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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

STEPHEN G. AQUILINA and LUCINA J. AQUILINA, Individually and on Behalf of All Others Similarly Situated; and DONNA J. CORRIGAN and TODD L. CORRIGAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON; LLOYD'S SYNDICATE #2003; LLOYD'S SYNDICATE #318; LLOYD'S SYNDICATE #4020; LLOYD'S SYNDICATE #2121; LLOYD'S SYNDICATE #2007; LLOYD'S SYNDICATE #1183; LLOYD'S SYNDICATE #1729; LLOYD'S SYNDICATE #510; BORISOFF INSURANCE SERVICES, INC. d/b/a MONARCH E&S INSURANCE SERVICES; SPECIALTY PROGRAM GROUP, LLC d/b/a SPG INSURANCE SOLUTIONS, LLC; ALOHA INSURANCE SERVICES, INC.; ILIKEA LLC d/b/a MOA INSURANCE SERVICES HAWAII; and DOES 1-100,

Defendants.

No. 1:18-cv-00496-JMS-KJM

**REPLY MEMORANDUM
OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION
FOR AN AWARD OF
ATTORNEYS' FEES,
LITIGATION EXPENSES,
AND SERVICE AWARDS**

Trial Judge: J. Michael
Seabright
Hearing Date: August 15, 2022

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Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2) and the Court's Order Granting Preliminary Approval of Class Action Settlement, *Aquilina v. Certain Underwriters at Lloyd's London*, No. 1:18-cv-00496-ACK-KJM, 2021 WL 3611027, at *15 (D. Haw. Aug. 13, 2021) ("Preliminary Approval Order"), Plaintiffs¹ respectfully submit this Reply Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Litigation Expenses, and Service Awards. This memorandum further supports Plaintiffs' request for an order approving: (i) Class Counsel's requested attorneys' fee award in the amount of 30% of the Settlement Fund, or \$540,000 (plus interest earned), and expenses of \$227,473.16;² and (ii) Service Awards to Plaintiffs totaling \$5,000 (consisting of \$2,500 to the Aquilina Plaintiffs and \$2,500 to the Corrigan Plaintiffs). A proposed order is submitted herewith, which was previously submitted to the Court with Plaintiffs' opening memorandum of law ("Fee Brief") (ECF No. 418-1).

I. INTRODUCTION

As set forth in the Fee Brief, an award of 30% of the Settlement Fund is reasonable under Ninth Circuit authority based on the exceptional results achieved

¹ Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Settlement Agreement and Release (the "Settlement Agreement") (ECF No. 408).

² The expenses have been restated to include an estimate of the cost to attend the Final Approval Hearing. Supplemental Declaration of Daryl F. Scott in Support of Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses, and Service Awards ("Supplemental Scott Decl."), ¶5.

for the Settlement Class. Such an award is reasonable and appropriate as it represents a negative multiplier of 0.13, utilizing Class Counsel's normal hourly rates that have been approved by Courts in this Circuit and elsewhere, and a negative multiplier of 0.21, utilizing adjusted hourly rates that have been previously approved by Courts in this District. Indeed, even if the Court applied reduced hourly rates of \$300 per hour to Class Counsel's lodestar, the requested attorneys' fee would represent a negative multiplier of 0.30. Therefore, these lodestar multipliers clearly demonstrate that a 30% fee award is appropriate here.

The Mail Notice notified Class Members that Class Counsel would seek attorneys' fees of up to one-third of the Settlement Fund. Following the filing of the Fee Brief wherein Class Counsel requested an award of 30% of the Settlement Fund, the Settlement Administrator, RG/2 Claims Administration LLC ("RG2"), promptly posted the Fee Brief on the Settlement Website for Class Members to review. Objections, if any, were due by December 6, 2021. No objections to the fee request, expense request, or request for Service Awards have been filed, demonstrating that the Settlement Class does not oppose Class Counsel's request of 30% of the Settlement Fund, plus expenses and Service Awards or any of the other requests made in the Fee Brief. Accordingly, Plaintiffs request that the Court grant this motion.

II. THE ATTORNEYS' FEE REQUEST SHOULD BE APPROVED

A. Legal Standards Governing the Award of Attorneys' Fees in Settled Class Actions

If the Settlement Agreement is approved, the Settlement Class will receive distributions from the \$1,800,000 common fund generated by the efforts of Class Counsel. Paying reasonable attorneys' fees from the common fund compensates Class Counsel for bringing and prosecuting the Litigation. For a cash-only settlement, like this one, “[b]ecause the benefit to the class is easily calculated in a common fund case, courts may award a percentage of the common fund rather than engaging in a lodestar analysis to determine the reasonableness of the fee request.” Preliminary Approval Order, 2021 WL 3611027, at *15. When using the percentage method, courts are also encouraged to conduct a cross-check under the lodestar method to “guard against an unreasonable result[.]” *Id.*; see also *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002).

Courts consider the following six factors to determine whether a departure from the Ninth Circuit's 25% benchmark is appropriate: (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; and (6) whether the case was handled on a contingency basis. *Vizcaino*, 290 F.3d at 1048-50; see

also Martin v. Marriott Int'l, Inc., No. CV 18-00494-JAO-RT, 2021 WL 4888973, at *6 (D. Haw. Oct. 19, 2021).

As explained in the Fee Brief, an upward adjustment from the 25% benchmark and award of 30% of the Settlement Fund is warranted here because, among other things, “counsel achieved extraordinary results” in an action that presented a large risk of nonpayment due to the novelty of the causes of action. *See* Preliminary Approval Order, 2021 WL 3611027, at *16. Indeed, Class Members will automatically receive a recovery of over 100% of the premiums they paid. Given the significant risks Class Counsel faced in obtaining any relief, coupled with the tremendous results obtained, Plaintiffs submit that the 30% requested fee award is reasonable. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (“negative multiplier suggests that the percentage-based amount is reasonable and fair”).

B. An Award of 30% of the Settlement Fund Is Reasonable

The Ninth Circuit has held that an award of attorneys’ fees up to 33 1/3% of the fund can be reasonable. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). As discussed below, the requested fee award is reasonable under the circumstances and should be approved.

1. Class Counsel Achieved an Exceptional Result

Class Counsel achieved a superior result. The Settlement Fund of \$1.8 million represents roughly 100% of each Class Member's total premiums, taxes, and fees paid during the Class Period, if not more, for purchasing the Lloyd's surplus lines policies at issue in the Litigation, meaning that Class Members will receive a recovery of the full amount of the premiums they paid, if not more, from the Settlement Fund. Guglielmo Decl., ECF No. 418-4, ¶4; *see Martin*, 2021 WL 4888973, at *6 (awarding 30% attorneys' fee award where "[p]laintiffs' counsel obtained a favorable result that benefits the class members"). Courts in this Circuit and elsewhere have found that settlements achieving 20% of damages or less, constituted exceptional results warranting an upward departure from the 25% benchmark. *See In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *4 (N.D. Cal. Aug. 3, 2016) (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *see also In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee"); *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *7-8 (C.D. Cal. June 10, 2005) (upward adjustment warranted where the court found that "the Settlement Fund, as a percentage of recovery, is greater than recoveries obtained in other cases where courts have awarded attorneys'

fees of one-third of a common fund”); *Waldbuesser v. Northrop Grumman Corp.*, No. CV 06-6213, 2017 WL 9614818, at *2 (C.D. Cal. Oct. 24, 2017); *see also In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003).

Further, the Mail Notice disclosed to Class Members that Class Counsel would seek up to 33% in attorneys’ fees from the Settlement Fund. ECF No. 408, Ex. A. No objection to the Settlement or proposed attorneys’ fees has been filed. *See Martin*, 2021 WL 4888973, at *6 (noting that “the Court has received no objections to the settlement or the requested fees”). Class Counsel now seeks 30% – less than the amount it disclosed it could seek in the Mail Notice.

Thus, it is clear that Class Counsel delivered a significant benefit to Class Members and the results achieved factor supports the requested fee.

2. The Litigation Was Exceptionally Risky for Class Counsel

Class Counsel engaged in hard-fought litigation for approximately three years without any compensation. Plaintiffs faced substantial risks and uncertainties that were present from the outset of this litigation that made it far from certain that any recovery for the Class would be obtained.

First, Defendants vigorously denied that the Hawaii Surplus Lines Act (“HSLA”), HRS §431:8-301(a), imposed any diligent search requirement on them and they denied that Plaintiffs sustained any damages, citing to payments they had made to Plaintiffs under their surplus lines insurance policies. *See, e.g.*, ECF Nos.

219, 228, 285 (Monarch’s motion to deny class certification and Aloha’s and Underwriters’ joinders). At all times in the Litigation, Defendants asserted that Plaintiffs did not have standing or damages. Based on the discovery taken, as well as Class Counsel’s interpretation of the HSLA, Class Counsel believed that they could have won on liability and proved damages, but knew that success at summary judgment and trial was far from certain. As a complex consumer class action, this case would entail hard-fought and lengthy litigation. Guglielmo Decl., ECF No. 418-4, ¶74.

Second, the theory of the case here is unique. Class Counsel is not aware of any other similar class action litigation asserting comparable claims against insurers and retail brokers for improper sales of surplus lines insurance. *Id.*, ¶75. As such, Class Counsel knew at the outset of the Litigation that they would have to brief novel theories to achieve any success in the Litigation. Undoubtedly, liability issues were likely to boil down to a hotly contested and inherently unpredictable “battle of the experts” and expenses would be substantial. *Thompson v. Transamerica Life Ins. Co.*, No. 2:18-CV-05422, 2020 WL 6145104, at *3 (C.D. Cal. Sept. 16, 2020), *appeal dismissed*, No. 20-56088, 2021 WL 1546066 (9th Cir. Apr. 14, 2021) (plaintiffs’ counsel undertook the litigation despite the risk that resolution of the issues would no doubt devolve into a “battle of the experts”). If litigation were to continue, pre-trial motion practice would have ensued and trial preparation would

have been underway, taking tremendous time and resources. The Court's ruling on the pending class certification motions likely would have led to the inevitable Rule 23(f) interlocutory appeal, potentially delaying prosecution of the case should a stay pending appeal be granted. Given the inherent risks that existed and the prospect of protracted litigation, engendering enormous time and monetary expenditure, an upward adjustment from the benchmark is warranted here.

3. Class Counsel's Performance Generated Benefits Beyond the Cash Settlement Fund

The Settlement requires that Underwriters and Monarch pay up to \$50,000 for the costs of Settlement Administration. ECF No. 408, ¶4.4. This significant provision allows for the costs of Settlement Administration to be borne by Defendants, rather than Class Members. This results in Class Members obtaining additional benefits beyond the Settlement Fund, as the common fund will not be used to pay the costs of Settlement Administration unless the costs exceed \$50,000. Therefore, this factor further weighs in favor of the fee request.

4. The Requested Fee Is Consistent with the Market Rate

As discussed in the Fee Brief, the attorneys' fees awarded in comparably sized consumer protection cases in this District and elsewhere supports the 30% fee award requested. *See, e.g., Martin*, 2021 WL 4888973 (awarding 30% fee in action alleging Hawaii Revised Statutes Chapter 480 unfair and deceptive acts and practices and unjust enrichment claims); *Howerton v. Cargill, Inc.*, No. CIV. 13-

00336-LEK-BMK, 2014 WL 6976041, at *6 (D. Haw. Dec. 8, 2014) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes); *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes); Order Granting Final Approval of the Class Action Settlement, *Smith v. Bank of Hawaii*, No. 1:16-cv-00513-JMS-WRP, ECF No. 233, ¶14 (D. Haw. Dec. 22, 2020) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes).

Courts have held that an upward adjustment from the benchmark to one-third of a common fund was appropriate where the percentage of recovery for class members represented an exceptional result. *See Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 9614818, at *2 (awarding one-third fee where counsel recovered 40% of damages and noting "the exceptional result achieved in this action justifies an attorney fee award of one-third of the settlement fund"). As previously stated, Class Members will recover 100% of their damages here, if not more, from purchasing Lloyd's surplus lines policies. *See also supra*, §III.B.1. This result is far above what most class action settlements achieve and may not have been obtained had the case proceeded to trial. Given the novelty of the claims, time, and effort to develop, litigate and achieve the extraordinary result for the Class, and the complexity of claims, a 30% award is appropriate.

5. The Burdens Class Counsel Experienced While Litigating the Case Weigh in Favor of the Requested Fee

This factor considers burdens such as the cost of litigation, duration, and foregoing other work. *Vizcaino*, 290 F.3d at 1048-50. Class Counsel have incurred substantial costs in attorney time and litigation expenses detailed in Sections III.C. and IV., *infra*. Including the months of research prior to bringing the Litigation, Class Counsel has devoted approximately three years to the case, at times requiring attorneys to work exclusively on the Litigation, billing thousands of hours researching and drafting the legal claims, propounding and responding to numerous sets of discovery, reviewing documents, briefing arguments, preparing for and taking depositions, working with experts, and arguing before this Court. *See* Guglielmo Decl., ECF No. 418-4, ¶¶7-48. Each Defendant was represented by separate counsel and the meet and confer process during discovery took hundreds of hours of attorney time, with no guarantee that this attorney time and expenses would ever be recouped. *Id.*, ¶73. Because each Defendant briefed each motion individually, rather than filing joint briefing, Class Counsel were required to devote additional time to respond to arguments raised by each of the Defendants, carefully briefing the nuanced issues that were raised by each Defendant. *Id.*, ¶75. At all times, Class Counsel had to forego significant other work to ensure that the proper number of resources could be dedicated to the Litigation. Therefore, this factor supports the reasonableness of the fee request.

6. The Case Was Handled on a Contingency Basis

Class Counsel undertook this action in December 2018 on an entirely contingent basis, assuming a substantial risk that the Litigation would yield no, or very little, recovery and leave them uncompensated for their time and substantial out-of-pocket expenses. Guglielmo Decl., ECF No. 418-4, ¶73; Scott Decl., ECF No. 418-2, ¶¶8-9. Indeed, Class Counsel have received no compensation for their efforts and costs. Guglielmo Decl., ECF No. 418-4, ¶73. Absent this Settlement, there was a sizeable risk that, at the end of the day, Class Members, as well as their counsel, would obtain no recovery. Despite the litigation risks, Class Counsel were able to forge a resolution that provides significant monetary relief to the Class. Even if the requested 30% is awarded, Class Counsel will not be fully compensated for the time and effort expended in litigating and obtaining the Settlement for the Class. Thus, there is little doubt that Class Counsel undertook a significant risk here and the fee award, respectfully, should reflect that risk.

C. A Lodestar Cross-Check Supports the Fee Request

Class Counsel's requested fee will result in a negative multiplier. Class Counsel spent 6,301.50 hours litigating the Litigation, producing a lodestar amount of \$4,206,913.50 based on historical, standard hourly rates of counsel that range from \$400 to \$900 per hour. *See* Scott Decl., ECF No. 418-2, ¶6. The hours billed in this matter were spent drafting pleadings and briefs, engaging in party and third-

party discovery, and negotiating the Settlement. Guglielmo Decl., ECF No. 418-4, ¶¶7-48. Class Counsel billed at their standard hourly rates, which have been accepted by District Courts in this Circuit and elsewhere. *See, e.g., In re Vizio, Inc. Consumer Privacy Litig.*, No. 8:16-ml-02693, ECF Nos. 308-18, 337 (C.D. Cal) (approving Scott + Scott's rates); *In re GSE Bonds Antitrust Litig.*, No. 19-CV-1704, 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *Alaska Electrical Pension Fund v. Bank of Am.*, No. 1:14-cv-07126, ECF No. 742, ¶¶5, 7 (S.D.N.Y. Nov. 30, 2018) (same); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-cv-07789, 2018 WL 5839691, at *5 (S.D.N.Y. Nov. 8, 2018) (same); and *Morrow v. Ann, Inc.*, No. 1:16-cv-03340, ECF Nos. 70-71, 94 (S.D.N.Y.) (same).

To align more closely with customary rates charged in this District, Class Counsel has also calculated its lodestar using adjusted Hawaii hourly rates. These rates were calculated by using the rates approved for plaintiffs' attorneys in recent Hawaii complex litigation. *See Martin v. Marriott Int'l, Inc.*, ECF No. 169-8, *Smith v. Bank of Hawaii*, No. 1:16-cv-00513-JMS-WRP, ECF No. 217-1 (D. Haw. Apr. 10, 2020), and *Sheehey v. Bhanot*, No. 1:13-cv-00663, ECF No. 390-1 (D. Haw. Mar. 30, 2018). Under the adjusted Hawaii hourly rates, Class Counsel's lodestar would be \$2,588,099.50, using hourly rates that range from \$575 for partners to \$300 for associates. Thus, an award of 30% represents a negative multiplier of 0.21 using adjusted Hawaii hourly rates.

Class Counsel's lodestar using rates previously approved by Courts in this Circuit and elsewhere would result in a negative multiplier of 0.13. A multiplier of less than one (or a negative or fractional multiplier) demonstrates that the requested fee is well within the range of reasonableness. *See, e.g., Zyda v. Four Seasons Hotels & Resorts*, No. CV 16-00591-LEK-RT, 2020 WL 9762910, at *3 (D. Haw. Apr. 1, 2020) (noting that a lodestar crosscheck "results in a *negative* lode-star that further supports the reasonableness of attorneys' fees in this matter"); *Howerton*, 2014 WL 6976041, at *4 (awarding 30% attorneys' fee award where lodestar multiplier was between 0.62 and 1.39, depending on geographic valuation of lodestar submitted); *Covillo v. Specialtys Cafe*, No. C-11-00594, 2014 WL 954516, at *7 (N.D. Cal. Mar. 6, 2014) ("Plaintiffs' requested fee award is approximately 65% of the lodestar, which means that the requested fee award results in a so-called negative multiplier, suggesting that the percentage of the fund is reasonable and fair."). The negative multiplier further demonstrates that the requested fee is within the range of reasonableness because courts in this jurisdiction often award multipliers in the 1-4 range. *See, e.g., Vizcaino*, 290 F.3d at 1051 n.6 (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0).

The lodestar crosscheck further weighs strongly in favor of the reasonableness of the requested fee award.

III. THE REQUESTED EXPENSES ARE REASONABLE

As discussed in the Fee Brief, Class Counsel in this case have incurred expenses in the aggregate amount of \$227,473.16 while prosecuting the action. Supplemental Scott Decl., ¶5. The submitted expenses are reasonable, necessary, and directly related to the prosecution of the action. *See In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (“Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.”). Therefore, Class Counsel requests that the Court award expenses in the amount of \$227,473.16.

IV. SERVICE AWARDS FOR PLAINTIFFS ARE WARRANTED

As also discussed in the Fee Brief, Plaintiffs seek Service Awards of \$2,500 each to the Aquilina Plaintiffs and the Corrigan Plaintiffs in compensation for their involvement in this Litigation and service on behalf of other Class Members. As the Court recognized, “[t]he Aquilinas and the Corrigans have played a critical role in this litigation over the last three years.” *Aquilina*, 2021 WL 3611027, at *17. Awards of this size and greater are routinely awarded to class representatives in this District and elsewhere. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving incentive awards of \$5,000 each to two class representatives in a settlement of \$1.725 million); *Martin*, 2021 WL 4888973, at *7 (finding \$2,500 incentive payment per class representative reasonable); and *Alberto*

v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008) (collecting cases and noting that “[c]ourts have generally found that \$5,000 incentive payments are reasonable”).

Therefore, the requested Service Awards are reasonable.

V. CONCLUSION

Based on the foregoing and the reasoning in the Fee Brief, Plaintiffs respectfully request that the Court enter the revised proposed Fee Order, which awards Class Counsel attorneys’ fees of 30%, or \$540,000, plus interest, expenses of \$227,473.16, and Service Awards to Plaintiffs of \$5,000 (consisting of \$2,500 to the Aquilina Plaintiffs and \$2,500 to the Corrigan Plaintiffs).

Dated: July 11, 2022

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Counsel for Plaintiffs and Class Counsel

CERTIFICATION OF SERVICE

I hereby certify that on July 11, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/ Joseph P. Guglielmo

Joseph P. Guglielmo