UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: LINCOLN NATIONAL COI LITIGATION	Case No.: 2:16-cv-06605-GJP
IN RE: LINCOLN NATIONAL 2017 COI RATE LITIGATION	Case No.: 2:17-cv-04150-GJP

JOINT DECLARATION IN SUPPORT OF CLASS COUNSEL'S MOTION FOR APPROVAL OF COMMON FUND PAYMENT OFATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

As members of the Steering Committee appointed by the Court in each of the two above-captioned consolidated actions ("the Actions"), undersigned counsel hereby collectively submit this Joint Declaration in support of "Class Counsel's Motion for Approval of Common Fund Payment of Attorneys' Fees, Litigation Expenses, and Service Awards" (the "Fee Application") filed in connection with the proposed class settlement ("the Settlement") of all claims alleged in the Actions.[1]

I. INTRODUCTION

1. In March 2017, the Court appointed the law firms of Barrack Rodos & Bacine, Bonnett Fairbourn Friedman & Balint, PC, Kozyak Tropin & Throckmorton, and Susman Godfrey L.L.P. as the Steering Committee in *In re: Lincoln National COI Litigation,* Case No. 2:16-cv-06605-GJP (the "2016 Action"). [2016 Action ECF 29]. In February 2018, the Court substituted The Moskowitz Law Firm for Kozyak Tropin & Throckmorton. [2016 Action ECF 75]. In March 2018, the Court appointed the law firms of Barrack Rodos & Bacine, Girard Gibbs, LLP, Bonnett Fairbourn Friedman & Balint, PC, The Moskowitz Law Firm, and Susman Godfrey L.L.P. as the Steering Committee in *In re: Lincoln National 2017 COI Rate Litigation,* Case No. 2:17-cv-04150-GJP (the "2017 Action"). [2017 Action ECF 17]. The Girard Gibbs firm changed its name to Girard Sharp LLP effective October 1, 2018. [2017 Action ECF 33].

2. Based on the foregoing appointments and our active participation in all material aspects of the investigation, prosecution, and settlement of the Actions, we have personal knowledge of the matters set forth herein. If called upon, we could and would competently testify that the following facts are true and correct based on our personal involvement in this litigation.

3. On behalf of all Plaintiffs' Counsel, we respectfully seek Court approval of an aggregate common fund attorneys' fee award of 33% of the Final Settlement Fund generated through our efforts in the consolidated Actions. We also respectfully request Court approval of (a) $2,345,671.06 in previously unreimbursed litigation expenses, and (b) $255,000 in aggregate service awards to be allocated $15,000 to each of the Class Representatives, both likewise to be

[1] Unless otherwise indicated, capitalized terms in this declaration have the same meaning as the corresponding defined terms in the Settlement.

paid from the Final Settlement Fund. As shown below, approval of the requested fees, expenses, and service awards is fully warranted under Third Circuit legal standards, and well-earned in light of the excellent result achieved on behalf of the Settlement Class.

II. PERTINENT HISTORY OF THE ACTIONS

A. Procedural Summary

1. The 2016 Action

4. Beginning on December 23, 2016, certain Plaintiffs filed putative class actions against Lincoln arising from the COI rate increase imposed in the fall of 2016. The cases were consolidated into one matter entitled *In re: Lincoln National COI Litigation*, Case No. 2:16-cv-6605-GJP (E.D. Pa.). [2016 Action ECF 29]. On June 8, 2017, Lincoln filed a motion to dismiss the consolidated complaint in the 2016 Action. [2016 Action ECF 40]. Plaintiffs responded on July 28, 2017, and Lincoln replied on August 17, 2017. The Court heard oral argument on the motion to dismiss on August 22, 2017, and denied the motion, in substantial part, on September 11, 2017. [2016 Action ECFs 44, 47, 48, 50, 51]. Plaintiffs subsequently filed a Second Amended Complaint. [2016 Action ECF 72].

5. Plaintiffs moved for class certification in the 2016 Action on June 25, 2019. [2016 Action ECF 111-114, 116]. While Plaintiffs' class certification motion was pending, the Parties participated in an unsuccessful mediation before The Honorable Barbara Jones (Ret.). Plaintiffs' motion for class certification in the 2016 Action was denied on August 9, 2022; however, over the objection of Lincoln, Plaintiffs were granted leave to file a new class certification motion by February 21, 2023. [2016 Action ECF 237, 244, 245]. Before Plaintiffs filed their new class certification motion, the Parties agreed to participate in another mediation before The Honorable Diane Welsh (Ret.) on December 13, 2022. That mediation and a series of follow-on discussions and negotiations between the Parties resulted in the Settlement Agreement that is being proposed for approval of the Court. Golan Decl., ¶ 4 [2016 Action ECF 247-4]. The Parties filed a joint request to stay these proceedings, including the deadline for filing a renewed motion for class

certification, while the Court considered approval of the proposed Settlement. [2016 Action ECF 246].

2. The 2017 Action

6. Beginning on September 18, 2017, certain Plaintiffs filed claims against Lincoln related to a COI rate increase announced in June and July 2017. Those cases were likewise consolidated into one matter entitled *In re: Lincoln National 2017 COI Rate Litigation*, Case No. 2:17-cv-04150-GJP (E.D. Pa.). [2017 Action ECF 17]. Lincoln filed an Answer to the Amended Complaint on May 24, 2018. [2017 Action ECF 24]. After that, discovery began in tandem with discovery in the 2016 Action. Plaintiffs in the 2017 Action moved for class certification on November 23, 2020. [2017 Action ECF 56-63]. On August 9, 2022, the Court denied the motion for class certification, but provided leave to file a new class certification motion by February 21, 2023, just as it did in the 2016 Action. [2017 Action ECF 111, 117, 118]. The 2017 Action also proceeded to mediation with Judge Welsh on December 13, 2022, and was part of the follow-on negotiations between the Parties. Golan Decl., ¶ 4 [2017 Action ECF 121-4].

3. Plaintiffs' Counsel's Vigorous Prosecution of the Actions

a. Plaintiffs' Discovery Directed to Lincoln and Third Parties

7. Prior to engaging in the initial mediation or entering into settlement negotiations with Lincoln, Plaintiffs engaged in a robust, intensive, and protracted discovery process. Fact discovery lasted until June 18, 2021. Plaintiffs and their experts reviewed over 600,000 pages of documents produced by Lincoln and by third parties, which included extensive actuarial tables and analyses, cash flow and profit testing, reinsurance and recapture transactions, policy-level data reflecting (among other things) the historical credits and deductions to the account value of all Class Members' policies, modeling files, and thousands of other actuarial and financial spreadsheets. In total, Plaintiffs issued 166 requests for production, 37 interrogatories, and 8 requests for admission. Plaintiffs' Counsel engaged in extended negotiations to secure responses to these discovery requests, including exchanging multiple meet and confer letters and emails and participating in numerous meet and confer conferences. These efforts resulted in Lincoln's

agreement to produce responsive information despite its initial objections to many of Plaintiffs' discovery requests, to search the emails and files of over 60 custodians, and to use hundreds of detailed and heavily negotiated search terms to capture responsive information.

8. In connection with its production of documents, Lincoln served 19 original, updated, and supplemental privilege and redaction logs containing over 5000 entries. Plaintiffs' Counsel analyzed each of these entries and engaged in an extensive meet and confer process with Lincoln over challenged entries. Through this meet and confer process, Lincoln agreed to retract the privilege and redactions on certain documents. For certain of the challenged privilege and redaction log entries that Lincoln refused to voluntarily withdraw, Plaintiffs submitted these disputes to the Special Master as described below.

9. Lincoln interposed numerous objections and refused to produce documents called for by numerous key discovery requests. After granting in part and denying in part Plaintiffs' first discovery dispute seeking assumptions underlying illustration actuary certifications, historical information relating to GAAP and VOBA determinations, information on profitability of Lincoln's universal life business, and the merger appraisal prepared for Jefferson Pilot, the Court appointed a Special Master – John J. Soroko, Esq. – to resolve remaining discovery disputes between the parties, subject to review by the Court. [2016 Action ECF 95; 2017 Action ECF 44]. In total, Plaintiffs' Counsel briefed six discovery disputes before the Special Master. Five of these involved documents sought by the Plaintiffs, including (1) documents relating to assumptions, experience, and profitability of the Legend policies under Lincoln's table shaving and exchange programs; (2) reinsurance-related documents, interim profitability projections and experience assumptions, and actuarial analyses and valuations of the Legend policies in connection with Lincoln's merger with Jefferson Pilot; (3) documents related to increased older-age sales, quarterly earnings reports and call scripts, and experience documents and data identified during the deposition of John Overton; (4) challenges to certain of Lincoln's privilege and redaction log entries; and (5) challenges to Lincoln's efforts to claw back a portion of an email from Lincoln manager Chris Larson on privilege grounds. Plaintiffs' Counsel also opposed Lincoln's motion for a protective order

submitted to the Special Master attempting to prohibit Plaintiffs from deposing Lincoln's Chief Executive Officer Dennis Glass.

10. Plaintiffs' Counsel were generally successful in whole or in part on the disputes submitted to the Special Master. Specifically, Lincoln was ordered to produce: (1) the documents related to its table shaving and exchange programs [2016 Action ECF 129, 138]; (2) the reinsurance-related and merger-related documents [2016 Action ECF 134, 138]; (3) the agreed-upon quarterly report packets and certain documents and data identified during the deposition of John Overton [2016 Action ECF 157, 162]; (4) over half of the documents previously withheld on privilege grounds [2016 Action ECF 146, 159, 160]; and (5) all but a portion of the Chris Larson email. [2017 Action ECF 65]. In addition, the Special Master denied Lincoln's motion for a protective order and allowed the deposition of Dennis Glass to go forward on specified terms. [2016 Action ECF 147, 161]. Plaintiffs' Counsel's efforts before the Special Master resulted in Lincoln's production of over 100,000 additional pages of documents.

11. Plaintiffs' Counsel issued over 15 subpoenas to third parties, including Milliman, Inc. ("Milliman"), Willis Towers Watson ("WTW"), Ernst & Young, and several of Lincoln's reinsurers. Plaintiffs' Counsel engaged in numerous rounds of meet and confer sessions with Milliman and Willis Towers Watson (two consultants who worked on the challenged COI Increases) and Ernst & Young (Lincoln's auditor), which resulted in the production of tens of thousands of pages of relevant documents from these third parties, much of which had not been produced by Lincoln. Plaintiffs' Counsel also secured licenses to Milliman's proprietary MG-ALFA actuarial software, which was used by Lincoln to model the COI Increases and was essential to allow Plaintiffs' experts to opine on the COI Increases.

12. As part of the pretrial process, Plaintiffs' Counsel also negotiated Stipulated Confidentiality and Protective Orders, securing the production of confidential business and proprietary information. [2016 Action ECF 69; 2017 Action ECF 31]. On February 20, 2020, the Court ordered the coordination of the discovery in the 2016 Action and the 2017 Action and allowed discovery from the 2016 Action to be used in the 2017 Action and *vice versa*. [2016 Action ECF 156; 2017 Action ECF 48]. Thereafter, Plaintiffs' Counsel negotiated Stipulated Amended

Confidentiality and Protective Orders consistent with the Court's Order coordinating discovery. [2016 Action ECF 163; 2017 Action ECF 49]. Plaintiffs' Counsel also negotiated a comprehensive Electronic Discovery Protocol governing the collection and production of electronically stored information, including a process for the identification of custodians and search terms and follow-up discovery. Due to various circumstances, including the need for Lincoln to complete production of documents, pending discovery disputes, the COVID 19 pandemic, witness schedules, and coordination with Individual Actions, the pretrial schedule was extended on multiple occasions. On several occasions, Plaintiffs' Counsel clashed with Lincoln over what Plaintiffs' Counsel perceived as extension proposals that were imposing unreasonable delays in the progress of the litigation and fought to keep the Actions moving forward as expeditiously as possible without jeopardizing Plaintiffs' Counsel ability to effectively develop the factual and legal theories.

13. Plaintiffs' Counsel took 22 highly technical fact depositions (with 10 of those depositions spanning between two and six days) and one expert deposition covering the expert reports submitted by Timothy Pfeifer in each of the Actions. These depositions are listed in the chart below. Through these depositions, which included testimony from individuals designated to testify on behalf of Lincoln, Milliman, and WTW under Rule 30(b)(6), Plaintiffs' Counsel obtained key admissions in support of Plaintiffs' claims as well as a clear understanding of facts underlying Lincoln's defenses to Plaintiffs' claims in the Actions.

Deponent	**Title**	**Deposition Date**	**Capacity**
Boulton, Gina	Assistant Vice President - Customer Service	11/27/2018	Rule 30(b)(6)
Burns, Michael	Senior Vice President - Life Solutions Division	07/22/2021 07/23/2021	Rule 30(b)(6)/Individual
Curley, Jeffrey	Investment Analyst	07/24/2019 03/24/2021	Individual

Deponent	Title	Deposition Date	Capacity
Desmonds, Elizabeth	Assistant Vice President – Financial Consulting	04/17/2019 04/18/2019 10/20/2020 12/14/2020 12/15/2020 04/12/2021	Rule 30(b)(6)/Individual
Elam, Phil	Chief Investment Officer	03/31/2021	Individual
Elder, Ken	Vice President - Enterprise Anti-Laundering Officer	07/16/2021	Rule 30(b)(6)
Friedman, Elinor	Managing Director - Willis Towers Watson	04/11/2019 04/08/2021 08/16/2021	Rule 30(b)(6) - WTW
Glass, Dennis	President and Chief Executive Officer	01/06/2021	Individual
Gulick, Jack	Assistant Vice President – Money Guard Product Development	01/22/2019	Individual
Kalmbach, Kyle	Head - Life Financial Planning & Analysis Team	11/19/2020	Individual
Konen, Mark	President - Insurance & Retirement Solutions	07/20/2021	Individual
Larson, Chris	Vice President – In-force Business	12/10/2020	Rule 30(b)(6)
Mylander, Thomas	Core Product Development	12/20/2018 12/09/2020	Rule 30(b)(6)
Overton, John	Director - Life Experience Studies Team	08/27/2019 03/09/2021	Rule 30(b)(6)
Parker, Michael	Senior Vice President - Product Management	05/09/2019 10/30/2019	Individual
Timothy Pfiefer	Lincoln's Expert	10/21/2021	Expert
Rabin, Kelly	Consulting Actuary - Milliman	06/09/2021 06/11/2021 06/14/2021	Rule 30(b)(6) - Milliman

Deponent	Title	Deposition Date	Capacity
Ramthun, David	Head - Financial Management	12/17/2020	Individual
Spurr, Paul	Senior Vice President and Head – Financial Planning & Analysis	05/30/2019 11/17/2020	Rule 30(b)(6)/Individual
Stankiewicz, Amy	Vice President - Reinsurance and Risk Management	02/28/2019 10/01/2020 10/02/2020	Rule 30(b)(6)
Vary, Matthew	Vice President and Head - Life Asset Liability Management	02/05/2019 11/05/2019	Rule 30(b)(6)
Williams, Adam	Actuary - Life Product Development Team	05/21/2019	Individual
Williams, Kevin	Actuarial Analyst	07/23/2019	Individual

b. Lincoln's Discovery Directed to Plaintiffs

14. Plaintiffs' Counsel also spent significant time and effort responding to discovery propounded by Lincoln. Lincoln issued 114 requests for production of documents, 99 interrogatories, and 125 requests for admission directed to Plaintiffs. Plaintiffs' Counsel prepared responses and objections to the written discovery requests on behalf of and in coordination with each of the Plaintiffs. Afterwards, Plaintiffs' counsel engaged in the meet and confer process, which spanned several months and involved the exchange of several detailed letters and participation in numerous conferences opposing certain of Lincoln's discovery requests that Plaintiffs asserted were beyond the scope of permissible discovery. These meet and confer efforts also resulted in agreed-upon search terms and custodians, where applicable, that Plaintiffs' Counsel used to collect responsive documents. With the assistance of outside vendors and in coordination with each named Plaintiff (along with other plaintiff-affiliated individuals), Plaintiffs' Counsel collected potentially responsive documents and applied the agreed-upon search terms. As a result of this process, Plaintiffs' Counsel reviewed and produced over 700,000 pages of documents in response to Lincoln's discovery requests. As part of this process, Plaintiffs' Counsel identified over 500 documents protected by the attorney client privilege or work product

protection and prepared privilege logs as required by Fed. R. Civ. P. 26(b)(5). Plaintiffs' Counsel then engaged in several meet and confer conferences and communications addressing Lincoln's challenges to certain entries on the privilege log, and prepared amended and revised privilege logs.

15. Plaintiffs' Counsel (1) defended 23 depositions of individual plaintiffs, individuals affiliated with certain plaintiffs' policies, and Rule 30(b)(6) depositions of the corporate representative for the institutional plaintiffs; (2) participated in three third-party depositions noticed by Lincoln; and (3) defended the depositions of Plaintiffs' three experts. These depositions are listed in the chart below. Plaintiffs' Counsel and each Plaintiff-affiliated deponent spent a significant amount of time preparing for the depositions – all of which lasted at least 5 hours and some of which spanned multiple days.

Deponent	**Capacity**	**Deposition Date(s)**
Bharwani, Bharti	Plaintiff	06/03/2019
Brinkhas, Andres	Rule 30(b)(6) - US Life	01/14/2021
Duhon, Janet	Third Party - Affiliated with Insured of US Life-Owned Policy	40/16/2021
Espinosa, Eduardo	Rule 30(b)(6) - Life Partners	05/11/2021
Gillam, Brandon	Rule 30(b)(6) – ATLES (nominee of Life Partners)	04/08/2021
Kanter, Alan	Insured of Kanter-Owned Policy	08/06/2019
Kanter, Harriet	Plaintiff	08/05/2019 08/06/2019
Kesselhaut, Arthur	Plaintiff	10/22/2020
Martindale, Myrtis	Third Party – Affiliated with Insured of US Life-Owned Policy	06/10/2021
Milgrim, Arthur	Plaintiff	05/29/2021
Mills, Robert	Plaintiffs' Expert	10/13/2021 10/14/2021
Mindlin, Allen	Plaintiff	07/30/2019
Mindlin, Bradley	Affiliated with the Mindlin-Owned Policy	07/31/2019
Mindlin, Ivan	Plaintiff	12/03/2019
Monroe, William	Third Party - Affiliated with Insured of US Life-Owned Policy	07/22/2021

Deponent	Capacity	Deposition Date(s)
Mukamal, Barry	Plaintiff	6/18/2019 11/20/2020
Patterson, William Lin	Plaintiff	10/26/2020
Rauch, Carol	Plaintiff	08/13/2019
Rauch, Lowell Jeffrey	Plaintiff	06/20/2019
Rombro, Robert	Plaintiff	08/20/2019
Stanton, Warren	Plaintiff	10/20/2020
Stern, Larry	Plaintiffs' Expert	10/05/2021
Trinchero, Patricia	Plaintiff	06/16/2021
Trinchero, Robert	Plaintiff	12/17/2020
Tutor, Marshall	Plaintiff	11/30/2020
Valentine, Barbara	Plaintiff	06/13/2019
Weinstein, Richard	Plaintiff	05/29/2019
Zail, Howard	Plaintiffs' Expert	10/06/2021
Zirinsky, Robert	Plaintiff	06/19/2019

16. Facilitated by the production of more than one million pages of documents by Plaintiffs, Lincoln, and third parties, Plaintiffs' Counsel exhaustively deposed or defended a total of 52 pertinent fact and expert witnesses over a total of 73 days.

c. Experts

17. The claims asserted in these Actions required significant expert analyses and the submission of expert reports. In order to facilitate an open and productive exchange with Plaintiffs' experts, Plaintiffs' Counsel negotiated and entered into with Lincoln a stipulation protecting from disclosure, among other things, communications between counsel and their experts, communications by and among the experts, and draft reports and analyses, which was entered by the Court on November 14, 2019, in the 2016 Action and February 7, 2020, in the 2017 Action. [2016 Action ECF 143; 2017 Action ECF 47]. On June 25, 2019, Plaintiffs' Counsel served opening expert reports on behalf of Larry Stern, an actuary, and Robert Mills, an economist, in support of their motion for class certification in the 2016 Action. [2016 Action ECF 119, 120]. On November 23, 2020, Plaintiffs' Counsel served opening expert reports on behalf of Howard Zail, an actuary, and Robert Mills in support of their motion for class certification in the 2017 Action.

[2017 Action ECF 62, 63]. In opposition to Plaintiffs' expert reports, on July 27, 2021, Lincoln served an expert report from actuary Timothy Pfiefer in the 2016 Action and served expert reports from Timothy Pfiefer and Glenn Hubbard (an economist) in the 2017 Action. On August 20, 2021, Plaintiffs' Counsel served rebuttal reports by Stern and Zail. Plaintiffs' Counsel deposed Timothy Pfiefer and Lincoln deposed Stern, Zail, and Mills.

18. Plaintiffs' 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 telephone and Zoom calls to discuss and analyze the challenged COI Increases as well as the underlying modeling in MG ALFA. Plaintiffs' 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. Plaintiffs' Counsel retained several confidential consulting experts, who provided invaluable assistance throughout the litigation. Plaintiffs' experts engaged in extensive analyses of Lincoln's and Milliman's models, data and related documents produced in the Actions. Plaintiffs' experts and consultants ultimately spent hundreds of hours conducting essential work in this case.

19. On October 29, 2021, Lincoln moved to exclude Stern's, Mills', and Zail's reports submitted in support of class certification. [2016 Action ECF 192; 2017 Action ECF 78]. Plaintiffs filed their briefs in opposition to these motions on November 23, 2021, [2016 Action ECF 198, 201; 2017 Action ECF 83, 84], and Lincoln filed its replies on December 8, 2021. [2016 Action ECF 203, 205; 2017 Action ECF 87, 89]. Although in its orders denying class certification the Court granted Lincoln's motions to exclude the actuarial experts, the Court subsequently granted Plaintiffs leave to file a new motion for class certification and ordered that expert reports on the merits were due at the same time. [2016 Action ECF 237, 244, 245; 2017 Action ECF 111, 118]. At the time of the Settlement, Plaintiffs' Counsel were working extensively with their existing experts as well as additional reinsurance expert retained to opine on a wide variety of class certification and merits issues, in an effort to, among other things, address the concerns from the Court's initial denial of class certification.

d. Steering Committee

20. Throughout the course of these Actions, the Steering Committee attended regularly scheduled meetings to discuss case strategy and all Court and Special Master conferences and hearings, keep abreast of the deadlines, and assigned work with the intent of moving the Actions forward.

21. In sum, through thorough discovery and preparation, Plaintiffs' Counsel was well aware of the strengths of their claims and risks of continued litigation before engaging in the mediation in December 2022 under the auspices of The Honorable Diane Welsh (Ret.) which ultimately led to the Settlement.

B. Summary of the Settlement Benefits

22. The Settlement resolves all putative claims arising out of the challenged COI increases alleged at any time in either the 2016 Action or the 2017 Action. Under the Settlement, in exchange for a release of liability from Settlement Class Members, Lincoln has agreed to establish a common settlement cash fund of up to $117,750,000 ("the Settlement Fund"). Lincoln's obligation to fund the Settlement Fund will be reduced based on the Policy Claim Percentage of any Policies that opt out of the Settlement, *i.e.*, by deducting from the Settlement Fund an amount equal to $117,750,000.00 multiplied by the sum of the Policy Claim Percentages for all Class Policies that are not Final Settlement Class Policies due to any opt-outs. What is left after those reductions will constitute the Final Settlement Fund. After payment of the costs to administer the Settlement, attorneys' fees, reimbursed litigation expenses, and service awards, the Settlement Administrator will distribute the net Final Settlement Fund to the Settlement Class Members in proportion to their respective Policy Claim Amounts without the need for any claim form or other effort by the Settlement Class Members. No portion of the Final Settlement Fund will be returned to Lincoln.

23. In addition to the foregoing monetary relief, under the Settlement Agreement Lincoln also agrees: (i) for a period of five years following the date of the Order and Judgment approving the Settlement, it will not apply to the Final Settlement Class Policies any increase in

the COI rates included in the COI rate schedules applied to the Final Settlement Class Policies implemented in 2016 or 2017 and challenged in the Actions, unless ordered to do so by a state regulatory body ("the COI Freeze Benefit"); and (ii) not to take legal action (including asserting an affirmative defense or counterclaim) that seeks to void, rescind, cancel, have declared void, or seek to deny a death claim for any Final Settlement Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in applying for, the Final Settlement Class Policy, except as set forth in the Settlement Agreement (collectively, the "No Contest Benefit").

24. Finally, the Settlement Agreement states that Class Counsel may seek payment from the Final Settlement Fund for attorneys' fees not to exceed 33% of the Final Settlement Fund (up to $38,857,500), reduced proportionately for any reduction attributable to Lincoln policyowners within the Settlement Class who exercise their right to opt out of the Settlement, plus the reimbursement of litigation expenses. The Settlement Agreement also permits Class Counsel to request the payment of Court-approved service awards to the Class Representatives of up to $15,000 per recipient. The Settlement is not, however, conditioned upon the Court's approval of such fees, reimbursed expenses, or service awards.[2]

C. Preliminary Approval and Class Notice

25. On June 14, 2023, the Court preliminarily approved the Settlement, approved the proposed Class Notice and manner of dissemination, ordered that the Class Notice be mailed to potential members of the Settlement Class within 21 days of the date of the Preliminary Approval Order, and approved the appointment of JND Legal Administration ("JND") as Settlement Administrator, who among other things, would be responsible for mailing the Class Notice and

[2] The Preliminary Approval Orders entered June 14, 2023 [2016 Action ECF 249; 2017 Action ECF 123], provide that Class Counsel shall file their fee, expenses and service awards motion by 60 days before the Settlement Hearing, which is set for October 4, 2023, and shall file their motion for final approval of the Settlement by 30 days before the Settlement Hearing. Accordingly, we are submitting the fee, expenses and service awards motion this day, and will submit the Settlement approval motion by September 5, 2023.

receiving any objections to the Settlement. [2016 Action ECF 249 at 2, 4-5; 2017 Action ECF 123 at 2, 4-5]. On July 5, 2023, JND mailed over 50,000 Class Notices to potential members of the Settlement Class. As of August 3, 2023, JND has not received any objections to the Settlement.

III. THE REQUESTED FEES ARE A REASONABLE PERCENTAGE OF THE VALUE OF THE SETTLEMENT'S BENEFITS

A. Percentage Award

26. Plaintiffs' Counsel prosecuted the class claims and generated the Settlement benefits on an entirely contingent basis, with no guarantee of recovering their fees and expenses. Although permitted under current common fund jurisprudence,[3] Class Counsel do not seek a fee of 33% of the entire Settlement Fund, but rather 33% of the Final Settlement Fund (*i.e.*, the Fund remaining after opt-outs).

27. Class Counsel's fee request is, in actuality, significantly less than 33% of the ***total*** Settlement benefits available to the Settlement Class, were one to consider the value of the non-monetary benefits secured through the Settlement. Such prospective benefits undeniably provide substantial additional value to the Settlement. In *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814 (S.D.N.Y Sept. 9, 2015), for example, class counsel reached a settlement in a COI case that similarly included a COI freeze and a non-contestability benefit. In calculating the attorneys' fee award, the *Fleisher* court took the value of that prospective relief into account when determining the value of the settlement benefit (estimated to be over $93.4 million) conferred on the class through the efforts of plaintiffs' counsel.

28. Accordingly, use of the Final Settlement Fund is a ***very conservative*** measure of the value of the benefits achieved through the Settlement generated by Plaintiffs' Counsel in the Actions.

[3] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 1980) ("[The] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel."); *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) (noting that "[c]lass counsel should not be penalized for . . . reasons unrelated to the quality of representation they provided," including that "settlement funds may remain even after an exhaustive claims process").

B. Lodestar Cross-check

29. If the Court elects to do so, the following paragraphs provide the requisite information for the Court to conduct a lodestar cross-check of the reasonableness of the requested fee award. Under the lodestar method, a cross-check is determined by multiplying the number of hours reasonably expended on the litigation by an hourly rate.

1. Reasonable Hourly Rates

30. Plaintiffs' Counsel are well-respected members of the bar who are highly experienced in the areas of consumer class actions and complex litigation, and in insurance-related class actions, in particular. As detailed and avowed to in their respective individual declarations,[4] the hourly rates submitted (a) reflect actual and customary billing rates, (b) are reasonable, (c) have been approved in various courts, and (d) are comparable to the rates for other law firms in the relevant geographical market. The hourly rates used to calculate the lodestar are consistent with, and in many cases lower than, those approved by this Court and other courts for complex litigation.

2. Reasonable Reported Hours

31. The following table summarizes the range of hourly rates, total hours worked, and lodestar amounts submitted from each of the law firms involved in the prosecution of the Actions:

Firm	Range of Hourly Rates			Total Hours	Lodestar Amount
Barrack Rodos & Bacine	$150.00	to	$1,050.00	5,479.65	$4,136,253.00
Berger Montague PC	$260.00	to	$990.00	234.60	$178,188.00
Bonnett Fairbourn Friedman & Balint PC	$190.00	to	$800.00	10,595.80	$6,792,679.00
Girard Sharp LLP	$200.00	to	$1,195.00	2,068.70	$1,245,695.00
Kozyak Tropin & Throckmorton, LLP	$150.00	to	$1,100.00	1,427.70	$924,570.00
The Moskowitz Law Firm	$295.00	to	$1,000.00	6,517.20	$4,975,654.00
Sarraf Gentile LLP	$919.00	to	$919.00	241.60	$222,030.40
Susman Godfrey LLP	$275.00	to	$1,300.00	7,110.15	$4,501,168.75
Total:				**33,675.40**	**$22,976,238.15**

[4] *See* the declarations of Jeffrey W. Golan, Andrew S. Friedman, Seth Ard, Howard M. Bushman, Scott Grzenczyk, Gail A. McQuilkin, Patrick F. Madden, and Ronen Sarraf filed herewith (collectively, "Supporting Declarations"). We are relying on the accuracy and legitimacy of each counsel's individually avowed amounts of attorney time and expenses as set forth in their respective declarations.

32. The number of hours submitted by Plaintiffs' Counsel is reasonable and justifiably incurred. The Steering Committee endeavored throughout the litigation to delegate and coordinate the efforts of Plaintiffs' Counsel so as to maximize the impact of their collective resources, while minimizing duplication and otherwise streamlining the prosecution of the case. This is particularly true given the coordinated discovery efforts among the Actions, which eliminated the need for duplicative depositions and documents productions in each of the Actions. The hours reported in the chart above do not include any time expended in connection with Plaintiffs' application for fees, reimbursement of expenses, and service awards.

33. Moreover, the Court is well-familiar with the complex legal and factual issues raised in the Actions, requiring the expenditure of substantial attorney time and effort.

3. Reasonable Resultant Multiplier

34. Based on a $117,750,000 Settlement Fund and the reported lodestar of $22,976,238.15, the requested 33% award yields ***a multiplier of only 1.69***. That multiplier will be lower still when applied to the Final Settlement Fund. A multiplier of 1.69 is well-within the recognized range of reasonableness in the Third Circuit. *See In re Prudential Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir.1998) (acknowledging that "Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied" (citation and quotation marks omitted)); *see also In re Cendant Corp. PRIDES Litig*., 243 F.3d 722, 742 (3d Cir. 2001) (holding that a lodestar multiplier of three would be reasonable and appropriate).

35. Plaintiffs' Counsel's work does not of course end with the approval of the Settlement Agreement. Continuing work will include supervising the administration of the Settlement, answering Settlement Class member inquiries, and, if necessary, litigating any objector challenges to the Settlement. This could amount to many additional hours of attorney work, reducing further still an already reasonable lodestar cross-check multiplier.

C. Additional Factors Demonstrating Plaintiffs' Counsel's Fees Are Reasonable

1. The Contingent Nature of the Case and the Delay in Payment to Plaintiffs' Counsel

36. Plaintiffs' Counsel undertook the Actions on a purely contingent-fee basis, assuming significant risk that the litigation would yield no recovery and leave them entirely uncompensated. From the outset of this litigation, Plaintiffs' Counsel have not been compensated for any time or expenses incurred.

37. Plaintiffs' Counsel understood that they were embarking on a complex and expensive litigation with no guarantee of ever being compensated for the investment of the time and money these cases would require. In undertaking the responsibility of representing the Class, Plaintiffs' Counsel were obliged to ensure that sufficient resources were dedicated to the prosecution of this litigation.

38. The Actions presented a number of significant risks and uncertainties that could have prevented any recovery at all. Foremost among those risks was the possibility that the Court might not grant a renewed motion for class certification (or that any order granting the motion could be challenged on appeal), that Lincoln might mount successful *Daubert* challenges to Plaintiffs' expert submissions, and that some or all of Plaintiffs' claims would fail at the summary judgment stage or at trial. Despite the most competent and diligent of efforts, success in this contingent-fee litigation was never assured. As a result of Plaintiffs' Counsel's extensive and persistent efforts, we achieved a very substantial recovery for the benefit of the Settlement Class in the face of these very substantial risks.

39. 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 1**); *Meek* Dkt. 311 (verdict form) (a true and correct copy attached as

Exhibit 2); *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 3**).

2. Novelty and Complexity of the Litigation

40. The Actions undeniably involved complicated factual issues and many novel legal issues. As the Court is aware, proof of Plaintiffs' claims required Plaintiffs' Counsel to understand and apply complex actuarial and financial concepts to complicated insurance products. This also required Plaintiffs' Counsel to acquire a working knowledge of actuarial standards, the nuances of reinsurance and recapture transactions, cash flow and profit tests, reserve requirements, regulatory standards, and similar insurance-related esoteric subjects.

41. The Actions also involved thorny, cutting-edge legal theories, including the development of novel theories applying the Lincoln policies' non-recoupment standard insurance provisions to breach of contract and related claims.

3. Skill and Experience of Plaintiffs' Counsel

42. Plaintiffs' Counsel are well-respected leaders in the fields of consumer class action litigation, with decades of experience in prosecuting and trying complex class actions. As explained above, Plaintiffs' Counsel are also experienced specifically in class COI litigation, which enabled Plaintiffs' Counsel not only to focus discovery on key actuarial data, spreadsheets, and pricing specifications and assumptions, but also to understand and obtain the modelling tools to assess their claims, Lincoln's purported defenses, and the reasonableness of the benefits of the Settlement Agreement.

4. Results Obtained

43. As described in detail above, the Settlement's benefits are tailored to address the fundamental concerns raised in the Actions, providing meaningful monetary relief of up to $117,750,000, even without considering the undeniable value of the COI Freeze Benefit and the No Contest Benefit. As further explained in the memorandum of law also being filed in support of

the fee, expenses, and service awards motion, the requested 33% fee award is certainly justified given the results obtained.

IV. PLAINTIFFS' COUNSELS' EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFITS OBTAINED ON BEHALF OF THE CLASS

44. As confirmed by their respective individual firm declarations, Plaintiffs' Counsel have incurred litigation expenses and charges prosecuting the Actions in the aggregate amount of $2,345,671.06.[5]

45. For the Court's convenience, the aggregate litigation expenses for which reimbursement is sought are summarized and categorized in the attached **Exhibit 4.**

46. Class Counsel ensured that common expenses were fairly shared by all Plaintiffs' Counsel through the establishment and maintenance of common litigation funds, to which all were required to contribute.

47. Barrack Rodos & Bacine ("BR&B") administered the litigation accounts opened for prosecution of the Actions, which were held at Santander Bank (the "Litigation Funds"). The members of the Plaintiffs' Steering Committees in the Actions contributed funds to the Litigation Funds. Upon receipt of invoices for services performed by professionals and other outside vendors, including for experts and consultants, mediation, the Special Master, Court reporting and other common expenses, BR&B disbursed funds from the Litigation Funds via checks to the vendors. BR&B reviewed, oversaw, and authorized all deposits to and disbursements from the Litigation Funds, assisted by BR&B's Office Manager and other members of the Steering Committees.

48. During the course of the Actions, the members of the Plaintiffs' Steering Committees contributed a total of $1,087,212.00 to the 2016 Action Litigation Fund and $902,890.10 to the 2017 Action Litigation Fund. The 2016 Action Litigation Fund disbursed $1,077,127.06 for expenses necessary to the prosecution of the 2016 Action and the 2017 Action Litigation Fund disbursed $898,915.60 for expenses necessary to the prosecution of the 2017 Action. The aggregate contributions made by Class Counsel to the two Litigation Funds and the

[5] *See, supra*, footnote 3.

expenses paid from the Funds are summarized in the attached **Exhibit 5**. As is evident from **Exhibits 4** and **5**, a major component of Plaintiffs' Counsel's expenses were the cost of experts and consultants, which were necessary given the novel, difficult, and complex issues presented in the Actions.

49. The total reimbursement of expenses being requested by Class Counsel includes the expenses paid by each of the respective Class Plaintiffs' law firms, in addition to the expenses paid through the Litigation Funds. The total expenses requested by Class Counsel do not reflect a double count of the payments by counsel to the Litigation Funds and the disbursements made from the Litigation Funds, and do not count the $14,059.44 balance that continues to be held in the Litigation Funds.

50. The expenses paid from the Litigation Funds are reflected in books and records maintained by BR&B. These books and records are prepared from Litigation Fund statements, invoices, bills and check records.

51. Finally, with respect to expenses incurred directly by Plaintiffs' Counsel, charges for computerized factual and legal research included online legal services such as Lexis/Nexis and Westlaw. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues.

52. Because they undertook representation on a purely contingent basis, and faced the genuine prospect of non-recovery, Plaintiffs' Counsel were highly incentivized to economize and otherwise avoid unnecessary expense.

53. In sum, as avowed in this and the individual declarations of Plaintiffs' Counsel, all expenses and charges for which Court-approved reimbursement is sought were reasonable and necessary to the prosecution of the Actions.

V. REQUESTED SERVICE AWARDS

54. "Because a named plaintiff is an essential ingredient of any class action, an incentive or service award can be appropriate to encourage or induce an individual to participate in the suit." *Scovil v. FedEx Ground Package Sys., Inc.*, 2014 WL 1057079, at *6 (D. Me. Mar.

14, 2014). A substantial service award is appropriate where the class representatives "have actively participated and assisted Plaintiffs' Counsel in this litigation for the substantial benefit of the Settlement Class despite facing significant personal limitations and sacrifices." *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, 2014 WL 6968424, at *7 (D. Mass. Dec. 9, 2014); *see also Teh Shou Kao v. CardConnect Corp.*, 2021 WL 698173, at *11 (E.D. Pa. Feb. 23, 2021) (Pappert, J.) (approving incentive awards for each settlement class representative); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive awards are fairly typical in class action cases.").

55. The 2016 Action was filed in December 2016, and the 2017 Action in September 2017. In the more than six years since the initial case investigation and filing, Plaintiffs' Counsel has relied heavily on the efforts of the named Class Representatives, each of whom devoted significant time and effort in service of the Class with no guarantee of compensation. Specifically, each Class Representative on whose behalf a service award is sought performed the following work:

(1) provided critical pre-suit documentation and engaged in pre-suit discussions to determine their appropriateness as a putative Class Representative;

(2) reviewed and signed off on the initial pleadings;

(3) collaborated with Plaintiffs' Counsel to provide verified responses to Lincoln's interrogatories;

(4) collaborated with Plaintiffs' Counsel and, in some instances, third-party discovery vendors to collect potentially responsive documents for review and production, including any follow-up document requests by Lincoln;

(5) prepared with Plaintiffs' Counsel to be deposed (frequently over the course of several days);

(6) sat for a deposition (each of which lasted for at least 5 hours with many lasting 7 hours or more); and

(7) communicated promptly and consistently with Plaintiffs' Counsel throughout the Actions concerning the status and strategy of the case, including the proposed settlement, among other topics.

56. Warren Stanton, trustee for the Kesselhaut policy, died during the case and the new trustee was never deposed and did not participate, so we did not include him. Life Partners was also dismissed from the 2017 case and is therefore not included. Robert Trinchero, one of the original 2017 case plaintiffs, passed away after his deposition, and his wife Patricia – who was also deposed – was substituted into the case for him.

57. Accordingly, as Class Counsel we respectfully request that the Court approve a Service Award in the amount of $15,000 to each of the following Class Representatives:

- Robert Rombro
- Harriet Kanter
- Ivan a Mindlin
- Alan Mindlin
- Richard Weinstein
- Lowell Rauch
- Carol Anne Rauch
- Bharti R. Bharwani
- Robert A. Zirinsky
- US Life 1 Renditefonds GmbH & Co. Kg and US Life 2 Renditefonds GmbH & Co. Kg
- Barbara Valentine
- Barry Mukamal
- Patricia Trinchero
- Marshall Lewis Tutor
- Arthur Kesselhaut
- William Lin Patterson
- Milgrim Investments

58. A $15,000 service award is consistent with service awards previously approved by this Court and elsewhere within the Third Circuit. *See, e.g., Teh Shou Kao v. CardConnect Corp.*,

2021 WL 698173, at *11 (E.D. Pa. Feb. 23, 2021) (Pappert, J.) (approving incentive awards of $15,000 to each settlement class representative).

59. Furthermore, a total service award of $255,000 across seventeen Class Representatives, if awarded, will have an exceptionally small impact on the amount to be paid to other members of the class. The award represents 0.0022% of the total Settlement Fund. Even assuming that the Court grants the full amount of the maximum requested attorneys' fees and expenses and the full amount of the requested service award, the service award would only reduce the payment to other class members by approximately 0.0033%.

60. Each Class Representative's share of the net Final Settlement Fund will be based entirely on their respective Policy Claim Amounts. Even with the addition of an incentive award of $15,000 – in combination with their proposed recoveries from the expected net Settlement Fund – these Class Representatives stand to recover far less than the largest payments resulting from the settlement itself, some of which are expected to be over $100,000.00. The Class Representatives thus do not receive an undue benefit through receipt of the requested service award; rather, the service awards reflect the work actually performed and the risk that their efforts would not result in any recovery at all.

61. In sum, each of the Plaintiffs have spent a significant amount of time litigating the Actions for the benefit of absent class members. Their time and effort expended on behalf of the Settlement Class as a whole should not go unrecognized. We accordingly request Court approval of a $15,000 service award to each Class Representative.

V. CONCLUSION

62. For the reasons set forth above, we urge the Court to approve as appropriate and warranted the payment of (a) a fee award to Class Counsel in the amount of 33% of the Final Settlement Fund, (b) reimbursed litigation expenses to Class Counsel in the aggregate amount of $2,345,671.06, and (c) service awards to the seventeen Class Representatives in the aggregate amount of $255,000.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed this 4th day of August, 2023, at Phoenix, Arizona.

/s/*Andrew S. Friedman*
ANDREW S. FRIEDMAN
Bonnett Fairbourn Friedman & Balint, PC\

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed this 4th day of August, 2023, at Philadelphia, Pennsylvania.

/s/*Jeffrey W. Golan* (with permission)
JEFFREY W. GOLAN
Barrack, Rodos & Bacine

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed this 4th day of August, 2023, at San Francisco, California.

/s/*Daniel C. Girard* (with permission)
DANIEL C. GIRARD
Girard Sharp, LLP

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed this 4th day of August, 2023, at Miami, Florida.

/s/*Howard M. Bushman* (with permission)
HOWARD M. BUSHMAN
The Moskowitz Law Firm

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed this 4th day of August, 2023, at New York, New York.

/s/*Seth Ard* (with permission)
SETH ARD
Susman Godfrey LLP

EXHIBIT 1

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

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

Defendant.

TRANSCRIPT OF INTERIM PRETRIAL CONFERENCE

BEFORE THE HONORABLE BETH PHILLIPS
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

Kathleen M. Wirt, RDR, CRR
United States Court Reporter
400 E. 9th Street, Suite 7452 * Kansas City, MO 64106
816.512.5608

APPEARANCES

For Plaintiff:

MR. PATRICK J. STUEVE
MR. BRADLEY WILDERS
MR. ETHAN M. LANGE
MS. LINDSAY TODD PERKINS
Stueve Siegel Hanson, LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112

MR. MATTHEW W. LYTLE
Miller Schirger, LLC
4520 Main Street, Suite 1570
Kansas City, MO 64111

For Defendant:

MR. DANIEL L. DELNERO
MR. JAMES RANDOLPH EVANS
Squire Patton Boggs LLP
1201 W. Peachtree Street, NW
Suite 3150
Atlanta, GA 30309

MR. JOHN W. SHAW
MS. LAUREN TALLENT ROGERS
Berkowitz Oliver LLP
2600 Grand Boulevard, Suite 1200
Kansas City, MO 64108

APRIL 28, 2023

- - -

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 2

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 3

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

EXHIBIT 4

EXHIBIT 4

In re: Lincoln National COI Litigation, No. 16-cv-06605
In re: Lincoln National 2017 COI Rate Litigation, No. 17-cv-04150

AGGREGATE LITIGATION EXPENSES PAID

DESCRIPTION	Amount
Actuarial Experts & Consultants	$892,532.03
Banking Services	$465.63
Copying - Inhouse	$10,959.35
Court Reporters	$182,525.87
Damages Expert	$503,045.00
Database Providers	$327,108.85
Delivery Services/Messengers	$5,978.35
Deposition Prep Conference Facility	$125.00
Document Searches	$26,920.58
Filing Fee - Witness Fee	$2,583.33
Financial Consultants	$100,350.00
Meals	$6,954.91
Mediation	$23,575.82
Online research	$71,087.16
Outside Copy and Delivery Services	$14,309.32
Parking	$2,130.45
Postage	$617.50
Process and Legal Documents Service	$1,721.50
Special Master	$67,308.08
Telephone	$17,993.91
Trained Document Translation Services	$15,890.00
Transportation	$15,568.23
Travel (Local)	$458.53
Travel (Out-of-Town)	$55,461.66
TOTAL	**$2,345,671.06**

EXHIBIT 5

EXHIBIT 5

In re: Lincoln National COI Litigation, No. 16-cv-06605
In re: Lincoln National 2017 COI Rate Litigation, No. 17-cv-04150

LITIGATION FUND CONTRIBUTIONS

FIRM	AMOUNT
Barrack Rodos & Bacine	$423,954.00
Bonnett Fairbourn Friedman & Balint PC	$423,954.00
Girard Sharp LLP	$181,000.00
Kozyak Tropin & Throckmorton, LLP	$140,898.80
The Moskowitz Law Firm	$288,145.30
Susman Godfrey LLP	$532,150.00
TOTAL	**$1,990,102.10**

LITIGATION FUND DISBURSEMENTS

DESCRIPTION	EXPENSES
Actuarial Experts & Consultants	$777,736.86
Banking Services	$465.63
Court Reporters	$157,947.94
Damages Expert	$503,045.00
Database Providers	$300,832.12
Deposition Prep Conference Facility	$125.00
Document Searches	$26,920.58
Financial Consultants	$100,350.00
Mediation	$23,575.82
Outside Copy and Delivery Services	$1,183.13
Process and Legal Documents Service	$662.50
Special Master	$67,308.08
Trained Document Translation Services	$15,890.00
TOTAL	**$1,976,042.66**