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Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LSIMC, LLC, on behalf of itself and all others similarly situated,

Plaintiff,

vs.

AMERICAN GENERAL LIFE INSURANCE COMPANY,

Defendant.

Case No. 2:20-cv-11518-SVW (PVCx)

CLASS COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARD

Date: June 26, 2023
Time: 1:30 p.m.
Ctrm: 10A
Judge: Stephen V. Wilson

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I. INTRODUCTION

After two years of hard-fought litigation, and on the eve of trial, Class Counsel settled this complex case concerning the under-crediting of interest rates on universal life insurance ("UL") policies for an outstanding result: monetary benefits totaling $55.5 million, and additional non-monetary relief valued at $9.24 million. The $55.5 million alone in cash and increased interest payments to Settlement Class Members[1] is equal to over 44% of the Class's total possible recovery. When considering the additional $9.24 million from the Settlement's non-monetary benefits, the Settlement's total gross benefits rise to more than $64.74 million—over 51.5% of Defendant American General ("AmGen")'s total potential liability. These benefits are exceptional standing alone, but are even more extraordinary when viewed against the significant difficulties Plaintiff faced in this case. *See, e.g.*, *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *2–*3 (C.D. Cal. Sept. 18, 2020) (settlement for "approximately 29% of Plaintiffs' claimed damages" was "an exceptional result" warranting an upward adjustment from the 25% benchmark and collecting cases).

The Settlement is particularly significant "in light of the long, contentious, and uncertain road that Class Members would have to traverse to receive relief." Dkt. 217 at 2 (Preliminary Approval Order). As the Court observed, "the Class was certified for liability purposes only" and "Plaintiff faced several risks in terms of presenting a theory of damages . . . and converting a liability judgment into actual damages." *Id.* Those risks were apparent from the beginning. The Court granted AmGen's second motion to dismiss and gave Plaintiff only 14 days to plead additional facts sufficient to establish "a fuller picture of how Defendant's interest rates changed over time relative to its investment returns, or what returns could have been reasonably expected when a redetermination was made." Dkt. 34 at 4. That threshold hurdle was just the beginning of the difficulties Plaintiff faced. Even if a

[1] Unless noted, all referenced exhibits are attached to the Declaration of Glenn Bridgman, and all capitalized terms mean the same as in the Settlement Agreement. Ex. 1. This brief uses the terms "Settlement Class" and "Class" interchangeably.

jury found AmGen liable for breach at trial, Class Members would still have faced years of individualized damages trials, and post-trial and appellate litigation to receive any monetary compensation, and could well have received no such compensation even had they prevailed on liability. Yet, this Settlement secures significant and immediate compensation through cash and increased interest payments that counsel for AmGen stated at the preliminary approval hearing "will be paid into the cash value of the policies" such that "[t]here is a 100% likelihood that the accumulation value of the policies will be impacted positively by the settlement." Ex. 5.

The Settlement's relief directly remedies the misconduct alleged. Plaintiff claimed that AmGen paid lower interest rates than it should have, in violation of contractual terms. The Settlement increases those very same interest rates such that the Class receives higher interest payments, in addition to payments from a cash Settlement Fund. Retired United States District Judge Gary Feess, who supervised the parties in successfully mediating this matter, has submitted a declaration attesting that he "strongly support[s]" this Settlement which was, in his view, "in the best interest of the parties," and that the "advocacy on both sides of this case was excellent and exemplified the highest levels of professionalism and zealous advocacy." Dkt. 215-4, ¶10 (Decl. of Hon. Gary A. Feess in Support of Preliminary Approval).

This is not a case where a prior governmental investigation, criminal conviction, whistleblower, or news exposé paved the way. To the contrary: this is the first lawsuit that counsel is aware of alleging this type of wrongdoing. There have been *no* government investigations at all. Class Counsel performed the initial factual and legal investigation prior to filing this lawsuit, expended thousands of hours thereafter pressing the case forward, and spent substantial amounts in expert fees and other expenses, all with no promise or assurance of any kind that it would receive payment for its services.

All told, Class Counsel invested more than 3,200 hours in time, and over $363,000 in expenses, on a fully contingent basis—all with the very real possibility of receiving nothing in return. Among other things, Class Counsel:

- Advanced the case past three motions to dismiss;
- Won discovery disputes against AmGen to secure over 163,000 pages of critical documents;
- Subpoenaed AmGen's external auditor, securing an additional 3,524 pages of key documents;
- Won certification of the issue class;
- Produced six expert reports, and took or defended the deposition of all four testifying experts;
- Took or defended the Rule 30(b)(6) depositions of AmGen's and Plaintiff's corporate representatives;
- Prepared mediation submissions for, and participated in a full-day mediation with Judge Feess (Ret.);
- Moved to exclude AmGen's insurance and actuarial expert, and opposed AmGen's motion to exclude Plaintiff's insurance expert;
- Opposed AmGen's motion for summary judgment—briefing between the parties which totaled 62 pages with over 1,400 pages of exhibits;
- Filed seven motions *in limine*; and
- Filed all pretrial documents, including Plaintiff's witness list, the parties' joint exhibit list, and Plaintiff's memorandum of contentions of fact and law.

Bridgman Decl. ¶¶15–25.

With Judge Feess's (Ret.) oversight, the parties ultimately signed a Term Sheet only the week before the hearing on AmGen's motion for summary judgment and the parties' *Daubert* motions—just two weeks before trial. The Settlement reached on the brink of trial was reached with one of the largest insurance companies in the

world, represented by two of the most prestigious law firms in the country with deep insurance experience.

Class Counsel respectfully moves this Court for an award of attorneys' fees of $8 million to be paid from the Final Settlement Fund, which is approximately 14.4% of the $55.5 million of monetary benefits viewed in isolation, and 12.4% of the Settlement's total gross benefits of $64.74 million. Both percentages are well below the Ninth Circuit's 25% benchmark in percentage-of-recovery cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("[T]he 'benchmark' award is 25 percent of the recovery obtained, with 20–30% as the usual range." (cleaned up)). Class Counsel also requests $363,445.27 for litigation expenses, and a service award of $25,000 for LSIMC, LLC for its time and effort in helping bring this case to a successful conclusion.

II. BACKGROUND

A. Class Counsel Investigated Defendant's Conduct, Filed Suit, and Overcame AmGen's Motions to Dismiss

The Settlement Class consists of owners of over 40,500 UL policies issued by AmGen. UL policies combine the insurance component of a traditional life insurance policy with a savings component: policyholders' premium payments help make up the policy's "accumulation value," which is used to pay for the insurance component, and which also earn interest at rates set by AmGen. Each of the policies at issue have a guaranteed minimum annual interest rate of 3.00%, and contain the following provision:

> "This policy does not participate in our profits or surplus. . . . **Any redetermination of interest rates will be based *only* on expectations of future investment earnings**. We will not change these rates or charges in order to recoup any prior losses."

Ex. 3 at 17 (emphasis added). Thus, whenever AmGen redetermines interest rates, Plaintiff alleges they must be based "only on" AmGen's "expectations of future investment earnings" ("EFIE"). This lawsuit alleged that AmGen did not redetermine the interest rates it paid policyholders "based only on EFIE," resulting

in much lower interest payments ("under-crediting") than contractually required.

Prior to filing suit, Class Counsel reviewed AmGen's public documents concerning its investment returns to form the foundation of the Complaint. In consultation with industry experts, Class Counsel carefully studied the Policies' language, the general trends in investment returns, and the actuarial assumptions underlying the setting and redetermination of interest rates on UL policies. Class Counsel drafted the Complaint and filed this lawsuit on December 21, 2020.

Class Counsel then navigated this case past three motions to dismiss, totaling over 140 pages of briefing. Class Counsel continued to carefully assess this case's merits following each motion to dismiss to respond appropriately. This included hiring—at Class Counsel's own expense—experts to further analyze paywalled data concerning AmGen's investment returns in order to meet the Court's request for "a fuller picture" on how AmGen's interest rates changed over time compared to its investment returns, or what those interest rates should have been during redeterminations. Dkt. 34 at 4. This task was extremely difficult because insurers treat their EFIE as proprietary and highly confidential (as evidenced by AmGen's continued requests to seal this exact information, *e.g.,* Dkts. 99, 105, 122, 131, 142). Nevertheless, Class Counsel's efforts proved successful, and they added over eight pages of allegations related to AmGen's credited-rate practices in its Second Amended Complaint, which the Court found sufficient under *Twombly/Iqbal* to infer "an unexplained difference between [AmGen's] rate of return and the New Premiums Rate" that policyholders were earning. Dkt. 45 at 5. Plaintiff defeated AmGen's third motion to dismiss on September 28, 2021. *Id*.

B. Class Counsel's Efforts Uncovered Previously Undisclosed AmGen Practices that Resulted in Positive Change Even Before Settlement

Following the Court's denial of AmGen's third motion to dismiss, Class Counsel pushed the case forward through discovery. Within two months of the Court's order, Class Counsel had won several discovery disputes to compel AmGen to produce internal documents related to its practices for redetermining UL interest

rates. Dkts. 53, 60. These documents included Policy pricing memoranda, AmGen's historic credited rate analysis memoranda, historic interest rate tables, and policy-level transaction and cash flow history. These documents were critical to class certification and the merits, and many would have become exhibits at trial. Bridgman Decl. ¶14.

Following the filing and litigation of this lawsuit, AmGen made a positive, substantive change for policyholders, even before the Settlement was reached. In particular, Class Counsel uncovered that while AmGen publicly disclosed to policyholders on annual statements that it credited just one type of interest rate (the "New Money" or "New Premiums" rate); internally, AmGen used *two* interest rates to determine the amount of interest to credit—the New Money rate applicable to premium payments received within the past 36 months, and a "Portfolio" rate applicable to premiums that have been in accumulation values for longer than 36 months. But AmGen never previously disclosed the "Portfolio" rate, meaning that the only interest rate policyholders were aware of was not the "true" rate AmGen used to make interest payments. Class Counsel filed the Third Amended Complaint to include allegations related to AmGen's "Portfolio" rate (whose redeterminations Plaintiff alleged were also not "based only on EFIE"). Dkt. 81.

AmGen appears to have changed its disclosure policy for its Portfolio rate, following this litigation. Beginning in 2022, AmGen now discloses both its "New Money" *and* its "Portfolio" interest rates to policyholders on annual statements. Bridgman Decl. ¶18, Ex. 4. This increased transparency occurred before the parties had begun settlement discussions, and is a positive change for all AmGen policyholders—regardless of whether they are in the Class. While Class Counsel does not seek an additional fee for this increased transparency, other courts have awarded just that when included as part of a settlement. *See Skochin v. Genworth Fin., Inc.*, 2020 WL 6708388, at *2 (E.D. Va. Nov. 13, 2020) (awarding $2 million in fees specifically for "efforts in securing" "enhanced disclosures regarding

Defendants' plans to raise premiums in the future" against a life insurance company, as well as an additional percentage of the monetary relief).

C. Class Counsel Pursued Extensive Fact and Expert Discovery in Order to Prepare For Trial

This complex class action involving technical issues about AmGen's administration of its UL policies required substantial discovery. All told, Class Counsel served 37 requests for production of documents, 16 interrogatories, and 60 requests for admission, resulting in the production and review of over 163,000 pages of documents, spreadsheets, and data sets. Class Counsel also subpoenaed AmGen's external auditor, yielding an additional 3,524 pages of important documents. Bridgman Decl. ¶15. Class Counsel took and defended numerous depositions, including those of AmGen's and Plaintiff's corporate representatives. Class Counsel also responded to 12 interrogatories and 40 requests for production of documents from AmGen, working closely with the Plaintiff to produce all relevant documents requested. *Id*.

Given this case's complexities, discovery required significant work with top-notch insurance, actuarial, and economics experts—each of whom Class Counsel identified and retained. In addition to several consulting experts, Class Counsel worked with three testifying experts: economist Robert Mills; insurance expert Kevin Fry (the former head of the Illinois Department of Insurance); and actuarial expert and Fellow of the Society of Actuaries, Linley Baker. AmGen designated insurance and actuarial expert Craig Reynolds. Class Counsel took or defended the deposition of all four experts, and the parties produced eight expert reports in total. *Id*.

D. Class Counsel Won Certification of the Issues Class and Litigated the Case to the Eve of Trial

Plaintiff filed its motion for class certification on February 10, 2022, and its reply on April 25, 2022. Collectively, Class Counsel prepared and filed 37 pages of briefing supported by 23 exhibits totaling hundreds of pages. *Id*. ¶19. After a hearing, the Court granted-in-part Plaintiff's motion on August 4, 2022, certifying a

California class on the issue of AmGen's liability for breach. The Court declined to certify a damages class under Rule 23(b)(3), holding that individualized damages issues predominated over common ones, and ruled that damages would be determined separately following resolution of AmGen's liability. Dkt. 113 at 20. The Court appointed "experienced counsel" Susman Godfrey as Class Counsel, noting how it had helped Plaintiff "prosecute[] the action vigorously" thus far. *Id*. at 22. The Court set trial for November 29, 2022. Dkt. 114.

The parties continued litigating vigorously after class certification. Most of expert discovery occurred after class certification, including the initial reports and depositions of three of the four testifying experts. Class Counsel also opposed AmGen's motion for summary judgment, filing over 1,400 pages of exhibits in opposition. Dkt. 140. In preparation for trial, Class Counsel filed a motion to exclude the opinions of AmGen's only insurance expert, and opposed AmGen's motion to exclude Plaintiff's insurance expert. Class Counsel also filed seven motions *in limine* to cabin the scope of evidence at trial. Bridgman Decl. ¶¶22–25. The parties were ready to present argument on AmGen's motion for summary judgment and the parties' *Daubert* motions at the hearing scheduled for November 14, 2022, and to resolve any final issues at the Final Pretrial Conference scheduled for November 21, 2022.

E. Class Counsel Negotiated a Highly Successful Settlement

The parties did not reach agreement on the Settlement's terms until well after completing briefing on summary judgment and *Daubert*, and just two weeks before trial. *Id*. ¶28. An all-day mediation session before Judge Feess (Ret.) was held on September, 29, 2022. *Id*. ¶27. While the parties submitted detailed mediation statements and exhibits ahead of the session, they could not reach an agreement during that session. With Judge Feess's assistance, the parties continued negotiating after the session, including through the filing of multiple rounds of pretrial documents like witness and exhibit lists and motions *in limine*.

Throughout negotiations, Class Counsel made clear to AmGen its readiness and willingness to try this case. Class Counsel also consistently pushed for a relief structure that would significantly and directly compensate the Class for the claims at issue (e.g., historic interest underpayments). The parties, with the mediator's oversight, discussed whether the case could be resolved nationwide, after which AmGen provided additional data that permitted Plaintiff and Class Counsel to evaluate the feasibility and amount of a nationwide settlement. *Id*. The parties did not sign a Term Sheet until November 14, 2022.

In total, the $55.5 million Settlement is equal to over 44% of the amount of AmGen's total historic interest underpayments to the Policies under Plaintiff's theory of liability (which AmGen contested).[2] In particular, the Settlement's monetary benefits include:

- A $13 million, non-reversionary Settlement Fund. This is not a claims-made settlement. Class Members will automatically receive checks without having to submit any paperwork.
- $42.5 million in additional interest payments, on a non-discounted basis, to the accumulation value of In-Force Policies provided through an Interest Rate Bonus and Portfolio Rate Benefit. For four years, AmGen has agreed to: (1) increase the interest rate on Class Members' In Force Policies so that they will be paid more money in interest; and (2) "lock in" the spread that AmGen can earn on the difference between AmGen's Portfolio benchmark "earned rate"[3] and the Portfolio interest rate such that the spread cannot exceed certain amounts. The spreads are either those that AmGen set at

[2] Plaintiff's expert analyzed the nationwide data AmGen provided and calculated that the total amount of interest allegedly underpaid to the Class per Plaintiff's theory of breach was approximately $125.7 million. Dkt. 215-3, ¶7.

[3] Plaintiff alleged that the Portfolio benchmark "earned rate" is equivalent to AmGen's EFIE such that the "only" consideration AmGen can base redeterminations of interest rates on is its benchmark earned rate.

product pricing or those that were in effect in November 2022, whichever is smaller.[4]

Interest Rate Bonus Amounts

Time Period	Bonus Amount
Year 1	0.80%
Year 2	0.70%
Year 3	0.60%
Year 4	0.50%

Portfolio Rate Benefit "Locked In" Spreads

Product	Spread Temporary (bps)
ContinUL	110
Elite Survivor G	60
Elite Universal Life G	60
Elite Universal Life G 2003	60
Platinum Survivor Ultra G	75
Elite Transition UL	46
Elite UL	81
Elite Universal Life 2003	56
Platinum Provider Ultra 2003	71

At the preliminary approval hearing, the Court inquired about the likelihood that Class Members would receive these interest rate benefits. The answer is that every Class Member with an In-Force policy is ***guaranteed*** to receive this additional interest. Every Policy earns interest on its accumulation value through the normal operation of the Policy. The Interest Rate Bonus and Portfolio Rate Benefit increase the interest rates that Class Members are already earning, thereby increasing their accumulation values. As counsel for AmGen stated at the preliminary approval hearing when asked about "potential payout":

> "It's pretty definitive that, given the way the bonus is structured and locking in the spread, **that these amounts will be paid into the cash value of the policies**. As long as these policies are in force, there's no reason to believe we're going to have some kind of mass termination of

[4] By requiring AmGen to earn lower spreads than it otherwise could have by "locking in" current spreads or those set at pricing, this benefit further increases the interest Class Members earn on In-Force Policies. *See* Dkt. 215-3, ¶12.

> the policies. **There is a 100% likelihood that the accumulation value of the policies will be impacted positively by the settlement."**

Ex. 5 (emphasis added).

Plaintiff's expert, Mr. Robert Mills, has independently confirmed the $42.5 million valuation through the data AmGen provided during negotiations. Dkt. 215-3.

Indeed, the "100% likelihood" of a positive impact on accumulation values (e.g., increases to them) was a key component that Class Counsel pushed for, and secured, during negotiations. This is not a case where the settlement provides a coupon, or another dubious form of relief that may be of little to no value to most class members or is unrelated to the defendant's alleged misconduct. Exactly the opposite: the relief secured directly remedies the wrongs alleged. Plaintiff claimed that AmGen paid interest rates on the Policies lower than what was contractually required; in response, the Settlement raises those interest rates so that Class Members receive higher interest payments on their In-Force Policies, in addition to distributions from a Settlement Fund. And as AmGen's counsel explained, there is no reason why there would be a "mass termination" of these Policies and, in fact, these benefits ensure that Policies remain in force longer. Higher accumulation values means increased amounts available to pay for Policy premiums, permitting Class Members to pay less out of pocket. *See* Dkt. 140-8, ¶10 (Expert Report of Kevin Fry). And because the increased interest credited compounds over time, the benefits likely extend well beyond the initial four-year period.

Also, the Settlement releases claims against AmGen only through the period for which the Interest Rate Bonus and Portfolio Rate Benefit are in effect. If, after those bonuses expire, a Class Member believes that AmGen is under-crediting interest, or is otherwise breaching the Policies' terms with regard to that provision, a new suit can be brought. Bridgman Decl. ¶32.

Finally, on top of the $55.5 million in monetary benefits, the Settlement also provides significant non-monetary relief that increases the Settlement's gross benefits. AmGen has agreed not to deny coverage of any Class Members' death

claims because of an alleged lack of insurable interest (the "Non-Contestability Benefit"). Class Members benefit because AmGen may not take these actions challenging the payment of death benefits to try to indirectly unwind the Settlement's benefits. AmGen has likewise agreed not to recoup the cost of this Settlement through a cost of insurance increase or by adjusting its methodology for calculating its benchmark earned rates.

Mr. Philip Bieluch, an expert with extensive experience in the life insurance industry has quantified the value of the Non-Contestability benefit at $9.24 million. Bieluch Decl. ¶40. As a result, the combined monetary and non-monetary benefits conferred by the Settlement total $64.74 million.

III. ARGUMENT

A. Class Counsel's Fee Request is Reasonable

1. Class Counsel is Entitled to Fees as a Percentage of Recovery

The Supreme Court has long recognized that a lawyer who obtains recovery "for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); Fed. R. Civ. P. 23(h). The Court has discretion to use either a percentage-of-recovery method or a lodestar method to award fees, but the percentage method in common fund cases is dominant in the Ninth Circuit. *See In re Snap Inc. Secs. Litig.*, 2021 WL 667590, at *3 (C.D. Cal. Feb. 18, 2021). 25% of the recovery is the benchmark upon which courts evaluate percentage recoveries in the Ninth Circuit, and awards at or below that percentage are a "presumptively reasonable amount of attorney's fees," regardless of the lodestar. *Thompson v. Transamerica Life Ins. Co.*, 2020 WL 6145104, at *1 (C.D. Cal. Sept. 16, 2020) (approving fee request of 20% of net settlement fund with 4.2 lodestar multiplier); *Reyes v. Experian Info. Solutions, Inc.*, 856 F. App'x 108, 111 (9th Cir. 2021) (court abused discretion when it awarded only 16.67% instead of 25% of recovery because a 2.88 multiplier was not unreasonable and "similar lodestars are routinely approved").

If a lodestar cross-check is undertaken, multipliers under four are presumed reasonable. *E.g.*, *Vizcaino*, 290 F.3d at 1051 n.6 (noting that "multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied" in approving fee award with a 3.65 multiplier (cleaned up)); *Thompson*, 2020 WL 6145104, at *1 (approving 4.2 multiplier and collecting cases); *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007) (affirming fee award equal to 6.85 multiplier because it fell "well within the range of multipliers that courts have allowed").

2. The Requested Fee is Reasonable Considering the Significant Risks Borne by Counsel

In assessing reasonableness, courts consider: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden on class counsel; and (5) awards made in similar cases." *Thompson*, 2020 WL 6145104, at *2. "Foremost among these considerations, however, is the benefit obtained for the class." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). An excellent result for the class—especially in light of the obstacles faced—merits a higher fee.

i. <u>The results achieved are exceptional</u>

Here, the $55.5 million monetary Settlement, considered in isolation of other benefits secured, is exceptional. The recovery represents 44.2% of the total underpaid interest that Plaintiff alleged AmGen owed Class Members. That percentage increases to 51.5% when the Settlement's monetary and non-monetary benefits are combined. When compared to other class action settlements, this recovery is an exceptionally high percentage of a defendant's total potential liability. Indeed, "it is not uncommon for a class action settlement to amount to approximately 10% of the total potential value." *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, at *3 (C.D. Cal. May 30, 2014) (approving settlement potentially worth 9.1% of total liability as "within the range of reasonableness").

Courts have noted that similar, and even materially lower, percentage recoveries than obtained here weigh in favor of an upward departure from the Ninth Circuit's 25 percent benchmark. *See, e.g.*, *Marshall*, 2020 WL 5668935, at *2–*3 (citing cases where recoveries between 10% to 27.6% of maximum recovery justified upward departure from benchmark); *Hurtado v. Rainbow Disposal Co.*, 2021 WL 2327858, at *4 (C.D. Cal. May 21, 2021) (settlement "between 23.4% and 34.0% of the maximum" recovery justified upward adjustment); *Anthem, Inc. Data Breach Litigation*, 2018 WL 3960068 at *9–10 (N.D. Cal. Aug. 8, 2018) (14.5% recovery justified a percentage fee of 27%).

Here, Class Counsel is not requesting any upward departure, rendering its fee request as more than just reasonable: the fees requested are 14.4% of the Settlement's $55.5 million in monetary benefits considered alone, and 12.4% of the Settlement's overall benefits combined. Indeed, this Settlement is functionally equivalent to the benefits secured by the class in *Thompson v. Transamerica Life Ins. Co.*, where Judge Snyder approved fees totaling $19 million—representing 20% of the monetary relief obtained, with a lodestar multiplier of 4.2. *See* 2020 WL 6145104, at *2. The *Thompson* class alleged breach-of-contract claims against a life insurer for improperly increasing their cost-of-insurance rates. The settlement provided that compensation to class members would be through a "credit [to] the accumulation account of Settlement Class Policies that are in-force" or through "a check in the case of terminated or lapsed" policies. *Thompson v. Transamerica Life Ins. Co.*, Case No. 2:18-cv-05422-CAS-GJS, Dkt. 158, ¶39 (C.D. Cal. July 20, 2020); *see also Feller v. Transamerica Life Ins. Co.*, 2019 WL 6605886, at *5 (C.D. Cal. Feb. 6, 2019) (approving $27.688 million fee—representing 25% of settlement—where in-force policyholders would be paid through "an increase to the accumulation value of each In-Force Policy"). Here, ***all*** class members will receive a cash disbursement and, as noted (and like in *Thompson* and *Feller*), the additional interest payments from AmGen are guaranteed to "be paid into the cash value of the policies." Ex. 5.

Similarly, in *Herrera v. Wells Fargo Bank, N.A.*, 2021 WL 9374975, at *11 (C.D. Cal. Nov. 16, 2021), the Court awarded $23.1 million in fees from a total settlement value of between $84 million and $107.5 million—split between a $45 million settlement fund, $33.36 million in additional payments the defendant represented it had made or will make directly to class members, $5.5 million in notice and administrative costs, and the possibility of another $23.47 million in future refunds as part of a change in business practices. Judge Selna held that the total value of the settlement was "significantly higher than [the] $45 million" settlement fund, and that the requested $23.1 million in fees represented at most "27.5% of the total settlement value" and was reasonable. *Id*. at *12.

The recovery is even more significant considering the enhanced interest rate disclosures and improved annual statement transparency that AmGen adopted during this case. *Skochin*, 2020 WL 6708388, at *2 (awarding fees for settlement securing "enhanced disclosures"); *Green v. Lawrence Serv. Co.*, 2014 WL 12778929, at *9 (C.D. Cal. Apr. 1, 2014) (change in a defendant's policies can be considered in motion for attorneys' fees even if not part of settlement).

It is well-settled that "[i]n calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of the both the monetary and non-monetary benefits conferred on the Class." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015) (citing cases and considering valuation of a non-contestability benefit when awarding fees); *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) (noting that when non-monetary relief "can be accurately ascertained," courts may "include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees").[5]

[5] *See also* Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges 35 (3d ed. 2010) (stating that, under the percentage approach, the fee "is based on a percentage of the actual value to the class of any settlement fund plus the actual value of any nonmonetary relief").

Finally, the recovery is also exceptional given how quickly Class Members will receive compensation. This is not a claims-made settlement. Class Members will automatically receive checks through the addresses that AmGen keeps on file. Similarly, the Interest Rate Bonus and Portfolio Rate Benefit apply automatically to all Class Members' accumulation values through AmGen's administrative systems, once again without the need to submit any claim form.

ii. Class Counsel successfully navigated the high risks associated with this case on a fully contingent fee arrangement

Class Counsel overcame very high risks in securing the Settlement on the eve of trial. This litigation focused on the under-crediting of interest to UL policies through improper interest rate redeterminations, a case that Class Counsel—who has extensive experience litigating against life insurers—is unaware has ever been brought before. *Id*. ¶8. Bringing a case that others have not brought previously indicates the high risks of a potential recovery. *E.g.*, *In re Apple Inc. Device Performance Litig.*, 2023 WL 2090981, at *14 (N.D. Cal. Feb. 17, 2023) (successfully settling a case involving a "relatively unique subject matter" warranted upward adjustment). That risk was underscored when the Court initially dismissed the case, requiring Plaintiff to go back to the drawing board and find evidence sufficient to show, at the pleading stage, "a fuller picture of how Defendant's interest rates changed over time relative to its investment returns, or what returns could have been reasonably expected when a redetermination was made." Dkt. 34 at 4 (dismissing Plaintiff's First Amended Complaint, and ordering amendment within 14 days). It was by no means certain that Plaintiff's efforts to bolster its complaint would pay off, given that AmGen's renewed motion to dismiss vigorously contested even the adequacy of these supplemented allegations.

Once the case survived the pleading stage and progressed through discovery and class certification, recovery was still far from guaranteed. While the Court

certified an issue class, without a certified damages class, policyholders faced significant challenges in recovering any meaningful relief. As the Court recognizes, "Plaintiff faced several risks in terms of presenting a theory of damages that would survive summary judgment, defending against attempts by Defendant to decertify the class after the trial, and converting a liability judgment into actual damages." Dkt 217 at 2. A defendant as well-resourced as AmGen, with highly skilled counsel, had every reason to believe it would prevail at summary judgment or trial, especially after the Ninth Circuit decided to not review Plaintiff's 23(f) appeal of the Court's class certification decision. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004) (the defendant's belief in the strength of its case properly considered as a risk to recovery); Bridgman Decl. ¶20.

"The risk that further litigation might result in no recovery is a 'significant factor' in assessing the fairness and reasonableness of an award of attorneys' fees." *Taylor v. Shippers Transport Express, Inc.*, 2015 WL 12658458, at *15 (C.D. Cal. May 14, 2015) (citation omitted); *accord In re Pac. Enters. Secs. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee "because of the complexity of the issues and the risks"). Here, the risk of there being no recovery at all was very high. Even if Plaintiff prevailed at both summary judgment and trial, that would still not have entitled the Class to a penny. Victory on the issue of breach would only have meant additional litigation by absent Class Members interested and willing to litigate their individual damages' claims.

Class Counsel continued litigating this case, retaining highly specialized experts on UL policies, and helping them prepare their expert reports and their testimony for trial. Class Counsel opposed AmGen's motion for summary judgment, and proceeded deep into trial preparation activities when this Settlement was finalized.

Class Counsel undertook all of these risks on a fully contingent basis, without there ever being any guarantee of any recovery. "The risk that counsel will not

recover, as well as the financial burden accompanying the contingent nature of the representation, may justify a higher percentage fee award." *Taylor*, 2015 WL 12658458, at *16.

iii. Courts have approved similar percentage awards in breach-of-contract cases against life insurers.

Class Counsel's request for 14.4% is well within the range that courts have awarded in other cases involving breach-of-contract claims against life insurers. *See, e.g.*, *Feller*, 2019 WL 6605886 at *13 (approving 25% of monetary benefits); *Thompson*, 2020 WL 6145104, at *2 (approving 20% monetary benefits); *Fleisher*, 2015 WL 10847814, at *11 (approving award equal to 33.3% of monetary benefits); *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924, Dkt. 164 at 20:08–10 (S.D.N.Y. Mar. 18, 2019) (approving 30% of monetary benefits); *Brighton Trustees, LLC v. Genworth Life and Annuity Ins. Co.*, 3:20-cv-00240-DJN, at Dkt. 147 (E.D. Va. Oct. 25, 2022) (approving fees equal to 33.33% of the monetary benefits).

3. The Fee Requested is Reasonable Under the Lodestar Crosscheck

While courts are encouraged to confirm the reasonableness of a percentage fee request by cross-checking the lodestar multiplier, they are not required to. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. Apr. 1, 2008) ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point."). A court may "decline[] to conduct a lodestar cross-check in [a] case, given that under the percentage-of-the-fund method the fee request [is] significantly below the 25% benchmark." *Ebarle v. Lifelock, Inc.*, 2016 WL 5076203, at *11 (N.D. Cal. Sept. 20, 2016); *Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *15 (N.D. Cal. Jan. 26, 2007) (no cross-check in approving an $11.25 million fee because the fee was 25% of the recovery).

Here, Class Counsel's request of 14.4% is below the 25% benchmark and is presumptively reasonable. With a lodestar of 3.32 for the work completed through March 15, 2023, which will lower to 2.95 through settlement administration, *see* Bridgman Decl. ¶44, the cross-check only confirms the reasonableness of the requested award. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 (affirming fee with multiplier of 3.65 and collecting cases); *Steiner*, 248 F. App'x at 783 (approving 6.87 multiplier); *Reyes*, 856 F. App'x at 111 (25% award with a 2.88 multiplier was not unreasonable); *Craft*, 624 F. Supp. 2d at 1125 (approving 25% award with 5.2 multiplier).

In this entirely contingent action, Class Counsel have spent 3,216.30 hours through March 15, 2023, for a lodestar amount of $2,408,870.00.[6] Bridgman Decl. ¶¶36–37. The hourly rates for Class Counsel and its staff (ranging from $325 to $1,300) are comparable to peer law firms litigating matters of similar magnitude. In a survey of AmLaw 50 law firms performed by PwC Product Sales, LLC and issued in October 2021, the median billing rate per hour was $1,253 for equity partners and $819 for associates. *Id*. ¶39. Here, three of the four Susman Godfrey partners who primarily worked on this case had rates below the 2021 median. All associates working on the matter billed below the median rate. *Id*.

Courts routinely find Susman Godfrey's rates reasonable. *See, e.g.*, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4685536, at *8–*9 (C.D. Cal. May 8, 2017) (finding Susman Godfrey's rates "reasonable because they fall within the range of prevailing rates in the Central District of California for the type of work performed"); *Meta Platforms, Inc. v. Social Data Trading Ltd.*, 2022 WL 18806267

[6] In the Ninth Circuit, "affidavits of the plaintiffs' attorneys and other attorneys regarding prevailing fees in the community, and rate determinations in other cases are satisfactory evidence of the prevailing market rate." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (cleaned up). The lodestar is calculated using Susman Godfrey's 2023 hourly rates. *See Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate); *Wishtoyo Foundation v. United Water Conservation Dist.*, 2019 WL 1109684, at *8 (C.D. Cal. Mar. 5, 2019) (using current rates to determine fee award).

at *5 (N.D. Cal. Nov. 11, 2022) (Susman Godfrey's rates were "reasonable" and "consistent with the prevailing market rates for attorneys of similar skill, experience, and reputation"); *Fleisher*, 2015 WL 10847814, at *18 (Susman Godfrey's rates were "reasonable" and "comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude"); *In re Auto. Parts Antitrust Litig*., 2017 WL 3525415, at *4 (E.D. Mich. July 10, 2017) (Susman Godfrey's rates were "justified" and "well in line with market").

The 3,216.30 hours Class Counsel spent litigating over two years are also reasonable. Class Counsel sought discovery relevant to both class certification and the merits as soon as practicable, and elevated the work of associates where appropriate. For example, an associate took the deposition of AmGen's 30(b)(6) corporate representative and defended the depositions of Plaintiff's experts in this case. Moreover, when using the lodestar as a cross-check, "courts 'have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.'" *De Leon v. Ricoh USA, Inc.*, 2020 WL 1531331, at *15 (N.D. Cal. Mar. 31, 2020) (quoting *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 505 (2016)).

Finally, the current 3.32 multiplier does not account for *future* hours that Class Counsel will need to work to ensure that all Class Members receive the Settlement relief, including time that will be spent preparing papers in support of final approval, shepherding the notice and disbursement process, and administering the Settlement until all funds are distributed. In a Class of over 40,500, from experience in handling class action settlements of similar size, Class Counsel anticipates being required to respond to inquiries from Class Members during administration. That additional work would bring the effective lodestar in this matter to 2.95. *See Reyes*, 856 F. App'x at 111 (2.88 multiplier was reasonable). Bridgman Decl. ¶44.

Courts consider expected future hours worked when assessing the reasonableness of a lodestar cross-check. *See Perez v. Rash Curtis & Assocs.*, 2020 WL 1904533, at *20 (N.D. Cal. Apr. 17, 2020) (considering counsel's averment that there will be an additional 5,450 hours spent on the case when awarding fees equaling multiplier of 13.42); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 746 F. App'x 655, 659 (9th Cir. 2018) ("The district court did not err in including projected time in its lodestar cross-check).

B. Class Counsel's Expenses Are Reasonable, Were Necessarily Incurred to Achieve the Settlement, and Should Be Reimbursed

Class Counsel requests reimbursement of $363,445.27 for expenses incurred in connection with this action. Bridgman Decl. ¶45. These expenses, including filing fees, legal research charges, deposition costs, and expert fees, are all of the sort that would "normally be charged to a fee paying client" in non-contingent cases. *In re Allergan, Inc., Proxy Violation Derivatives Litig.*, 2018 WL 4959014, at *1 (C.D. Cal. Aug. 13, 2018) (citation omitted) (approving $756,983.55 in expenses in case that recovered $40 million for the class).

Class Counsel advanced expenses without any assurance they would ever be reimbursed given the contingent nature of the case. That Class Counsel was willing to spend its own money (without using outside funding), and where reimbursement depended entirely on this litigation's success, is perhaps the best indicator that expenditures were reasonable, necessary, and economical where appropriate.

Class Counsel also requests the Court approve payment of Settlement Administration Expenses under paragraph 56 of the Settlement. The Settlement Administrator has incurred $3,048.35 in expenses through February 28, 2023, and will incur additional expenses as payments are distributed. Intrepido-Bowden Decl. ¶¶ 3–4.

C. A Service Award for Plaintiff is Appropriate

Plaintiff requests a service award of $25,000 for being the class representative, which is 0.04% of the Settlement's monetary value. A service award is meant to compensate class representatives "for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). Factors are considered: (1) the risk to the class representative in commencing suit; (2) the notoriety and personal difficulties encountered; (3) the amount of time and effort spent; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed as a result of the litigation. *See Flo & Eddie*, 2017 WL 4685536, at *10.

Here, Plaintiff's risk was greater risk than normal given the case was the first to involve the complicated interest rate provision at issue. Plaintiff spent significant time gathering and reviewing documents to respond to AmGen's discovery requests, prepared for and attended a day-long deposition, and advised the settlement process. Without Plaintiff bringing this case, or its involvement in helping settle the case, most Class Members would not be receiving any relief. As this Court has now noted twice, Plaintiff has litigated this case "vigorously" on behalf of the Class. Dkt. 113 at 22, Dkt. 217 at 2.

The $25,000 request is in line with those awarded in other complex class actions involving UL policies. *See, e.g.*, *Hancock*, 15-cv-9924, Dkt. 164 at 21:2–4 (approving $40,000 service awards); *Fleisher*, 2015 WL 10847814, at *24 ($25,000); *Brighton Trustees*, 3:20-cv-00240-DJN, at Dkt. 147 ($25,000). It is also in line with those awarded in other complex class actions securing similarly sized settlements in this district. *E.g.*, *Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 9614818, at *8 (C.D. Cal. Oct. 24, 2017) ($25,000 service award for securing a $16.75 million recovery; and awarding class counsel $5.58 million in fees and $1.16 million in expenses); *Tibble v. Edison Int'l*, 2018 WL 6131151, at *2 (C.D. Cal. June 25, 2018) ($25,000 service award after proving damages of over $13 million at trial); *Flo &*

Eddie, 2017 WL 4685536, at *11 ($25,000 service award, which represented "only .2 percent of the $25.5 million minimum recovery").

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that this Court award its requested attorneys' fees in the amount of $8,000,000, plus a *pro rata* share of the interest earned in the Fund, reimbursement of $363,445.27 in litigation expenses, and a $25,000 service award for Plaintiff LSIMC, LLC.

Dated: April 3, 2023

Respectfully submitted,

By: */s/ Glenn C. Bridgman*

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CERTIFICATE OF COMPLIANCE

The undersigned, Class Counsel, certifies that this brief contains 6,894 words, which complies with the word limit of L.R. 11-6.1.

Dated: April 3, 2023

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