary judgment ruling as far as contract interpretation or the pricing mortality rate used prior to, I believe it was 2008. But once you start including those other rates, it shows why they're not designed to be used for that group, for the policies for pricing purposes when some will just say age and sex. Some say age, sex, risk class. Some say age, sex, risk class, duration.

So the issue of whether you can include and take into account not just expenses and profits, but also competitive factors that can drop the rate below where Mr. Witt had it and to account is the same, but when you're borrowing rates from other exercises, that difference in language shows why it's inappropriate. And we believe it's limited -- it should be admissible limited to that purpose.

MR. WILDERS: Your Honor, the whole section of this report is entitled, "Point 1, the policy language does not require Kansas City Life to set its COI rates equal to the assumed future mortality rates." That's a policy interpretation issue.

The conclusion of the paragraphs that they're relying on is that Mr. Pfeifer says, (quoted as read) "The differences in policy language support my understanding that the sentence refers to characteristics Kansas City Life has identified as ones it will use in assigning particular rates to

the insureds for the particular product, not the manner in which it will numerically specify those rates."

There's, then, no opinion in this section that the policy language from these policy forms is related to the criticism Mr. Witt should not have used the DAC or the cash-flow testing rates. That is an opinion that is not contained in the report here. And so they're trying to -- I think what's occurring here is they're using additional facts to support another opinion that wasn't disclosed.

MR. DELNERO: Your Honor, it's contained in -- the language I'm referencing is contained in Paragraph 54, second, third sentence. (Quoted as read.) "I also understand that plaintiff's expert proposes using, as substitutes for KCL's actual COI rates for the purposes of computing damages, (a) KCL pricing mortality rates up to 2005, (b) KCL's internal assumed future mortality rates used for purposes of GAAP DAC unlocking, the GAAP mortality rates, up to 2015, and then (c), for the BLP, LifeTrack, AGP, PGP, and MGP products only, beginning in 2015, the internal assumed future mortality rates KCL used for purposes of cash-flow testing, the CFT mortality rates, while for other products continuing to use -- continuing to substitute the GAAP mortality rates."

So the different policy groupings and the different policy language, once Mr. Witt in 2005 moves off of the pricing mortality rates and on to these other rates that were never

determined, considered, or used in pricing is where that different policy language is admissible. It's not to contradict in any way the Court's summary judgment order, it's to further explain why use of these improvements is improper, which is particularly critical for Mr. Meek because, without these improvements, it's very difficult for them to show any damages with respect to him.

THE COURT: Okay. I'll tell you what I'm going to need to do with these paragraphs is take a step back with the information that you've provided, go through this again. This has provided a lot of information that I didn't have before, and so I need to take your arguments, put them in the context of this, and defer ruling on this particular one, and, in all honesty, probably ask some more questions the next time we all meet. But let me defer ruling on those paragraphs.

I think the only remaining paragraph, then, would be Mr. Milton's rebuttal? Paragraph 16 in Mr. Milton's rebuttal? Those are my notes. Did the e-mail have another paragraph?

MR. DELNERO: Yes, but it's all -- frankly, it's all the same as this, so I can address them collectively. I'll give you the paragraph numbers I have from the e-mail.

THE COURT: Okay.

MR. DELNERO: But I also have 56 and 62, 68, and 96 from the original, and then 16 from the rebuttal. 56 through 62, 68, and 96, we believe or submit are admissible to the

extent they discuss GAAP and DAC and go to the pricing, so the same issue we've discussed.

THE COURT: Okay. So when you say 56, 62, 96, those are on the original report?

MR. DELNERO: Correct.

THE COURT: And those -- your arguments are all related to the issue that we discussed with respect to Paragraphs 49 through 52 and 54.

MR. DELNERO: No. It's the one we discussed before regarding specific -- not the difference in policy language, the -- that DAC and GAAP, criticisms of using those for pricing model are admissible, not admissible to the extent they're discussing contract interpretation.

THE COURT: Okay. Mr. Wilders, do you have anything to add to that?

MR. WILDERS: Only that we don't believe that they should be able to accuse Mr. Witt of not creating his own actuarial -- actuarially sound rates because the point here is he's supposed to be relying on Kansas City Life's mortality rates. We understand they're going to make argument that the GAAP do not reflect their mortality rates, but we don't think they should be able to criticize Mr. Witt for not coming up with his own rates.

THE COURT: So I do tend to agree that criticizing him for not coming up with his own actuarial model is not

appropriate. Now, using the wrong mortality rates is fair, but he is very clear that he did not do an actuarial analysis of the damages. It's purely a numbers in, numbers out.

MR. DELNERO: On cross, I think we're entitled to elicit that testimony so the jury understands that he was not doing an actuarial analysis because I think that's important because he's going to testify as to his actuarial experience, decades in the industry, and a bunch of, you know, really fancy credentials. So I think it's appropriate for the jury to know what he did and what he didn't do.

As long as he testifies consistently with his report that he didn't do an actuarial analysis, he just did the damages-in-and-damages-out, then I agree, our witnesses can't double down or address that issue. But I don't think it's appropriate for the jury to be misled into thinking he did something that he actually didn't.

THE COURT: I guess I'm going to have to rule on this at the time of the testimony. I agree, you can't suggest he did an actuarial analysis when, in fact, he didn't; but if there is no suggestion that he did an actuarial analysis, then I don't think it's relevant that he didn't do one. And I think, then, that that kind of opens up a whole other line of questioning that isn't relevant.

So that's my general thought on that topic. To the extent there's any other issues that need to be addressed, I

think it's probably going to have to wait for his actual testimony.

Moving, then, on to Mr. Milton's report, rebuttal report, Paragraph 16.

MR. DELNERO: And, Your Honor, I think I can save time on that one. It's the same issue as 49 to 52, and then 54.

THE COURT: Okay. Mr. Wilders, do you have anything to add to that?

MR. WILDERS: No. We agree, Your Honor.

THE COURT: Okay. That was all of the topics I wanted to discuss with respect to the experts' reports as it related to the motion to strike. Any questions or other topics that the parties would like to discuss on that issue?

MR. DELNERO: Not from us, Your Honor.

MR. STUEVE: Not from plaintiffs, Your Honor.

THE COURT: Okay. Then let's move to the discussion of equitable estoppel, and I can tell you right now that I'm not going to rule on this issue today, just so no one has any expectations that are not met.

My first question is for whoever from counsel for defendant's table is taking this issue. One area that I'm struggling with is I now have a better understanding of plaintiff's arguments regarding the statements they believe provide the basis for application of equitable estoppel. I'm

having some struggles with determining whether or not the defendant's statements that the COI is comprised of age, sex, and risk class induced the other party to believe that certain facts existed that, in fact, did not, that it induced them to believe that there were no expenses that were being added. And so I, in that respect, see some similarities to other Kansas cases that have applied equitable estoppel, and the *Ruth Fawcett* case where the taxes and other fees were used as the basis for equitable estoppel.

So can you explain to me in a little bit more detail why you believe that the statement "cost of insurance will be limited to age, sex, and risk class" was not a -- did not induce the plaintiff to believe that certain facts existed that did not?

MR. DELNERO: Sure, Your Honor. So there's a couple of things to that.

One, that statement, which it's not -- it never says limited. The statement in the policy is that the cost of insurance rate will be based on age, sex, risk class. It's contained in the policy, in the contract itself; and as the Court held on Page 11, the statement has to be something other than the contractual promise. You can't just point back to the contract, because otherwise, then, every breach of contract case would have no end because there was some contractual promise that wasn't followed. And so you could always point

back to the original contract language.

Second, Your Honor, the annual statements -- which I have a copy of the 2018 annual statements which I'm happy to provide to the Court and plaintiff's counsel. None of the annual statements contained that language. They disclosed the COI charge, and the COI charge is the dollar figure, which everyone -- there's no dispute that that dollar figure is accurate. That is the COI charge that Kansas City Life applied and deducted.

Their theory is that, well, by disclosing the charge, you're necessarily disclosing that you calculated it correctly. But there's no statement in any of the annual statements regarding the manner in which the charge was calculated, unlike in the *Fawcett Trust* case.

In the *Fawcett Trust* case, the check stubs which were in issue had a specific disclosure that state taxes were being withheld, and then it had a dollar figure for the state tax. What the defendant in that case did was they also included cost -- they didn't just include state taxes, they included conservation fees, which are not taxes. So they called the conservation fee a state tax. They called something X when really it was Y. That's not present in any of the Kansas City Life statements.

Further, Your Honor, you also don't have the testimony on reliance here.

THE COURT: And let's hold off on reliance. I've got a lot of questions about reliance. I have not -- I most certainly have not concluded that plaintiffs have established reliance, but I first want to stay on this point.

To me, there is more of a similarity to the *Ruth Fawcett Trust* in that, you know, they said they were paying -- that the fee was taxes. It was actually taxes and a conservation fee. Here, they say the COI, that this is the cost of the COI, when, in reality, it's the COI and expenses and/or some profit margin.

So can you explain to me in a little bit more detail how you think that those two situations are actually more different than what I currently see them?

MR. DELNERO: Sure. And part of it, we have to go into a bit what the COI charges and the COI actually are and how they're determined.

So in *Ruth Fawcett*, you just took the conservation fee and added it to the state taxes. You subtract out what they added, there's your damages, there's your misstatement. That's not the case with the COI charge.

The COI charge, it's not that Kansas City Life took the mortality rate -- by the way, Mr. Witt testified consistent with this.

It wasn't the case that Kansas City Life simply took the mortality rate and then lobbed on profit, lobbed on

expense. That's not -- if that had happened, then you would never have situations where KCL undercharged, because it would always be the mortality rate plus some extra.

What we actually have here and the Court's actual finding is that Kansas City Life considered more factors than it was permitted to. Some months, that consideration of additional factors resulted in a higher charge than would have been permitted under the Court's interpretation. Other months, it was a lower charge. So it's not just the simple addition of improper charges.

THE COURT: But it's still a misstatement. I mean, from a mathematical perspective, *Ruth Fawcett Trust* would be obviously much easier to calculate the damages, but it's the saying that certain facts existed when in actuality they didn't.

MR. DELNERO: Well, you have to go to the contract interpretation to actually get there. So then another thing that *Ruth Fawcett* says was that for equitable estoppel to apply, the facts can't be ambiguous or subject to multiple construction. There it was unambiguous that the insurer -- it was unambiguous that the defendant, OPIK, lobbed conservation fees and called it a state tax.

Here, we don't have that. We have a theory of contractual interpretation as adopted by this Court and some others, as rejected by additional courts, that says you took

factors into account that you shouldn't have. But the annual statements contained no representation, no statements regarding the manner in which the charge was calculated. So they're referring to an act, not a false statement.

THE COURT: So I'm happy to hear from counsel for plaintiff, whoever is taking this argument. And I do -- be careful. Why don't we start with this particular topic and not yet move to reliance.

MR. STUEVE: So, Your Honor, the Court found that non-mortality factors like expenses were not permitted to be added to the cost of insurance charge. They did that. The Court found they breached it. If you look at the annual statement, it says cost of insurance charge. There is no disclosure in there that, in fact, they added expenses into the cost of insurance charge.

The other nondisclosure is it has the separate expense charge with the dollar amount. There's no disclosure in there that they lumped additional expenses into the cost of insurance charge. The Court found separately that that was not permitted by the contract, and they breached that. That's precisely what the *Ruth Fawcett* court found was a misrepresentation, concealment, failure to disclose those charges.

THE COURT: Did you say that that was on the annual statement?

MR. STUEVE: Yes, Your Honor.

THE COURT: And is that what you say is -- are you also referring to the annual statement?

MR. STUEVE: I've got an example.

THE COURT: Yeah, why don't I see both of them.

MR. DELNERO: Might have the same one.

MR. STUEVE: Exhibit 34 from the deposition of -- it's these charges.

MR. DELNERO: Which year is that?

MR. STUEVE: Right here. It's from his deposition.

MR. DELNERO: Yes. So it's different ones, but it's the same language.

THE COURT: Okay. Can I keep these?

MR. DELNERO: Sure.

THE COURT: Okay. Let me look at these. Like I said, I'm not making a ruling on this today. So you've given me Exhibit 34 --

MR. STUEVE: That was from Mr. Meek's deposition.

THE COURT: Meek's deposition?

MR. STUEVE: Yes.

THE COURT: And just for purposes of the record, you provided me something similar but just for the year --

MR. DELNERO: 2018.

THE COURT: Yeah, I think these are the same documents.

MR. DELNERO: They all look the same, so it probably is.

THE COURT: The only difference is that this has two pages of a privacy notice, a letter and a privacy notice. So, okay, let me look at these.

Mr. Stueve, I am interested in the issue on reliance. It seems as though from your briefing you rely primarily on the fact that it was assumed in the *Ruth Fawcett Trust* case and, therefore, we should assume it here. I didn't see it really discussed in *Ruth Fawcett*, so I'm curious -- taking out the issue of Mr. Meek's affidavit that was provided in the supplemental -- I know that there's been a motion to strike, let's take that out. I'm curious about your thoughts on how we can infer or conclude reliance on a class-wide basis.

MR. STUEVE: Let me, if I could, if I can start with the *Ruth Fawcett* case, and the Court of Appeals specifically addressed this. "The district court found that the royalty owners demonstrated reliance on misrepresentations" --

THE COURT: Could you do two things: No. 1, slow down. And No. 2, I have a highlighted copy right here with me. So if you could point me to where you are.

MR. STUEVE: So I am on -- it looks like 475-1268. I've got the -- I have a Westlaw copy, Your Honor.

THE COURT: Okay.

MR. STUEVE: It's the second to the last page of the

opinion under why equitable estoppel applies here. The Court of Appeals opinion?

THE COURT: Okay.

MR. STUEVE: It's the heading of why equitable estoppel applies here.

THE COURT: Oh, the Court of Appeals opinion.

MR. STUEVE: Yes.

THE COURT: I don't have that one. So go ahead, just speak slowly, please.

MR. STUEVE: Yes. So "The district court found that the royalty owners demonstrated reliance on the misrepresentation by cashing the monthly checks without questioning the deductions. The court found the reliance was reasonable because the royalty owners were not given any information on what taxes were owed."

It went on to say, "How are royalty owners going to reasonably question a deduction that is not even listed on the information given them?"

With respect to the class-wide reliance, the court went on to say, "Moreover, an inference of reliance by the class is appropriate where circumstantial evidence used to show reliance is common to the whole class."

So the similarities in the case are remarkably similar in this respect, Your Honor. The calculation of the cost of insurance charge is done with data that is solely in

the possession of the defendant. Both the mortality expectations and the cost of insurance rate that are necessary to calculate that cost of insurance charge are completely in their possession. It's never disclosed. That's never disclosed, not disclosed how they calculate the cost of insurance charge in the annual report.

We've cited to the record that, in fact, Kansas City Life recognizes that the policyholders have to trust Kansas City Life that they've calculated those monthly deductions correctly because there's no way for them to independently ascertain whether that's accurate or not. So it is the policyholders allowing them to deduct from their cash value on a monthly basis those deductions that are based on calculations solely in Kansas City Life's possession, never disclosed to the policyholders. So we think the *Ruth Fawcett* case is directly on point on that front.

Now, they want to make -- and I want to talk about the reliance. And if I could, what they do is cherry-pick some deposition testimony by our client, the class representative, Mr. Meek. Remember, he had this policy for decades. They put in front of him certain annual reports and asked him specifically, did he recall seeing that in an annual report. He indicated that he didn't. But when asked -- and I'd like to -- if I may, his deposition is in the record, but I want to -- if I could approach, Your Honor, very briefly on this

point.

THE COURT: Thank you. Oh, you gave me two copies.

MR. DELNERO: One is probably mine.

THE COURT: Yeah.

MR. STUEVE: There you go.

If you look at 195, he was asked -- it's Line 11 -- "You were getting annual reports each year, correct?"

Answer: "I was being sent annual reports every year."

Okay. Then if you would, if you go over to Page 203, Line 4, he is handed Exhibit 34, which I gave the Court.

"This is an annual report letter for October 19th of 2009, correct?"

Answer: "Correct."

"It shows on Page 3 of 6" -- and if, Your Honor, if you -- that is the page that has those, a monthly deduction summary.

"It shows on Page 3 of 6 in the gray box the kind of information you received -- you were receiving each and every year since you owned the policy, correct?"

The answer is, "Yes."

So he does not dispute that he received those, that that information was contained in there. He couldn't have possibly questioned the accuracy. The *Vogt* court on nearly identical facts found that no policyholder would know about

these overcharges. The Eighth Circuit affirmed that. We cited in Footnote No. 1 of our supplemental brief, several courts have found as a matter of law that a policyholder could not have determined these overcharges because all of the information is in the possession of the defendant in calculating these.

So they did not go on and ask him, well, did you understand that those calculations were accurate, but, you know, obviously, that can be reasonably inferred. There's no other information that would have been presented to him in that annual report that would have allowed him or any other class member to have questioned the accuracy. They had to trust Kansas City Life.

Now, that's why it's reasonable to infer reliance based on those undisputed facts, not only that Mr. Meek relied on the nondisclosure of the critical information, but that the rest of the class did. And the *Ruth Fawcett* court expressly found that that was permitted under Kansas law. This Court should, in applying Kansas law, should follow that substantive law.

And that is not a violation of the Rules Enabling Act which they contend. The Court is permitted, in determining whether Rule 23 is satisfied, to apply the substantive law of the State of Kansas.

THE COURT: Okay. Let's briefly hear some argument

regarding the reliance issue that you wanted to make previously.

MR. DELNERO: Sure, Your Honor. And real quick, though, another difference between *Fawcett Trust* and this case, plaintiff's counsel's entire argument just now was premised on an omission, something Kansas City Life did not disclose. The *Fawcett Trust* case specifically said, this case deals with a false statement, the misrepresentation that a conservation fee was a state tax, when it wasn't. Every brief they filed on this issue, the arguments now keep coming back to omission. So that's why we addressed the *Dunn* case and omission as the appropriate metric.

Second, Your Honor, in *Murray v. Miracorp* decided by the Kansas Court of Appeals, which is cited in our brief, roughly a year after -- six months to a year after the *Fawcett Trust* case came about, the court said, quote, no defendant is ever going to admit to stealing another's trade secrets.

It's the same issue here. The omission that they keep bringing up is we never told them that you were breaching the contract. You never told them that you were calculating the rate in a way not permitted by the contract. Well, they're seeking to impose a duty to disclose that you're violating the contract. That would, as the *Murray v. Miracorp* court in the analogous tolling context said, would blow the statute of limitations out of the water because it would never happen.

Second on reliance, you can't rely on something you've never seen or never read. In the *Ruth Fawcett* case, you could infer reliance because the class members received a check with the stub, and then went and cashed it. So they did some affirmative act, demonstrating that they had it in their possession and looked at it.

Here, you don't have that. The cost of insurance rate, the cost of insurance charge is deducted automatically. Mr. Meek testified in paragraph -- Page 169, Lines 19 through 21, question: "And did you read each annual report you received?"

Answer: "No."

On Page 173, starts around Line 23 and continues on to the next page. After going back and forth with Mr. Shaw about the 2008 annual statement. "If I didn't see it and I didn't read it, then I wouldn't have any thought or concern."

Now, Mr. Meek's an attorney. He's a well-regarded criminal defense attorney. He's tried cases, frankly, all over the world. If he's saying he didn't see and didn't read every annual statement, I can almost guarantee you there are class members who didn't read a single one. Frankly, I don't know that I've read any of my annual disclosures from my life insurance product. I don't even remember which company issued it.

So when you can't establish that every single class

member read it and took some act, affirmative act based on it, you can't establish even an inferred reliance class-wide. Further, this is where the difference between the addition of a conservation fee and the cost of insurance rate and charge really come into effect. Every single class member who was charged a conservation fee when they shouldn't have was harmed, and they were all harmed in the same way.

Here, even Mr. Witt's model has multiple cells where class members were undercharged. He even admits that at least one class member -- we believe it's more, but Mr. Witt admits at least one class member was undercharged through the life of policy once he netted it out. Well, if you're being undercharged, then you're not going to run to the insurance company and say, oh, no, my rate is supposed to be set equal to mortality. You charged me $5, you were only supposed -- you were actually supposed to charge ten, here is the extra five bucks. That's like a Monopoly, a bank error in your favor, collect 200 bucks.

So there's an incentive for at least some class members that's not common throughout the class not to complain, particularly for older class members. Because Mr. Witt has testified in prior cases that the mortality rates used by insurers, including Kansas City Life, underestimate and undercharge for what he calls upper-age mortality. Well, those class members certainly are going to have no incentive to jump

up and say, "You're charging me incorrectly."

And so when you can't uniformly say that the only reasons a class member would have taken a certain action or would have taken no action is because of a misrepresentation or an omission, then you cannot apply even inferred reliance across the class. It just simply does not exist, and it does not exist here.

THE COURT: Okay. Let me ask Mr. Stueve a quick question. So are you relying on a false statement or an omission, or both?

MR. STUEVE: Well, it's interesting, Your Honor. The *Ruth Fawcett* case at 507 P.3d, at 1146, says the defendant's concealment of the conservation fees amounts to an affirmative misrepresentation.

What we're saying here is they identified the COI charge, but failed to disclose that they had lumped in expenses. And the same thing with the expense charge. They had the expense charge on the annual statement, but failed to disclose that they included additional expenses in the COI charge. So it's that concealment that constitutes affirmative misrepresentation that, under Kansas law, we meet that standard.

THE COURT: Okay. Okay. As I said, I'm going to take this issue under advisement. I need to think about this in light of the case law and your arguments.

MR. STUEVE: Your Honor, the only other thing that I would point out, if I could, in response to his argument is that -- the suggestion that we have to put on evidence that either Mr. Meek or the class saw every annual statement. That was not the requirement in *Ruth Fawcett*. There was no requirement that they had to put on evidence of every check stub. The point there and the point here is that there is no disclosure of the information that would be necessary for a policyholder to determine that they've been overcharged.

THE COURT: Okay. Let's move on to the next topic that I'd like to discuss, and that is the plaintiff's argument in the supplemental briefing that a summary judgment should be entered with respect to liability on Count III and, like the other two counts, only damages should remain.

So I think it's important to go back to the principle I found applies to this case, which is Kansas law that if the term is ambiguous, you look at the two reasonable interpretations and take the approach that's most favorable to the insured. I think we would all assume that, or conclude, and to the extent you don't, you can put that in your appeal notice, that this is ambiguous.

I'm a little unclear as to -- for example, the plaintiff's argument as to which interpretation is most favorable to the plaintiff. You argue, and in a footnote I think the defendant adopts the statement that the COI rates

using projected death claims would be lower than expected mortality rates because future policy owners are paid a death claim, and a number of the policy -- the policy owners who die due to pre-death termination.

So why wouldn't I adopt the interpretation that you believe is most favorable to the insured?

MR. WILDERS: Well, frankly, Your Honor, we don't believe -- although that would, we believe, produce larger damages, it's not a reasonable interpretation. It's something that they've invented. And if you look through the expert reports and their discussion of why they came up with this theory that it means projected death claims, they were using it as an effort to say that we calculate the cost of insurance based on our profitability. We do a holistic analysis where we put, you know, everything into the pot, including what we want our profits to be, what we think our expenses are going to be, and we generate all of these rates.

That's why they attempted to say projected death claims. But when you take out the expenses and the profits, projected death claims, you can't really create a mortality rate from a dollar amount paid out in death benefits, which is how they define it.

THE COURT: So let me ask you to stop right there and get their input because this does seem to be an odd way to calculate mortality rates by looking at projected payout

because, No. 1, it's going to include a lot of other elements than simply the death rate.

And so my first question was why wouldn't we take this approach? But I still had the question of why is this a reasonable interpretation?

MR. DELNERO: Your Honor, as an initial matter, it's the way life insurance companies think of this. So the holistic method of determining the COI rate was the way Mr. Witt testified life insurance companies determine a COI rate. In fact, Mr. Witt was asked, have you ever seen a policy -- or do you know of any insurance company that calculates the COI rate solely based on age, sex, and risk class? And he said no, other than a few highly specialized products not available to the general market. So it's not an interpretation we invented or invented for this case, it's how it actually works in practice.

Second, Your Honor, when an insurance company is viewing mortality, it's not doing it as a population study or to see generally how life expectancy is going, it's looking for a particular policy or cohort of insureds, how long they will live, how likely they are to die in a specific year, and what are the economic consequences to the insurer of them dying at various years, or a percentage of the policyholders dying at various years because they have to ensure that they have enough money to pay claims, ensure that the reserves are adequate, and

ensure there is some profitability. So it's not -- describing it as a profitability exercise is not really accurate, it's looking to see whether the pricing model actually works and actually works in reality.

Now, I understand the Court's ruling on Count I that, well, if that's what you're doing, the contract has to describe what you're doing. But in terms of how it actually works in practice, in terms of how every insurer applies it, that's how they view mortality. They view it as projected death claims, not as some hypothetical rate of what's going to happen to the population as a whole.

MR. WILDERS: That's just rearguing the policy interpretation issues that have already been decided because the point is not what insurance companies may do or how they do it, the point is what a reasonable person would understand this policy language to mean. And just like the *Vogt* case and just like the case in Jackson County in front of Judge Torrence involving this same defendant and this same policy language, the conclusion was that this language meant assumed future mortality rates. It means the rate of death for these policyholders at the time, in the future. So if you're looking at it today, it might be a projection of how many people are going to die ten years from now, and eleven years from now, and twelve years from now, and you calculate all of those rates, and those are the rates that are supposed to be applied.

THE COURT: Let me ask you a quick question. So I realize Judge Torrence was dealing with Missouri law, which I'm personally partial to, so I wish that this case was Missouri, but that's beside the point. How did he handle this issue? Did he decide it's a matter of contract interpretation that it meant future mortality rates and sent the issue of damages to the jury?

MR. WILDERS: Yes, he did. He said in Page 10 of his order, which is Exhibit D to our supplemental brief, the defendant has admitted that its expectations as to future mortality experience for the policies have been updated every few years since 2000. They established new rates in 2000, 2005, 2011, '15 and '16, and they haven't updated those rates since 1996, and for some policies since the 1980s, and that the expectations as to future mortality experience were lower at least in 2000 and 2005, and that established that there was at least a breach because they never changed their rates.

And then to the extent that the breach varied by age, sex, and rate class or the amount of damages or the DAC testing wasn't the appropriate rates upon which to calculate the damages for some class members, all of that went to the jury, and the jury agreed ultimately with Mr. Witt's calculations.

But I would also -- if I may --

THE COURT: Briefly.

MR. WILDERS: -- point out that when you're looking at how to interpret language that a reasonable policyholder is going to look at and understand, the Missouri standard is exactly the same as the Kansas standard. You look at it from the perspective of a consumer, a reasonable layperson, not the insurance company and how they operate, and ambiguity must be construed in favor of the reasonable policyholder if there are two reasonable interpretations.

Only one of us in the briefing has attempted to show why the phrase future -- "expectations as to future mortality experience" is basically synonymous with an assumed mortality rate, future mortality rate. It's a rate of death, it's an expectation of what the mortality is going to be in the future.

THE COURT: So what is your argument against Judge Torrence's interpretation of the phrase "expectations as to future mortality experience"?

MR. DELNERO: Your Honor, a few things. One, Judge Torrence's order is not an appropriate model for this trial. A, it's under different law; B, there are already -- they're a damages model, and Mr. Witt's testimony is different here than it is there. So there he just had one number for everything, he didn't break it apart, there was no separate Count III, and the jury just wrote the same number for all three counts, which cannot literally be true.

Regarding who this favors, under their

interpretation, the mortality rate would have to be changed. The COI would have to be changed anytime that there's a difference. With what we've lived through the past three years, that certainly does not favor the insured. And Mr. Witt testified at trial that for -- even for the pricing mortality, upper-age mortality is underestimated. So you reach a certain age, and you're being undercharged based on what the mortality-only rate would say. And certainly if you update that in light of COVID and other risk factors, that would require your rate to have to be significantly higher.

So that's one where maybe it will help a young insured, a healthy 25-year-old marathon runner, but other class members it's going to be particularly detrimental to. And the kind of age cohorts for these policies include several individuals like Mr. Meek, frankly, like Mr. Milton, our corporate rep and the individual who submitted the expert report, has the same policy Mr. Meek does, and he's close to 70, it would hurt them. Their interpretation would hurt those individuals. So this is one where you can't cleanly say contra proferentem, resolve the ambiguity in favor of the insured, because their suggested interpretation would harm at least certain class members.

Further, our interpretation which insures that the insurer has enough in reserves to satisfy claims and death benefits certainly helps the policyholders. They buy life

insurance to have that death benefit, and an interpretation that puts that in jeopardy and says, well, you can't take reserves into account, you can't take future projected death claims into account -- that death benefit from the company you purchased it from is much better than a claim against the state insurance fund for when an insurer fails.

So particularly with respect to Count III, our interpretation ensures that policyholders, that there are reserve funds available to pay death claims of policyholders, the reason they bought the policy; and it also means that when there's an event like COVID or other environmental or risk factors that result in mortality actually getting worse and not improving -- and we cited an NPR article discussing how post-COVID and pre-COVID, mortality is not improving in the United States.

THE COURT: Right, right, right. But I think in Count III I've ruled that the mortality rate had to be applied when it was updated, not that you had to update it at certain provisions. So NPR articles to the side, I think we need to focus on the interpretation of this and whether or not -- how to interpret this and whether or not, then, the mortality rates were updated.

So let me ask Mr. Wilder a question to follow up on a topic you mentioned. Was this count in the Jackson County case?

MR. WILDERS: It was, Your Honor. The damages number was different, but the count was in the Jackson County case. We cited in our brief where he interpreted this provision of the policy.

THE COURT: Okay. Let me look back at this issue.

MR. WILDERS: If I could point to two quick points to counsel's argument.

The first is, you know, Judge Laughrey addressed in the *Vogt* case this idea that, well, maybe it harms the class member. The reason it can't harm the class member is because under their interpretation of the policy, they can set the rates to anything they want. They can choose to undercharge below mortality, or they can choose to charge above mortality. An interpretation that says you can never charge a class member above mortality does not harm any class member. That was briefed to Judge Laughrey, and she specifically concluded that. Because if they have to set it at the mortality rate, they're not breaching the policy if they choose to charge less, but they certainly are breaching the policy if they choose to charge more.

And the second point is, the suggestion that maybe there are undercharges defeats summary judgment, we don't have to prove that it was an overcharge every month for every class member. We just have to prove there was at least one overcharge for each class member, and we have done that, with

the exception of the one individual that they were remarking about.

THE COURT: Okay. Do you have a very brief comment?

MR. DELNERO: Yes, Your Honor. First, *Vogt*, the *Vogt* case did not have a Count III, it did not have the improvement. It was only looking at the static model.

MR. WILDERS: That's true. Didn't have Count III, but it had the argument that it harmed the policyholders to impose a limitation on the maximum cost of insurance rate you could charge equals mortality.

THE COURT: And that's where I'm getting the case that had Count III and the case that didn't have Count III confused. Okay.

So very briefly, do you have a comment you'd like to make?

MR. DELNERO: Yes. *Vogt* did not. And the other issue with this is that Count III with the improvements, they loaded those damages into Count I, as well. So Count I has the updated -- what they call updated assumed mortality.

THE COURT: Well, that's a good segue into the next topic I'd like to discuss is a clarification to make sure that all three of us are on the same page as to what each count contains.

It seems to me that Count I -- and this goes to the point you made with respect to the defendant's damages expert.

Seems to me that Count I argues the full overcharge, the mortality -- the mortality rate and the expenses. Count II and III break those issues out, and Count II discusses only the damages associated with incorporating expenses and other fees, costs, into the COI; and Count III, then, only discusses the failure to update the mortality rates.

Mr. Wilders, do you agree with that?

MR. WILDERS: Yes, Your Honor.

THE COURT: So it doesn't seem to me that the plaintiff's experts, then -- expert needs to -- I don't fully understand, then, your argument that plaintiff's expert damage calculation needs to be recalculated in light of the Court's ruling because it seems to me that Count II and III are in one sense alternative theories to Count I.

MR. DELNERO: Your Honor, our position is that Count I should not include the improvements, the alleged improvements. Once you start introducing the alleged improvements, that gets you to Count III. Those improvements should be segregated and a part of Count III, not loaded into Count I.

THE COURT: Tell me what you mean when you say improvements.

MR. DELNERO: So it's the DAC and CFT issue. So Mr. Witt's model for Count I includes, oh, in 2008 you came out with this DAC unlocking exercise, and that had a lower

mortality rate than when the policies were initially underwritten, priced. So from 2008 forward, he uses that DAC unlocking rate, the improved rate, not the original pricing rate.

Around 2015, oh, you have this cash-flow testing rate. That's a further improvement. So from then forward, he uses -- I might be off by a year or two. But from then forward, he uses for not all of the policies, but for a certain cohort, this cash-flow testing rate as his damages model, not the original pricing rate, not the DAC unlocking rate he switched to around 2008.

So those incremental improvements should be in Count III, not part of Count I.

THE COURT: Why doesn't that -- why isn't that a topic of cross-examination for you that Mr. Witt improperly used mortality rates for calculation of the COI that were really done in connection with other purposes?

MR. DELNERO: Because under the way they've pled the complaint and under the Court's order and the way the jury will be charged, those are two separate theories of breach. One theory of breach is that you included items other than -- and I'm lumping Count I and Count II together in this. You included or considered factors that you weren't permitted to. Count III is that you failed to update them, and the contract required you to update it.

THE COURT: And why can't you combine both of them into Count I?

MR. DELNERO: Because there's not a separate model. Mr. Witt's Count I model and Count I damages figure includes the updates. So there should be a model that does -- at a minimum, a model that does not include the updates.

THE COURT: When you say updates, don't you mean update to the mortality? Now, you argue that's not the proper update to the mortality rates, but when you say update, isn't that Mr. Witt's testimony as to how mortality was updated?

MR. DELNERO: Correct, Your Honor, that should be included in Count III and Count III only, not included in Count I, which no part of their Count I theory, no part of the complaint, no part of the Court's order in Count I requires Kansas City Life to readjust the COI rate based on changes or improvements in mortality. So since that's not part of the substantive count, it's not part of the theory, there's a mismatch between the damages model and the actual count that I think will confuse the jury, regardless of the amount of cross-examination. That could be easily fixed by moving that all into Count III where it should be.

THE COURT: So what do you see as the difference between Count I and II?

MR. DELNERO: Count II is a subset of Count I, and Mr. Witt went through the rate where he said, well, based on a

few different calculations -- we take issue with the way he did it, but putting that aside, based on my calculations, 52 to 68 percent of the overcharges appear to be related to expenses rather than profit, duration, reserve setting, et cetera. So the jury could somehow reject Count I as a whole but still find that expenses were inappropriate to include. I'm not entirely sure how they would reach that based on the summary judgment finding, but in theory, they could find in favor of them on expenses, but not on the other factors, and award the 52 percent number. It's literally a percentage of the Count I damages.

THE COURT: Okay. So Count II in your mind is expenses, and what is Count I?

MR. DELNERO: Count I is everything.

THE COURT: But not the failure to increase the mortality rates.

MR. DELNERO: Correct.

THE COURT: Okay. So it's not everything.

MR. DELNERO: Well, it's all of the alleged improper factors and charges.

THE COURT: Okay.

MR. DELNERO: Count II is expense only, Count III is improvements. So Count I should be, in my view, under the Court's order, should be the full scope of the improper considerations; Count II, a subset; and then Count III -- this

is the way they pled it. I didn't plead the complaint.

THE COURT: No, I want to know what your understanding is. So, Mr. Wilders?

MR. WILDERS: So, Your Honor, we really feel like this is rearguing Daubert and summary judgment because the Court's already found that Mr. Witt's damages opinions on all three counts are reliable enough to be admitted and presented to the jury.

We did plead Count I to include all of the overcharges. Paragraph 69 of our complaint, "Defendant does not determine cost of insurance rates based on its expectations as to future mortality experience." That's the language that requires them to use their then-current mortality assumptions, as the Court held in its summary judgment order.

We pled the complaint, Count I is everything. Count II is a subset of only expenses, and Count III is a subset of only the improvements. If the jury thinks that Mr. Witt's damages model as to Count I is not persuasive, they can award -- they can still find a percentage as to the expenses persuasive or their percentage as to the improvements persuasive. I think we're entitled to present that in an alternative theory.

If they wanted to present a model that was only original mortality without the profit and expense components that were loaded into the rates, their experts could have done

that. They've had his report for a very long time. They've only produced that damages figure to us in the last few days. So we consider that to be quite untimely, given that we asked all of their experts, both of their experts, Mr. Milton and Mr. Pfeifer, did you produce an alternative damages calculation, and they both said no. And that's exactly how they're litigating the case, which is there's our damages model, they're going to critique it at trial, and the jury is going to determine whether it satisfies a preponderance of the evidence.

THE COURT: Okay. We're kind of shifting topics here.

MR. WILDERS: Yeah.

THE COURT: But why don't we go ahead into that topic.

Do your experts now -- do you expect your experts to now testify as to a damages model?

MR. DELNERO: Yes, Your Honor, to the ones that we attached to our supplemental brief. There's two pieces to it, one correcting this issue, the -- and separating out the improvements from the original based on the Court's summary judgment order. Those are two separate counts, and Count III may not even be sent to the jury.

THE COURT: I just don't know how I can now admit expert reports that are based upon a summary judgment order.

Discovery is done for one purpose, summary judgment is done, and then the case goes to the jury. So, you know, I'll take this under consideration, but I've got to tell you, if you can't tell from my tone of voice, you've got an uphill battle as to why now you have additional evidence, new evidence that you can put forth to the jury.

MR. DELNERO: Your Honor, it really isn't new. They didn't create any new calculations, it's -- just they made -- they just made two to three specific changes to Mr. Witt's spreadsheet.

THE COURT: Okay. Were they asked at their deposition if they had done any calculations?

MR. DELNERO: The testimony he recounted was accurate.

THE COURT: And they said no, and now they've done calculations.

MR. DELNERO: Now they have, based on Mr. Witt's own models. They didn't create their own model. They literally used his spreadsheets that he produced.

THE COURT: To do additional calculations.

MR. DELNERO: Yes, Your Honor.

THE COURT: Okay. So you kind of see my point. You've got a high hill to climb here. We can take this up at the actual pretrial conference, as opposed to the pre-pretrial conference we're in today. So let's -- we can discuss that

issue. I'll make a final decision on that later, but I'll tell you, it's -- I'm not likely to rule with you on that issue.

But that brings me to another issue that I'd like to discuss briefly, and then I think that is the last issue that I want to discuss. But to the extent the parties briefly have any questions or topics you want to bring up, we can do so.

Again, this question is for counsel for plaintiff. The disclosure of this mortality study that was included in Mr. Milton's rebuttal report -- and if this is something that you would prefer that we discuss at the pretrial conference, but it's the issue that plaintiff brought up in, I think, their supplemental briefing.

MR. DELNERO: Your Honor, it hasn't been completed.

THE COURT: What has not been completed?

MR. DELNERO: The mortality study reference was a potential ongoing project, I believe. I think that's something that we need to discuss at the next --

THE COURT: Okay. Why don't you guys discuss that and flesh that out to the extent you can, and we'll push that off to the next pretrial conference.

So let me go through my notes, but I do believe those were all of the topics that I wanted to discuss with the parties at this time. I know I haven't necessarily given you as much final -- as many final rulings as maybe you'd hoped, especially in light of the pretrial conference that's coming

up, but this is just an area of law and just a topic generally that I know so little about that it's taking me longer to get up to speed on what the terms mean, what the concepts mean. And so this has been helpful, but I just need to go back to the drawing board and look through all of this again before making rulings on a lot of these issues.

With that, does counsel for plaintiff have anything else that you'd like to discuss at this time?

MR. STUEVE: Your Honor, just very briefly. I want to make sure the Court understood. We didn't have this number, but we do argue the prejudice that's required for equitable estoppel, if the Court were to limit the damages to those five -- the past five years, over 56 percent of the class will not have any damages because their policies would have lapsed before that time frame, and the damages number goes from about 18 million to approximately one million.

THE COURT: Okay. There were two other topics that I wanted -- I would like a copy of the Jackson County jury instructions. We looked online and weren't able to access them, so I would like to get a copy of those.

MR. STUEVE: Okay.

THE COURT: And I don't need an answer to this question right now, but to the extent you have any witnesses that will be testifying via deposition, the rule is -- the rule I follow is a little bit different than the Missouri state

court rule. If the witness is not testifying, then the testimony can be presented via deposition. If the witness is testifying, then we won't have any additional reading or playing of the deposition.

MR. STUEVE: So here is the question that we have. We have very limited depo designations of the corporate representative of Kansas City Life. Our plan was to play those in our case-in-chief. Is that consistent with the Court's --

THE COURT: Is the corporate representative testifying?

MR. DELNERO: I believe so, Your Honor. And we'll confirm.

THE COURT: But, then, if the corporate representative is here, the corporate representative who testified, then the corporate representative needs to be called.

MR. STUEVE: Let me just be clear. Your corporate representative that you had at the *Karr* trial was different than the corporate representative that we deposed on those points.

You're saying if the same witness that was produced as the corporate rep is going to be in the courtroom, you want us to call him.

THE COURT: Yes.

MR. STUEVE: So we'll just need to confirm because

you had a different corporate rep.

MR. DELNERO: Right. So there were two different 30(b)(6) representatives.

THE COURT: I'll tell you, why don't you guys talk about this and see if you can work it out. What I don't want is someone here, able to testify, but instead you play deposition testimony. I don't want someone who is going to testify, and in addition we play deposition testimony. So work out who your corporate rep is going to be. If they're going to be here, what the issue is with respect to playing of the testimony, and then we can take it up at the next hearing.

MR. STUEVE: Will do, Your Honor, thank you.

MR. WILDERS: I do think under -- as I understand it, under the rule for admitting depositions in federal court, if the witness is available within 100 miles, we can't play the deposition, but there is a carve-out for people who were deposed under 30(b)(6) because we can't call a 30(b)(6) witness that was required to be ready for those topics at trial. And so the rule says an officer or a corporate designee on behalf of 30(b)(6) you can play in federal court. Is that different from what I understand you're saying?

THE COURT: No. If the corporate representative is here, however, you call the person is all I'm saying.

MR. WILDERS: Okay.

THE COURT: Any other topics?

MR. EVANS: Your Honor, Randy Evans. I actually tried the *Karr* case in Jackson County. And the only thing that I just want to put in your head, because if I were sitting where you're sitting, I would make a lot less money, but I would also want to know what are the trouble spots that are ahead.

So in the *Karr* case, what happened was the jury wrote down the same number for everything. And, in fact, they were told in closing argument, just put the same number down, the judge will fix it. And that's not where we want to end up here, and that's why these -- my colleague, who is way smarter than I am, is very good at isolating Count I, Count II, and Count III. And I just wanted to -- I truly appreciate the fact you're going to get the instructions because I think that will tell you a little bit about what transpired to lead to such a result.

The second thing that I just want to make sure that we don't lose sight of is until the *Vogt* decision, nobody, including Kansas City Life, had an idea about this other interpretation of its policy. So equitable estoppel, as you know, I mean -- remember, I'm the oldest lawyer in the room, so --

THE COURT: Wasn't that also the case in *Ruth Fawcett*?

MR. EVANS: I'm sorry?

THE COURT: Wasn't that also the case in *Ruth Fawcett*? They didn't know that it was illegal until two thousand, either '11 or '14.

MR. EVANS: Right, except that, here is the difference. Kansas City Life didn't start charging one rate and then right after Mr. Meek left the office decided to charge a different rate. What he was told there was the same all the way through; whereas, with *Fawcett* what happened was they were told, you're going to be charged taxes, and then afterwards they grouped in conservation fees after the fact.

The fact is Kansas City Life didn't know any of this until *Vogt* came down, and even then, while there was early success for Mr. Stueve's firm, most of the recent cases coming down have all started to go the other way, which is --

THE COURT: Well, and I appreciate that. As you probably know, I follow the Eighth Circuit law, and the Eighth Circuit law on this issue is very, very clear. And so that is, for a variety of reasons, why my ruling is the way that it is.

So, you know, I've been doing this for a while now, and what I've found is that civil attorneys like to talk. And so, therefore, I've developed a rule that if there are different topics, then the attorneys can most certainly take a specific and distinct topic. These are complex issues, there are a lot of issues, but the attorneys need to stay on the topic that you've been assigned. Tag-teaming usually is

ineffective, and it most certainly extends the argument in the trial, which is something that I'm always working to avoid.

So again, I apologize I haven't been more definitive in my rulings. This has been helpful. I'm going to go back to the drawing board and review these issues with this argument in mind.

We, as you know, have the next pretrial conference set. It looks as though maybe this case won't have as many traditional pretrial issues in terms of motions in limine and things of that sort. Maybe I'm wrong, but it seems as though a lot of these issues are still -- will be related to the issues that are outstanding. So file whatever is necessary for the pretrial conference, and I will be better prepared to rule on some of these outstanding issues then. And godspeed with the mediation.

So have a good weekend.

(Hearing adjourned.)

- - -

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

May 3, 2023

/s/_____
Kathleen M. Wirt, RDR, CRR
U.S. Court Reporter

EXHIBIT 3

VERDICT FORM A

Note: Complete this form by writing in the names required by your verdict.

On Plaintiffs' claim that Defendant breached the COI charge provision, as submitted in Instruction No. 18, we find in favor of:

Plaintiffs

(Plaintiffs) or (Defendant)

Note: Complete the following paragraphs only if the above finding is in favor of Plaintiffs.

For the period of June 18, 2014, to February 28, 2021:

We find Plaintiffs' damages for Defendant's consideration of factors other than age, sex, and risk class and its expectations as to future mortality experience when setting the COI rate to be:

$ 908,075.00 (state the amount or, if none, write the word "none").

Note: Fill in the next blank only if you determined Defendant failed to apply its then-current mortality rates when setting the monthly COI charge.

We find Plaintiffs' damages for Defendant's failure to apply its then-current mortality rates when setting the monthly COI charge to be:

$ _____ (state the amount or, if none, write the word "none").

For the period of May 1, 1982, to February 28, 2021:

We find Plaintiffs' damages for Defendant's consideration of factors other than age, sex, and risk class and its expectations as to future mortality experience when setting the COI rate to be:

$ 5,059,275.00 (state the amount or, if none, write the word "none").

Note: Fill in the next blank only if you determined Defendant failed to apply its then-current mortality rates when setting the monthly COI charge.

We find Plaintiffs' damages for Defendant's failure to apply its then-current mortality rates when setting the monthly COI charge to be:

$ _____ (state the amount or, if none, write the word "none").

Dated: 05/25/23

Foreperson

VERDICT FORM B

Note: Complete this form by writing in the names required by your verdict.

On Plaintiffs' claim that Defendant breached the expense charge provision, as submitted in Instruction No. 19, we find in favor of:

Defendant

(Plaintiffs) or (Defendant)

Note: Complete the following paragraphs only if the above finding is in favor of Plaintiffs.

For the period of June 18, 2014, to February 28, 2021:

We find Plaintiffs' damages to be:

$ 0 (state the amount or, if none, write the word "none").

For the period of May 1, 1982, to February 28, 2021:

We find Plaintiffs' damages to be:

$ 0 (state the amount or, if none, write the word "none").

Foreperson

Dated: 05/25/23

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

CHRISTOPHER Y. MEEK, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	
v.	)	Case No. 19-00472-CV-W-BP
KANSAS CITY LIFE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER (1) GRANTING DEFENDANT'S MOTION TO PARTIALLY DECERTIFY CLASS, (2) DISMISSING COUNT V WITHOUT PREJUDICE, AND (3) DIRECTING THAT JUDGMENT BE ENTERED

This lawsuit presents claims that Defendant—an insurance company—improperly calculated the rate for the cost of insurance (the "COI Rate"), resulting in improper and excessive charges for cost of insurance (the "COI charge") under a universal life insurance policy (the "Policy"). A trial was conducted the week of May 22, 2023, but several issues remained for resolution before a judgment could be entered. For the reasons discussed below, the Court (1) **GRANTS** Defendant's Motion to Partially Decertify the Class, (Doc. 299), (2) **DISMISSES** Count V without prejudice and (3) **DIRECTS** that judgment be entered.

I. BACKGROUND

The Court starts with a summary of the claims asserted in the Amended Complaint:

- Count I alleges Defendant breached the Policy by considering factors other than the policyholder's age, sex, and risk class and its own expectations as to future mortality experience when calculating the COI Rate;

- Count II alleges Defendant breached the Policy by deducting expense charges in excess of the amount allowed by the Policy;
- Count III alleges Defendant breached the Policy by failing to apply its updated mortality expectations when calculating the COI Rate;
- Count IV asserts a conversion claim; and
- Count V seeks declaratory and injunctive relief.

(*See* Doc. 8.) At trial the Court agreed with Plaintiff's counsel that Count I subsumes Count III.

In February 2022, the Court granted in part Plaintiff's Motion for Class Certification. As relevant here, it determined Kansas law governs Plaintiff's claims, (Doc. 136, p. 16),[1] and Kansas's statute of limitations applies. (Doc. 136, pp. 22-23 & n.10.) Based on these determinations (and others that need not be detailed here) the Court certified the following Class:

> All persons who own or owned [certain specified life insurance policies] issued or administered by Defendant, or its predecessors in interest, that [were] active on or after January 1, 2002, and [who] purchased the life insurance policy while domiciled in Kansas. Excluded from the Class are: KC Life; any entity in which KC Life has a controlling interest; any of the officers, directors, employees, or sales agents of KC Life; the legal representatives, heirs, successors, and assigns of KC Life; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family.

(Doc. 136, p. 25.) The Class was certified only for Counts I through IV. (Doc. 136, p. 25.)

On March 27, 2023, the Court granted in part the parties' separate motions for summary judgment. One of the critical issues addressed in that Order related to the statute of limitations. The Court:

[1] All page numbers are those generated by the Court's CM/ECF system.

1. Adhered to its conclusion that Kansas's statute of limitations applied;
2. Held the statute of limitations for the contract claims (Counts I – III) was five years, and all breaches occurring within five years of the suit's filing (June 18, 2019) were timely;
3. Held that, under certain circumstances, Kansas will equitably estop a defendant from asserting the statute of limitations as a defense; and
4. The parties' arguments did not permit the Court to determine whether equitable estoppel applied in this case.

(Doc. 243, pp. 6-12.) The Court then construed the meaning of relevant Policy provisions and determined (1) Defendant had considered improper factors (including, among other things, expenses and profits) in determining the COI Rate, but (2) factual disputes precluded summary judgment on any aspect of Plaintiff's claims that Defendant failed to apply its then-current expectations as to future mortality experience when setting the COI rate. (Doc. 243, pp. 12-17.) These determinations (which need not be detailed further here) essentially granted Plaintiff summary judgment on liability with respect to (1) a portion of Count I and (2) Count II. Finally, the Court granted Defendant summary judgment on the conversion claim (Count IV). (Doc. 243, pp. 18-19.)

Shortly after the summary judgment order was issued, the Court participated in a telephone conference with the parties, and thereafter the parties submitted supplemental briefs. Among other things, the parties agreed the facts relevant to equitable estoppel were to be determined by the Court and not the jury. (Doc. 253, pp. 14-15; Doc. 254, pp. 18-19.)

At the pretrial conference, the Court indicated it needed to hear evidence before it could rule on the issue of equitable estoppel and decided the appropriate course was to proceed to trial and allow the parties to present any additional evidence that related solely to equitable estoppel

outside the jury's hearing. (Doc. 292, p. 10.) To avoid the need for a second trial, the Court also proposed having the jury return a verdict regarding damages for two time periods based on the application (or not) of equitable estoppel. (Doc. 292, pp. 10-11.)[2]

At trial, the Court largely adopted Plaintiff's proposed approach with respect to the verdict directing instructions. The first Verdict Director, (Doc. 309, p. 23 (Instruction No. 18)), told the jury that Defendant breached the Policy if it "(1) considered factors other than age, sex, and risk class and its expectations as to future mortality experience when setting the COI rate" *or* "(2) failed to use . . . its then-current mortality rates when setting the monthly COI charge." The jury was then told it had previously been determined Defendant considered impermissible factors when setting the COI Rate, but it had not been determined whether Defendant failed to apply its then-current mortality rates. The jury was also told it had not been determined whether the Class suffered damages. On the corresponding Verdict Form, the jury was directed to determine (for the two separate periods) damages for Defendant's consideration of impermissible factors. The jury was also directed to indicate whether it found Defendant failed to apply its then-current mortality rates by inserting the amount of damages; if it found Defendant did not breach the policy in this manner, it was to leave the line for damages blank. (Doc. 311, pp. 1-2 (Verdict Form A).) In this way, the first Verdict Director and Verdict Form A addressed Counts I and III.

The second Verdict Director, (Doc. 309, p. 24 (Instruction No. 19)), addressed Count II. The jury was told it had been determined that (1) "Defendant cannot consider expenses when setting the COI rate" but (2) it had done so, and the jury had to "determine whether Plaintiffs were damaged by Defendant's consideration of expenses and, if so, the amount of damages."

[2] Conducting a hearing before trial solely with respect to equitable estoppel would not have been efficient because some evidence relevant to liability and damages also potentially applied to equitable estoppel. A separate hearing before trial would have required that evidence to be presented twice.

For the two time periods at issue, the jury

1. Awarded damages for Defendant's consideration of improper factors in setting the COI Rate,
2. Determined damages for Defendant's consideration of expenses was zero, and
3. Determined Defendant did not breach the Policy by failing to apply its then-current mortality rates.

(Doc. 311.) The Court must determine whether equitable estoppel applies so the appropriate monetary award can be included in the judgment. The Court must also adjudicate Count V.

II. DISCUSSION

A. Statute of Limitations

As stated earlier, the statute of limitations for a breach of contract claim under Kansas law is five years. Under Kansas law a breach of contract claim accrues when the breach occurs; Kansas law does not apply a "discovery rule" and accrual does not depend on when the plaintiff learned (or should have learned) about the breach. *E.g.*, *Great Plains Trust Co. v. Union Pac. R. Co.*, 492 F.3d 986, 993 (8th Cir. 2007) (citing *Pizel v. Zuspann*, 795 P.2d 42, 54 (Kan. 1990)); *Dunn v. Dunn*, 281 P.3d 540, 548 (Kan. Ct. App. 2012). Kansas law also does not recognize the "fraudulent concealment" doctrine, under which the statute of limitations is tolled against a party that has tried to conceal its breach. *E.g., Freebird, Inc. v. Merit Energy Co.*, 883 F. Supp. 2d 1026, 1035 (D. Kan. 2012) (analyzing Kansas law). However, there are circumstances in which Kansas courts will hold a party is estopped from asserting the statute of limitations as a defense.

In briefing on this issue, the parties extensively discuss the elements of equitable estoppel. The Court, however, declines to analyze whether equitable estoppel applies because it finds one of the requirements for equitable estoppel—reliance—is an individualized determination that cannot be decided for the entire Class.

1. Reliance

A defendant is equitably estopped from asserting the statute of limitations as a defense if,

> by acts, representations, admissions, or silence when [the defendant] had a duty to speak, [it] induced the [plaintiff] to believe certain facts existed. The [plaintiff] must also show that [he] *reasonably relied and acted upon such belief* and would now be prejudiced if the [defendant] were permitted to deny the existence of such facts.

L. Ruth Fawcett Trust v. Oil Producers Inc. of Kansas, 507 P.3d 1124, 1144 (Kan. 2022) (quotation omitted; emphasis supplied) (hereafter "*Ruth Fawcett Trust*"). More succinctly, the defendant's actions must create "a false sense of security that prevented the plaintiff from timely suing." *Id.* at 291; *see also Dunn*, 281 P.3d at 544; *Newman Mem. Hosp. v. Walton Const. Co.*, 149 P.3d 525, 542 (Kan. Ct. App. 2007); *Robinson v. Shah*, 936 P.2d 784, 798 (Kan. Ct. App. 1997). "To determine whether the doctrine applies, courts must look at the facts and circumstances of each case and should not apply it in a formulaic manner." *Ruth Fawcett Trust*, 507 P.3d at 1144.

Here, Plaintiff argues the Annual Statements Defendant sent to policy holders established reliance.[3] The Annual Statements disclose, among other things, deductions for Cost of Insurance and Expense Charges. The Court sets aside any questions about whether equitable estoppel can be based on the Annual Statements. Instead, the Court concludes equitable estoppel can be based on the Annual Statements only if they were seen and read by a would-be plaintiff.

Ruth Fawcett Trust repeatedly described the reliance element as requiring the plaintiff to demonstrate he "detrimentally relied" on the defendant's representations. *Ruth Fawcett Trust*, 507 P.3d at 290-91. It also upheld application of equitable estoppel because the defendant in that case

[3] To the extent Plaintiff argues the Policy holders relied on Defendant to comply with the contract, the Court rejects this argument. All parties to a contract rely on the other party to comply, but equitable estoppel requires the would-be plaintiff to rely on something that caused him or her to not sue. A general expectation that the other party will comply with the contract, or a general statement from the defendant that it complied, is insufficient. To hold otherwise would allow equitable estoppel to be the norm or effectively create a discovery rule where Kansas law does not provide one. *See McCaffree Fin. Corp. v. Nunnink*, 847 P.2d 1321, 1332 (Kan Ct. App. 1993); *see also Murray v. Miracorp, Inc.*, 522 P.3d 805, at *9 (Kan. Ct. App. 2023) (citing *McCaffree*).

"made affirmative misrepresentations that deterred the Class members from pursuing timely legal action." *Id*. at 292. This explanation demonstrates there must be a causal relationship between the defendant's actions and plaintiff's deterrence. As a factual matter, the deterrence required by the Kansas Supreme Court cannot be ascribed to the defendant's statements unless the plaintiff is aware of those statements. Thus, in this case, a Class member could not have suffered detriment based on anything in the Annual Statements unless that Class member read the Annual Statements.

Cases decided before *Ruth Fawcett Trust* support this analysis. For instance, in *Iola State Bank v. Biggs*, the Kansas Supreme Court stated the party asserting estoppel must have been "induced . . . to believe certain facts existed. It must also show it rightly relied and acted upon such belief . . . ." 662 P.2d 563, 571 (Kan. 1983). However, Class members could not be induced to believe anything in the Annual Statements unless they read them. Similarly, in *Dunn*, the Kansas Court of Appeals cited another Kansas Supreme Court decision for the proposition that the defendant's actions must have caused the plaintiff to "'act[ ] in good faith in reliance thereon to his prejudice whereby he failed to commence the action within the statutory period.'" *Dunn*, 281 P.3d at 550 (quoting *Klepper v. Stover*, 392 P.2d 957, 959 (Kan. 1964)). A Class member cannot rely on the Annual Statements, and nothing in the Annual Statements could have caused a Class member to "fail[ ] to commence the action within the statutory period," unless the Class member saw the Annual Statements.

2. Rule 23 of the Federal Rules of Civil Procedure

Rule 23 of the Federal Rules of Civil Procedure allows a class to be certified if, among other things, (1) there are questions of law or fact common to the class and (2) the common questions of law or fact predominate over individual questions. *See* Fed. R. Civ. P. 23(a)(2), 23(b)(3). As the Court discussed in more detail when it certified the class, the common questions

included determinations regarding choice of law issues, the appropriate statute of limitations, and whether certain doctrines (such as fraudulent concealment or the discovery rule) applied. (Doc. 136, pp. 23-25.) However, equitable estoppel was not discussed by the parties when the issue of class certification was raised, so the Court did not have occasion to consider its impact on the Rule 23 analysis. Defendant has raised the issue subsequently; in fact, currently pending is its Motion to Partially Decertify the Class because the issue of equitable estoppel cannot be decided on a class-wide basis. Given the inquiry required to determine if equitable estoppel applies, the Court agrees and concludes the motion, (Doc. 299), should be **GRANTED**.

Plaintiffs allege the Annual Statements misled class members into not realizing they had a cause of action. However, as explained above, the Annual Statements could only mislead those Class members who read the Annual Statements. Whether a plaintiff read the Annual Statements is not a fact common to the class members, so it is not capable of determination on a class-wide basis. *See Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011) (discussing what qualifies as a "common question"). This conclusion is consistent with other cases holding (in a variety of legal contexts) that the issue of reliance is not amenable to class-wide determination because it requires an individualized determination of what information each class member saw or what each class member thought. *E.g.*, *Hucock v. LG Elec. U.S.A., Inc.*, 12 F.4th 773, 777 (8th Cir. 2021); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 985-86 (8th Cir. 2021); *In re St. Jude Med., Inc.*, 522 F.3d 836, 839-40 (8th Cir. 2008); *see also Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 462-3 (2013) ("Absent the fraud-on-the-market theory, the requirement that [securities fraud] plaintiffs establish reliance would ordinarily preclude certification of a class

action seeking money damages because individual reliance issues would overwhelm questions common to the class.").[4]

Plaintiff argues he can rely on class-wide circumstantial evidence to establish reliance; however, he does not identify any such evidence. Facts about Defendant's billing practices, mailing practices, and the format of and information contained in the Annual Statements could be decided class-wide; however, none of this evidence permits the Court to conclude, for each and every class member, whether they looked at the Annual Statements and thereby relied on anything Defendant said therein. Plaintiff's argument cites *Ruth Fawcett Trust*, but there are significant differences between the facts and procedural posture in this case and in *Ruth Fawcett Trust.* The defendant in that case (Oil Producers Incorporated of Kansas, or "OPIK") had leased mineral rights from the plaintiffs. OPIK was required to pay a monthly royalty and was allowed to deduct certain costs (including taxes) from those royalty payments; it itemized those deductions on the monthly check stubs. OPIK was not permitted to deduct conservation fees from the royalty payments, but it did so anyway. To avoid detection, it "disguised" the conservation fees as taxes on the monthly check stubs. *Ruth Fawcett Trust*, 507 P.3d at 1143-44.

The issue of reliance was discussed in greater detail by the trial court and the Kansas Court of Appeals than it was by the Kansas Supreme Court. The trial court made specific findings regarding the check stubs and the information they contained and concluded the class members must have seen the information OPIK provided because they cashed the checks. *L. Ruth Fawcett*

[4] On at least two occasions, the District of Kansas has declined to certify a class to resolve assertions of equitable estoppel because of the individualized nature of the inquiry. "Whether the Court would apply an equitable doctrine to toll a particular class member's statute of limitations must depend on the particular circumstances of that class member's closing, including the particular representations made to the member and the facts available to him." *Doll v. Chicago Title Ins. Co*., 246 F.R.D. 683, 688 (D. Kan. 2007) (emphasis deleted); *see also Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 539 (D. Kan. 1995) ("[A] determination of whether the doctrine of equitable tolling or fraudulent concealment can be invoked by a particular plaintiff requires individual inquiries into [the defendant's] conduct with regard to that plaintiff.")

Trust v. Oil Producers, Inc. of KS, 2016 WL 11775738, at * 2-5, 8 (Kan. Dist. Ct. Sept. 1, 2016). The Kansas Court of Appeals affirmed the finding "that *by cashing the monthly checks* and not questioning the deductions, the royalty owners demonstrated reliance on the check stubs being truthful and accurate." *L. Ruth Fawcett Trust v. Oil Producers, Inc. of KS*, 475 P.3d 1268, 1281 (Kan. Ct. App. 2020) (emphasis added). In addition to the trial court's explanations, the court of appeals opined that reliance could "be inferred because there is no other way to explain why they would not question the deduction. The only reasonable explanation is that the Class members relied on the misrepresentation." *Id*. at 1283.

In this case, there is another plausible and obvious reason why the Class members might not have taken action: they did not look at the Annual Statements. In *Ruth Fawcett Trust*, the trial judge found the class members were aware of the check stubs' contents because the class members cashed the checks; here, there is no similar fact that would permit the Court to find the class members were aware of the Annual Statements's contents. Plaintiff makes much of the Kansas Court of Appeals's observation that "[i]t would not be feasible to take the testimony of every Class member," *id.,* but this does not permit the Court to make a class-wide determination of an individualized fact. To the contrary, it explains why such a determination cannot be made under Rule 23: this individual issue predominates over common issues by requiring testimony from each class member. Moreover, the Kansas Court of Appeals also observed "OPIK does not challenge the Class certification on appeal," *id*., which may explain why OPIK's challenge to the class-wide determination was rejected. In contrast, here, Defendant has challenged the certification through its Motion to Partially Decertify, so the Court must consider the Rule 23 implications of this significant, individualized question's emergence after the class was certified.

3. Decertification

"[A]fter initial certification, the duty remains with the district court to assure that the class continues to be certifiable throughout the litigation," *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir.), *amended,* 855 F.3d 913 (8th Cir. 2017), and when (as is the case here) the Court concludes the original certification's scope is too broad, it may alter or amend the order certifying the class. Fed. R. Civ. P. 23(c)(1)(C). Accordingly, the Court amends the class definition to obviate the individualized inquiry related to equitable estoppel.

The Court previously determined claims related to improper charges imposed within five years of the filing of suit (that is, on or after June 18, 2014) are timely. The Court will therefore amend the class definition to limit the claims to this period; the new class definition is:[5]

> All persons (1) who own or owned a Better Life Plan, Better Life Plan Qualified, LifeTrack, AGP, MGP, PGP, Chapter One, Classic, Rightrack (89), Performer (88), Performer (91), Prime Performer, Competitor (88), Competitor (91), Executive (88), Executive (91), Protector 50, LewerMax, Ultra 20 (93), Competitor II, Executive II, Performer II, or Ultra 20 (96) life insurance policy issued or administered by Defendant, or its predecessors in interest, (2) that was active on or after January 1, 2002, (3) purchased the life insurance policy while domiciled in Kansas, **and (4) incurred charges for "Cost of Insurance" or "Expense Charges" between June 18, 2014 and February 28, 2021.** Excluded from the Class are: KC Life; any entity in which KC Life has a controlling interest; any of the officers, directors, employees, or sales agents of KC Life; the legal representatives, heirs, successors, and assigns of KC Life; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family.

Consistent with the Court's ruling and to minimize prejudice to the class members, all claims based on charges incurred before June 18, 2014, are dismissed without prejudice. The Court will enter judgment based on the jury's verdict for the period between June 18, 2014, and February 28, 2021.

[5] The only substantive change is to add the portion in bold.

B. Count V

Count V is entitled "Declaratory and Injunctive Relief." A request for declaratory or injunctive relief is not an independent claim, and Plaintiff has not demonstrated he is entitled to these remedies.

Plaintiff seeks a declaration establishing "the parties' respective rights and duties under the Policy" and that Defendant's conduct was "unlawful and in material breach of the Policy . . . ." (Doc. 8, ¶ 95.) However, any declaration to which Plaintiff is entitled has already been issued as part of the Court's prior rulings and the jury's verdict; any further relief in the form of a declaration would be redundant and unnecessary.

Plaintiff also asks for an injunction to prevent Defendant from further breaches of the Policy, (Doc. 8, ¶ 96), but he has not satisfied the requirements for an injunction under Kansas law. In particular, Plaintiff has not demonstrated a reasonable probability of irreparable future injury or that an action for damages would not be an adequate remedy. *See Empire Mfg. Co. v. Empire Candle, Inc.*, 41 P.3d 798, 808 (Kan. 2002) (discussing availability of injunctive relief to prevent future breaches of a contract). Therefore, the Court dismisses Count V without prejudice to the Court's other rulings in the case.

III. CONCLUSION

The Court directs that judgment be entered with respect to the following Class:

> All persons (1) who own or owned a Better Life Plan, Better Life Plan Qualified, LifeTrack, AGP, MGP, PGP, Chapter One, Classic, Rightrack (89), Performer (88), Performer (91), Prime Performer, Competitor (88), Competitor (91), Executive (88), Executive (91), Protector 50, LewerMax, Ultra 20 (93), Competitor II, Executive II, Performer II, or Ultra 20 (96) life insurance policy issued or administered by Defendant, or its predecessors in interest, (2) that was active on or after January 1, 2002, (2) purchased the life insurance policy while domiciled in Kansas, **and (4) incurred charges for "Cost of Insurance" or "Expense Charges" between June 18, 2014 and February 28, 2021.** Excluded from the Class are: KC Life; any entity in which KC Life has a controlling interest; any of

the officers, directors, employees, or sales agents of KC Life; the legal representatives, heirs, successors, and assigns of KC Life; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family.

The judgment to be entered is as follows:

1. Pursuant to the Court's March 27, 2023, Order, the jury's May 25, 2023, verdict, and this Order, judgment is entered in favor of the Class and against Defendant on Count I in the amount of $908,075.00.
2. Pursuant to the Court's March 27, 2023, Order, the jury's May 25, 2023, verdict and this Order, judgment is entered in favor of the Class and against Defendant on Count II in the amount of zero dollars.
3. Pursuant to the jury's May 25, 2023, verdict, and this Order, judgment is entered in favor of Defendant and against the Class on Count III.
4. Pursuant to the Court's March 27, 2023, Order, judgment is entered in favor of Defendant and against the Class on Count IV.
5. Pursuant to this Order, Count V is dismissed without prejudice to the other rulings in this case.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: June 20, 2023