

1 Michael J. Bidart (State Bar No. 60582)
mbidart@shernoff.com
2 Reid Ehrlich (State Bar No. 334012)
rehlich@shernoff.com
3 SHERNOFF BIDART ECHEVERRIA LLP
600 So. Indian Hill Boulevard
4 Claremont, California 91711

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David W. Slayton,
Executive Officer/Clerk of Court,
By J. Covarrubias, Deputy Clerk

5 Stuart C. Talley (State Bar No. 180374)
stuart@kctlegal.com
6 KERSHAW TALLEY & BARLOW PC
401 Watt Avenue
7 Sacramento, California 95864

8 Gretchen M. Nelson (State Bar No. 112566)
gnelson@nflawfirm.com
9 Gabriel S. Barenfeld (State Bar No. 224146)
gbarenfeld@nflawfirm.com
10 NELSON & FRAENKEL LLP
601 So. Figueroa Street, Suite 2050
11 Los Angeles, California 90017

12 Gregory L. Bentley (State Bar No. 151147)
gbentley@bentleymore.com
13 Matthew W. Clark (State Bar No. 273950)
mclark@bentleymore.com
14 BENTLEY & MORE LLP
4931 Birch Street
15 Newport Beach, California 92660
Attorneys for Plaintiffs and the Class

16 SUPERIOR COURT OF CALIFORNIA
17 COUNTY OF LOS ANGELES

18 HOLLY WEDDING, et al,

19 Plaintiffs,

20 v.

21 CALIFORNIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM, et al.,

22 Defendants.
23

Case No.: BC517444
[JCC Proceeding No. 4936]
[Hon. William F. Highberger]

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES, COST
REIMBURSEMENT, INCENTIVE
AWARDS, AND APPROVAL OF
SETTLEMENT ADMINISTRATION
EXPENSES**

24 DATE: July 26, 2023
25 Time: 11:00 a.m.
26 Dept: SS 10
27 Complaint Filed: August 13, 2013
28 Trial Date: Not Set

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1 **I. Introduction**

2 This case presented complex issues at every turn. From the outset, Plaintiffs’ Counsel
3 understood that to succeed, Plaintiffs would have to, among other things, overcome a multitude of
4 pleading challenges and motions for summary judgment; obtain class certification; overcome
5 discovery issues including that the sale of the affected policies commenced in 1995 and
6 documentation and witnesses would likely be difficult to locate; overcome claimed immunity
7 arguments; prove to the Court that the Evidence of Coverage (the “EOC”) limited CalPERS’ right
8 to increase premiums; prove to a jury that the 85% rate increase announced in February 2013 (the
9 “Challenged Increase”) was “as a result” of the automatic inflation protection benefits; and prove
10 the amount of damages CalPERS owed each member of the class including proving that class
11 members who reduced benefits to avoid the Challenged Increase suffered damage.¹ The number of
12 issues in this case that have cropped up from the inception to the present has been daunting. From
13 day one, CalPERS fought on every front including at times even objecting to the page limit for
14 filings. It became very clear from the start that CalPERS would stop at nothing to defeat this lawsuit
15 and as a result the case would be complex, risky, and would require a significant investment of time
16 and money to build a factual record from the ground up and overcome numerous hurdles to prove
17 Plaintiffs’ claims.

18 Counsel pursued this case and, against the odds, obtained this Settlement after nearly a
19 decade of hard-fought litigation and after a prior failed settlement. The Settlement is significant not
20 only because it secured substantial monetary payments but it did so without adversely affecting the
21 financial viability of the Long-Term Care Fund (the “LTC Fund” or the “Fund”). Since many
22 Settlement Class Members are maintaining their LTC policies, they have expressed concern that
23 the Fund be available in the event that they may need to obtain benefits in the future from their
24 policies. Structuring a settlement that provides adequate benefits for those who wish to cash out
25 and surrender their policies and at the same time provide benefits for those who wish to keep their

26 _____
27 ¹ Plaintiffs’ Counsel, also referred to herein as “Class Counsel” or “Counsel,” refers to the law firms the
28 Court appointed as Settlement Class Counsel. (See Revised [Proposed] Order Granting Preliminary
Approval Of Second Class Action Settlement, filed March 10, 2023, ¶7.) In this brief we also refer to the
Settlement Class as the “Class” or “Class Members.”

1 policies without undermining the LTC Fund was difficult. However, despite the many challenges
2 and risks, Counsel resolved this lawsuit in a manner that navigated the multitude of issues that have
3 confounded this case.

4 By this motion, Plaintiffs seek approval of \$80 million that CalPERS has agreed to pay, out
5 of which Counsel will be paid attorneys' fees of approximately \$72,129,336, the Settlement
6 Administrator will be reimbursed its expenses for this Settlement and the Prior Settlement
7 estimated, Counsel will be reimbursed their out-of-pocket litigation expenses and Plaintiffs will
8 receive Service Awards. Counsel's anticipated fee award represents Counsel's lodestar of
9 \$36,575,585.40 with a 1.99 multiplier. Class Counsel spent 48,699.82 hours to bring this case to a
10 successful conclusion. A percentage fee cross check shows that it represents 11% of the total of
11 over \$633 million on cash payments that Class Members will receive in the Settlement.
12 (Declaration of Cameron R. Azari ("Azari Decl."), filed concurrently, at ¶ 43.) The total amount to
13 be paid to Class Members will undoubtedly increase as a result of, among other things, the
14 additional premiums paid in 2023 by those who have selected a premium refund as well as the
15 addition of Class Members who have requested a refund but due to a web system error their
16 elections were not received prior to the deadline.²

17 Plaintiffs seek reimbursement of Counsel's out-of-pocket costs totaling \$2,285,174.39, and
18 Settlement Administration costs estimated to be \$5,500,488.89.³ Plaintiffs seek approval of an
19 award of \$85,000 total to the named Plaintiffs for their hard work in prosecuting this case for nearly
20 ten years.⁴ Plaintiffs initiated the investigation that led to this litigation (not the other way around).
21 Without them there would be no case and no settlement.

22 Notice was sent to all Class Members. The Notice told Class Members that CalPERS agreed
23 to separately pay no more than \$80 million "which will be used to pay Class Counsel's Attorneys'
24

25 ² CalPERS has agreed to have these individuals submissions be accepted in light of the nature of the issue
26 regarding their efforts to complete the submission online.

27 ³ Of this, \$3,500,488.89 represents outstanding costs due to the Settlement Administrator for work on the
28 Prior Settlement and an estimated \$2,000,000 for administering the Second Settlement.

⁴ Of this amount, Holly Wedding will receive \$35,000 and Eileen and Richard Lodyga will each receive
\$25,000.

1 Fees, unreimbursed litigation expenses incurred by Class Counsel that are no more than \$2.5
2 million, and Settlement Administration costs for both the Prior Settlement and this Settlement
3 which are estimated to be \$5 million and Service Awards [of \$85,000] for the Plaintiffs.” (Azari
4 Decl., Ex. 2 [Long Form Notice], at p. 8, ¶ 17.) The Notice also confirmed that this payment was
5 being made by CalPERS over and above the amount to be paid to the Class Members and that under
6 no circumstances would the amounts awarded for attorneys’ fees and costs, service awards and
7 settlement administration costs reduce the payments to the Class. (*Id.*, p. 9, ¶ 17.)

8 There have been a total of 50 objections submitted to the Settlement.⁵ And 274 Class
9 Members have excluded themselves from the Settlement.

10 Of those who have objected only 13 (less than one-tenth of 1%) took issue with the
11 requested fees, costs or service awards – and many of the objections were based on arguments that
12 there was no merit to the lawsuit at all and thus no reason to award fees to Counsel, or concerns that
13 the payment of fees will undermine the LTC Fund. The objections are addressed below and in
14 Plaintiffs’ Response to Objections, filed concurrently herewith, but in summary the payment of
15 attorneys fees, costs and service awards will not adversely affect the viability of the LTC Fund.
16 And, unfounded beliefs by Class Members that there is no merit to this lawsuit are readily refuted
17 by the Court’s finding in its Statement of Decision after Phases 1-2 of the trial, that CalPERS did
18 not have the unfettered right to impose an 85% rate increase on policyholders with automatic
19 inflation protection benefits. (Nelson Decl., Ex. 8, [Statement of Decision], pp. 32-37.)

20 Plaintiffs’ fee request is fair and reasonable given the considerable risk Counsel assumed to
21 pursue this case, the risk of receiving no payment, the massive amount of work they performed
22 during the nearly decade long litigation, the over \$3.8 million in costs that Counsel expended, and
23 the overwhelming support shown for the Settlement by Class Members. Here, the requested fees—
24 which amount to approximately 11% of the total Settlement value—fall well within the norm for
25 attorneys’ fees awarded in class actions and are justified by the extraordinary result obtained for

26
27 ⁵ An additional 3 objections were received but they were not from Settlement Class Members.
28 Rather they are from individuals who did not qualify because they either did not have automatic
inflation protection benefits or they were not citizens of California in February 2013. Another letter
filed with the Court was determined to be an award dispute and not an objection.

1 the Class. Because the requested fees and costs, the service awards for Plaintiffs and the
2 administration expenses are objectively reasonable and plainly appropriate, Plaintiffs respectfully
3 request that the Court grant this motion.

4 **II. Background⁶**

5 **A. Counsel took on extraordinary risks to prosecute this action**

6 Plaintiffs' Counsel built this case from the ground up. Counsel initially filed this case
7 because two of the originally named Plaintiffs—Elma Sanchez and Holly Wedding—contacted
8 them in early 2013 about whether they had any legal recourse to challenge CalPERS'
9 announcement of the 85% rate increase.

10 The underpinning of the lawsuit was CalPERS' announcement in February 2013, that it
11 would implement an overall 85% rate increase over two years commencing in 2015 (the
12 "Challenged Increase"). This rate increase followed premium increases that were implemented in
13 2003, 2007, 2010, 2011 and 2012. The Challenged Increase was by far the largest rate increase
14 implemented by CalPERS applied only to policyholders who purchased LTC1 and LTC2 policies
15 who had elected to include in their policies automatic inflation protection benefits and/or lifetime
16 benefits. The rate increase was so stunning it prompted hearings in the California Legislature where
17 policyholders presented compelling testimony on the impact the increase would have on them and
18 extensive efforts by many including governmental unions to force CalPERS to withdraw the
19 increase. Despite these hearings, the Legislature did nothing to rein CalPERS in and stop the rate
20 increase. Thus, it was left to Plaintiffs and Class Counsel to develop the evidence necessary to hold
21 CalPERS accountable.

22 As the case developed, pleading challenges as well as summary judgment motions and
23 ultimately a trial resulted in the dismissal of certain claims and the elimination of certain class
24 members. The record in this case confirms that Counsel had to develop every fact to build, brick
25 by brick, a legal case that the Challenged Increase was improper.

26 While Class Counsel, who are all highly sophisticated class counsel, fully expected that

27 ⁶ The summary of the facts outlined below are set forth in greater detail in the Nelson Declaration filed
28 concurrently herewith.

1 CalPERS would vigorously defend the case, the scope of its defense and many of the actions of its
2 counsel were surprising. Indeed, CalPERS was steadfast in its view that the case would be
3 dismissed in its entirety on demurrer (wrong), a class would never be certified (wrong), the case
4 would be dismissed on summary judgment (wrong), the class would be decertified (wrong), the
5 Court in the first phase of the trial would find that CalPERS had every right to impose the
6 Challenged Increase (wrong) and CalPERS would never settle the case (wrong). So determined
7 was CalPERS in its view that this case lacked merit that, for nearly seven years, and in the face of
8 a settlement Plaintiffs reached with its co-defendants, it refused to even discuss a resolution of the
9 case. Thus, it became very clear early on that Counsel would have to devote significant time and
10 resources to pursue risky claims in a case that would likely take years to resolve.⁷

11 This Settlement was only achieved because Counsel invested the time and money necessary
12 to achieve these results. Those efforts—including years of contentious discovery, motion practice
13 including demurrers and two motions for summary judgment, class certification and decertification
14 briefing supported by hundreds of exhibits, numerous witness depositions and expert declarations
15 and reports and appellate briefing, trial preparation including the production of experts for
16 depositions, detailed expert reports prepared on at least two different occasions, and two phases of
17 the trial and post-trial briefs—are described in depth below as well as in Plaintiffs’ Memorandum
18 in Support of the Motion for Final Approval, and the supporting Nelson Declaration. They confirm
19 the obvious, that this fee and cost application, as well as the requested service awards and settlement
20 administration costs are reasonable and should be approved.

21 **1. The Filing of the Complaint, the FAC and the Pleading Challenges.**

22 Counsel faced considerable legal risk when they decided to pursue this case. Plaintiffs Elma
23 Sanchez and Holly Wedding each reached out to attorneys at what was then known as Kershaw
24 Cutter & Ratinoff (now Kershaw Talley Barlow) and Shernoff Bidart Echeverria Bentley (now
25 Shernoff Bidart Echeverria and Bentley More) in or around March 2013 and were deeply disturbed
26 by the impending 85% rate increase. Counsel commenced an analysis of the viability of filing a

27 ⁷ Ironically, had CalPERS recognized that the Challenged Increase was improper when the lawsuit was
28 filed (which was prior to the implementation of the increase), it could have avoided many of the claims by
Plaintiffs and reduced the total amount of potential damages which only grew exponentially over time.

1 complaint against CalPERS and ultimately these two firms filed a government class claim against
2 CalPERS in 2013 which was denied.

3 In or around May 2013, plaintiffs Richard and Eileen Lodyga reached out to counsel at
4 Kreindler & Kreindler⁸ seeking legal assistance in challenging the 85% premium increase. A
5 government class claim was filed on their behalf which was also denied. And counsel for the
6 Lodygas and counsel for Ms. Sanchez and Ms. Wedding then coordinated their efforts and reached
7 an agreement to work cooperatively in filing a single case against CalPERS.

8 In the Complaint filed on August 13, 2013, Plaintiffs Elma Sanchez and Holly Wedding
9 asserted a variety of claims and allegations including breach of contract, breach of fiduciary duty
10 and rescission. (Compl., filed Aug. 13, 2013.)⁹

11 Following the transfer of the case into Complex, Plaintiffs filed an amended complaint
12 adding Plaintiffs Richard and Eileen Lodyga, and also naming various former members of the
13 CalPERS Board of Administration in the claim for breach of fiduciary duty. Plaintiffs also named
14 as defendants Towers Watson Co., Towers Perrin, Tillinghast-Towers Perrin (collectively the
15 “Towers Defendants”), the actuarial firms that were involved in the development, pricing and
16 marketing of the LTC program at its inception through 2004. Plaintiffs asserted claims for
17 professional negligence against those defendants. (FAC, filed Dec. 18, 2013.) In all, Plaintiffs
18 asserted causes of action for breach of fiduciary duty, breach of contract, breach of the covenant of
19 good faith and fair dealing, rescission, declaratory and injunctive relief and professional negligence.

20 In the FAC, Plaintiffs alleged, among things, that at all times CalPERS knew, or should
21 have known, that its LTC policies were grossly underpriced, the program was underfunded and that
22 CalPERS was improperly investing the portfolio leading to claims for breach of fiduciary duty.
23 (FAC, ¶¶ 1-7, 43-45, 92-98.) Plaintiffs further alleged that CalPERS breached its contract (the
24 Evidence of Coverage [“EOC”]) by increasing premiums in the face of language in the EOC that
25 was ambiguous and thus precluded it from increasing premiums. (*Id.*, ¶¶ 101-109.) Plaintiffs
26

27 ⁸ At the time Gretchen Nelson and Stuart Fraenkel were partners at the Kreindler firm. In 2015, they
opened Nelson & Fraenkel LLP and representation of the Plaintiffs transferred to their new firm.

28 ⁹ For health reasons, Ms. Sanchez was forced to withdraw as a class representative in 2015.

1 further alleged that increasing the premiums as to those with automatic inflation protection benefits
2 breached the express language of the EOC that stated: “Your premium will not increase as a result
3 of these annual benefit increases.” (*Ibid.*)

4 On April 2, 2014, CalPERS filed a demurrer seeking the complete dismissal of the FAC
5 against CalPERS and the individual Board members without leave to amend on the grounds that
6 “CalPERS has a[] clear and explicit contractual right to impose the complained-of-premium
7 increases, which is dispositive of Plaintiffs’ contract based claims” and “CalPERS and the Board
8 Defendants are legally immune from Plaintiffs’ tort-based claims.” (CalPERS Demurrer, dated
9 April 2, 2014, at p. 25.)

10 The Towers Defendants also demurred to the FAC seeking the outright dismissal of the
11 complaint without leave to amend, arguing that (1) Plaintiffs lacked standing to pursue the claims
12 because they were not in contractual privity with Towers, (2) the claims are time barred since the
13 Towers Defendants last performed their services for CalPERS in 2004; and (3) Plaintiffs cannot
14 allege causation or damages against the Towers Defendants.

15 Following extensive briefing on the demurrers, the Court (Hon. Jane Johnson) overruled
16 the demurrers in their entirety and further denied CalPERS’ request to certify the issues for
17 immediate appellate review under Code of Civil Procedure Section 166.1. (See Ruling on
18 Submitted Matter RE Demurrers to Corrected First Amended Complaint, dated May 29, 2014.)

19 **2. Discovery, Discovery and More Discovery.**

20 Prior to the hearing on the demurrer and after, Plaintiffs served interrogatories and
21 document requests on CalPERS. CalPERS responded and although it agreed to produce a very
22 limited category of documents, it asserted an massive number of objections on a variety of grounds.

23 Following the hearing on the demurrers, Defendants served extensive discovery requests on
24 the Plaintiffs and the discovery games began. In all, more than 250 separate written discovery
25 requests were served by all parties during the course of this case. There were 45 days of depositions
26 taken of various witnesses, including Plaintiffs, representatives of the Defendants, and third parties.

27 Moreover, Plaintiffs were forced to file motions to compel as a result of the many objections
28 interposed to Plaintiffs’ discovery requests, including objections relating to closed session meeting

1 privilege, the legislative privilege, official information privilege, and the deliberative process
2 privilege. The Court granted Plaintiffs' motions but ultimately ordered the Parties to submit their
3 privilege disputes to a Special Master for consideration. After a lengthy hearing, the Special Master
4 issued his report on April 13, 2016, and CalPERS objected requesting a hearing on the reports.
5 Ultimately it nearly two years before Plaintiffs were successful in obtaining many of the documents
6 that CalPERS had withheld.

7 In all, over 100,000 pages of documents were produced in discovery in this case from the
8 defendants and through third party subpoenas. This does not include the massive amount of data
9 that was produced by the Long Term Care Group ("LTCG"), the third party administrator of the
10 program. Counsel reviewed and analyzed all of these documents and had them loaded into a
11 searchable database. Counsel traveled to Minnesota to take depositions of representatives of LTCG.
12 In response to subpoenas served on LTCG, it produced thousands of pages of documents including
13 pricing and marketing materials as well as data regarding the class. These documents were also
14 reviewed and analyzed by Counsel.

15 In all, Plaintiffs served 29 separate sets of written discovery on the defendants including
16 eight sets of document requests and six sets of special interrogatories on CalPERS. Plaintiffs served
17 three separate sets of document requests on the Towers Defendants along with special and form
18 interrogatories.

19 Plaintiffs also were subjected to discovery responding to thirteen separate sets of written
20 discovery. Plaintiffs produced more than 1,100 pages of documents. Ms. Lodyga was subjected
21 to three days of deposition and Mr. Lodgya and Ms. Wedding to two days of deposition.

22 In summary, there was a massive amount of discovery conducted in this case with multiple
23 motions to compel, multiple rounds of briefing on privilege issues that are not the norm, such as
24 closed session, legislative actions, official acts and deliberative privilege objections. Counsel
25 pressed on and never gave up in seeking to obtain all discovery necessary to fully prosecute this
26 case on behalf of Plaintiffs and the Class.

1 **3. Class Certification Was Achieved After A Herculean Effort.**

2 On September 15, 2015, Counsel filed a lengthy and detailed motion for class certification
3 supported by expert declarations and a wealth of documentary evidence. CalPERS and the Towers
4 Defendants each filed oppositions supported by competing expert declarations and declarations
5 from various class members. Plaintiffs filed detailed replies to the oppositions of CalPERS and the
6 Towers Defendants. In all, more than 4,000 pages of documents were filed in support of and in
7 opposition to Plaintiffs' motion for class certification.

8 On November 23, 2015, the Court heard lengthy argument on the motion allowed further
9 briefing on certain issues raised during the argument by CalPERS and the Towers Defendants.
10 Following that supplemental briefing, on January 28, 2016, the Court issued its ruling granting the
11 motion for class certification as to CalPERS on the breach of contract and breach of fiduciary duty
12 claim and as to the Towers Defendants on the negligence claim.

13 On April 20, 2016, following the retirement of the Honorable Jane Knudson, the case was
14 reassigned to the Honorable Ann I. Jones. Judge Jones intervened on the issue of notice and on
15 June 21, 2016, the Court issued its order approving the form and manner of notice to the Class. In
16 response to that notice, 169 class members opted out of the certified class.

17 **4. Towers Files a Motion for Summary Judgment -- Plaintiffs and
18 Towers Settle the Case**

19 In July 2016, pursuant to a stipulation between counsel for Plaintiffs and Towers, the Court
20 ordered Towers to file its motion for summary judgment and further set a briefing schedule and
21 hearing on February 3, 2017. The Parties engaged in further discovery in the interim including
22 taking the depositions of former Towers employees. In November 2016, Towers filed its motion
23 for summary judgment and Plaintiffs filed their opposition in January, 2017.

24 Following the filing of Plaintiffs' opposition, counsel for Towers approached Class Counsel
25 to determine whether there was any interest in mediating the case. The parties agreed to conduct a
26 mediation before an experienced mediator from Washington D.C., Nancy Lesser of PDX ADR. By
27 Stipulation and Order, the hearing on the Towers' summary judgment motion was continued to
28 allow the parties an opportunity to conduct mediation on March 1, 2017.

1 After extensive briefing and an lengthy mediation session, Plaintiffs reached an agreement
2 to settlement with Towers for \$9.75 million. Towers' motion for summary judgment was never
3 ruled on. Instead, the parties presented their motion for preliminary approval and after extensive
4 briefing on settlement issues, the Court granted preliminary approval on October 25, 2017. The
5 settlement provided for the payment of cash to members of the certified class.¹⁰ Counsel did not
6 seek any fees from the settlement but did seek reimbursement of out of pocket expenses of
7 approximately \$600,000 that had been incurred and the creation of a cost fund in the amount of \$1
8 million. A further term of the settlement with Towers was the agreement that Plaintiffs would file
9 a further amended complaint upon the granting of final approval and the settlement was subject to
10 a good faith settlement order in Towers favor.

11 In response to the notice that was disseminated to the certified class, 93 objections were
12 filed to the Towers settlement. On January 26, 2018, the Court conducted a lengthy almost two
13 hour hearing where many objectors appeared and spoke out against the settlement. After hearing
14 the views of the objectors, the Court granted final approval to the Towers settlement. (Order, dated
15 January 26, 2018.) Pursuant to the terms of the settlement, on January 30, 2018, Plaintiffs filed their
16 Second Amended Complaint.

17 **5. CalPERS Files a Motion for Summary Judgment**

18 In March 2017, CalPERS filed a summary judgment/summary adjudication motion, seeking
19 dismissal of all claims against it and the individual Board defendants. CalPERS raised a welter of
20 arguments in support of its motion, including that Plaintiffs' contract claim was time-barred and
21 further that CalPERS was entitled to raise premiums under the terms of the EOC, and that
22 defendants were immune from liability for breach of fiduciary duty because the decisions made by
23 its Board Members were discretionary.

24 Plaintiffs filed their opposition to the motion on April 28, 2017, CalPERS filed its reply on
25 May 18, 2017.¹¹ A lengthy hearing was held on CalPERS motion on June 8, 2017 and at the

26 ¹⁰ Approximately 122,000 members of the certified class received notice of the Towers settlement. There
27 are fewer in the Settlement Class due primarily to the elimination of the claims of class members with
lifetime only benefits.

28 ¹¹ More than 6,200 pages of documents were filed in support of and in opposition to CalPERS summary
judgment motion, including expert declarations.

1 conclusion of the hearing the Court without issuing a ruling signaled its intention to continue the
2 trial date and further stated that it intended to request the filing of a trial plan. (Transcript, June 8,
3 2017, p. 74-76.) The Court further engaged in a discussion with counsel directed to the Court's
4 interest in determining whether there were any issues that could be resolved that would provide
5 information that would aid in advancing a settlement of the case. (*Id.*, pp. 74-81.) In addition, prior
6 to and at the hearing CalPERS made clear that it intended to seek to decertify the class. (*Id.*, 81-
7 85.)

8 On June 15, 2017, the Court issued its ruling denying summary judgment but granting
9 summary adjudication as to the breach of fiduciary duty and rescission causes of action. (Nelson
10 Decl., Ex. 4.) In denying the motion as to the contract claim, the Court stated:

11 Plaintiffs have raised a triable issue as to whether the CalEPRS Defendants breached
12 these provisions of the EOC by imposing the 85% premium increase on certain LTC1
13 and LTC2 policyholders, as opposed to all LTC1 and LTC2 policyholders across the
14 board. Rather than increase premiums "on an issue-age basis for all similar *coverage*"
as the EOC permits, Plaintiffs claim that CalPERS increased premiums based on the
policyholder's *benefits*. . . .

15 Futher the unambiguous terms of the EOC do not permit rate increases that are the "result
16 of" increasing benefits owed to policyholders who purchased inflation protection.
17 (*Id.*, pp. 11-12, emphasis in original.) And in a footnote to the citation to the terms "coverage" and
18 "benefits," the Court noted that "[t]his distinction by Plaintiffs between "coverage" and "benefits"
19 is a reasonable interpretation" because "the EOC distinguishes between these two terms." (*Id.*, p.
20 12, n. 11.)

21 **6. Plaintiffs File a Trial Plan, CalPERS Fails to Decertify the Class and It
22 Files A Writ**

23 In a Joint Report filed with respect to the Status Conference set for July 18, 2017,
24 CalPERS stated:

25 This matter unfortunately does not lend itself to trial management measures designed
26 to facilitate potential settlement, such as an early trial of the non-certified declaratory
27 relief claim. The problem is that CalPERS could not settle this matter if it wanted to.
28 As explained below, the CalPERS Long Term Care Program is wholly dependent
upon a closed fund without access to monies for extraordinary expenses. Any
material settlement payment, or indeed, any judgment requiring the reimbursement of
increased premiums would simply require CalPERS to increase premiums to maintain

1 the actuarial solvency of the Program. Under these circumstances, CalPERS has no
2 choice but to seek to vindicate its defenses in this matter.

3 (Nelson Decl., Ex. 5 [Joint Status Conference Statement], pp. 4-5.)

4 At the Conference, in addition to discussing issues relating to the Trial Plan, Plaintiffs raised
5 an issue that had been confounding them for nearly a year – obtaining data from the LTCG
6 necessary for Plaintiffs’ experts to prepare damage calculations. As Plaintiffs noted, in the Joint
7 Status Conference Statement:

8 Since November 2016, the parties have been engaged in extensive meet and confer
9 efforts to obtain computer data from CalPERS and its vendor, the [LTCG], concerning
10 the policyholders enrolled in the CalPERS LTC program. After several months of
11 determining what data was available and plaintiffs agreeing to share the cost of extracting
12 the data, LTCG eventually produced data files on April 4, 2017. On April 18, 2017, the
13 plaintiffs took the deposition of the LTCG person most knowledgeable concerning the
14 data that was produced. But the individual designated by LTCG was not qualified to
15 testify on numerous issues where testimony was required and it became apparent that
16 much of the data that was needed by Plaintiffs’ experts had not been produced.

17 . . .

18 Despite repeated promises by LTCG to produce the requested data and information, to
19 date, it has not yet been produced.

20 (*Id.*, pp. 7-8.)¹²

21 At the Status Conference, CalPERS requested, and the Court granted it leave to retake
22 the depositions of the Plaintiffs and it further allowed Plaintiffs time to obtain the necessary
23 documentation from LTCG. And at a further Status Conference in September 2017, the Court
24 set a schedule for the filing of Plaintiffs’ Proposed Trial Plan, CalPERS’ motion for
25 decertification, disclosure of experts and rebuttal experts, deadline for completion of expert
26 discovery. The trial was set for November 19, 2018.

27 In December 2017, Plaintiffs filed their Proposed Trial Plan, and on February 5, 2018,
28 CalPERS filed its motion to decertify the class. CalPERS argued that the class had to be
decertified because (1) extrinsic evidence as to each class member’s interpretation of the EOC
and as to the circumstances under which class members entered into the EOC was required to
prove Plaintiffs’ contract claim, (2) the existence of intra-class and conflicts with class counsel

¹² CalPERS flat out refused to assist in this process of data gathering claiming it had no control over the LTCG.

1 precluded certification, and (3) there was no manageable way to prove damages.

2 On March 7, 2018, Plaintiffs filed their opposition and after CalPERS filed its reply, the
3 Court conducted a hearing and on May 15, 2018, issued its Order denying decertification
4 rejecting each and every one of CalPERS' arguments. (Nelson Decl., Ex. 6.)

5 Undaunted, on July 9, 2018, CalPERS filed a petition for writ of mandate as to the
6 Court's denial of certification. Plaintiffs filed a preliminary opposition to the petition. And,
7 CalPERS filed a reply.

8 **7. The Writ Is Denied, The Case Presses Forward To Trial.**

9 CalPERS' position that it would never settle this case, although apparent from the inception,
10 became even more apparent in its actions leading up to trial. A settlement short of trial was clearly
11 not in the cards. In December 2018, the appellate court summarily denied CalPERS' writ.

12 Plaintiffs and CalPERS served the expert designations and expert discovery commenced in
13 December 2018 and continued through January 2019. On January 17, 2019, CalPERS associated
14 in additional counsel, the law firm of Durie Tangri LLP.¹³

15 Following the completion of the expert discovery, the Parties filed a multitude of motions
16 in limine directed to experts and other issues. The Court set a two day hearing to consider issues
17 related to experts and directed the Parties to have their experts available. Trial was scheduled to
18 commence in June, 2019.

19 In March 2019, the case was transferred to this Court and orders issued by this Court altered
20 the landscape of the pre-trial and trial proceedings. This Court cancelled the two day expert hearing
21 on motions in limine. On May 23, 2019, this Court announced that it was reconsidering *sua sponte*
22 the ruling of the Honorable Ann Jones on summary judgment as to one issue of contract
23 interpretation and specifically that "[t]he distinction by Plaintiffs between 'coverage' and 'benefits'
24 is a reasonable interpretation." (Nelson Decl., Ex. 7.) And in May 2019, the Court granted
25 CalPERS motion to bifurcate the case and set the first phase of the trial for June 10, 2019. The
26 Court also granted CalPERS' motion to file a cross complaint, over the vigorous objection of
27

28 ¹³ Ultimately, the Durie Tangri firm substituted in place of Drinker Biddle. And, in early 2023,
Durie Tangri merged with Morrison & Foerster, current counsel for CalPERS.

1 Plaintiffs, thus laying the groundwork for the Court’s Statement of Decision outlining the
2 circumstances under which CalPERS may raise premiums.

3 On June 10, 2019, the first phase of the trial commenced. The Court struck CalPERS statute
4 of limitations defense following briefing thus concluding the second phase. The Court then ordered
5 the Parties to file drafts of their respective Statements of Decision and the Court issued its draft
6 Proposed Statement of Decision on July 1, 2019.

7 And, it was then that CalPERS for the first time broached the idea of a settlement. The
8 Parties agreed to engage the Honorable Layn Phillips (Ret.) who is a highly respected mediator
9 who has been responsible for settlements in some of the most contentious and complex cases
10 including the *NFL Concussion Litigation*, the *DOE Rockwell Rocky Flats Nuclear Plant Litigation*,
11 the *Michigan State University Sexual Abuse Cases*, the *Merck Vioxx Securities Litigation*, the *High*
12 *Tech Employees Antitrust Litigation*, the *Anthem Data Breach Litigation*, the *Walmart*
13 *Consolidated Wage and Hour Litigation*, and the *Wells Fargo Financial Accounts Securities*
14 *Litigation*.

15 The Court agreed to hold its Statement of Decision under submission to provide the Parties
16 with the opportunity to conduct settlement negotiations. And efforts to resolve the case commenced
17 in August 2019 and continued through January 2020. The negotiations involved three in-person
18 all day sessions on September 4, 2019, October 7, 2019 and November 14, 2019. The Parties also
19 had their respective actuarial experts available to address financial issues relating to the LTC Fund.
20 The negotiations were complicated and difficult, largely because CalPERS’ intransigence and
21 refusal to consider a resolution had driven the case into its then-seventh year and the damages had
22 ballooned.¹⁴ As a result of these complications, Plaintiffs undertook efforts to engage the State of
23 California in the settlement negotiations. Those efforts were unsuccessful.

24 During that period, the Parties continued to press forward to the third phase of the trial. In
25 August, 2019, CalPERS filed a motion to reopen expert discovery so that it could designate new

26 ¹⁴ CalPERS, of course, disputed the amount of Plaintiffs’ experts calculated damages. Among other
27 things, CalPERS claimed there were no damages – a position that was clearly untenable, but it also
28 claimed that the damages were a fraction of what Plaintiffs’ expert claimed because it maintained
had the 85% rate increase not been implemented, a 79-80% rate increase would have been imposed
as to all policyholders.

1 experts – a motion that Plaintiffs vigorously opposed. The Court allowed CalPERS leave to
2 designate new experts.

3 By February 2020 it was clear that a settlement could not be reached. The Court issued its
4 Proposed Statement of Decision and the parties filed their respective objections to the Proposed
5 Statement. The Court conducted a Trial Readiness Conference in late February 2020 and set a
6 further schedule on proceedings including the filing of a motion to amend the complaint. The
7 hearing on objections was originally scheduled for March 2020.

8 And then on March 16, 2020, the world (and the Los Angeles Superior Court) shut down as
9 a result of the COVID 19 pandemic.

10 The court reopened for remote proceedings in June 2020 and on July 1, 2020, the Court
11 heard argument on the Proposed Statement of Decision and Plaintiffs motion to amend the
12 complaint. The Court filed its Statement of Decision on July 27, 2020 and granted Plaintiffs leave
13 to amend their Complaint to clarify that CalPERS is named as a defendant as an agency of the State
14 of California.

15 The Parties then continued to press forward to the third phase of trial – however, the
16 pandemic created serious scheduling issues.

17 Counsel spent countless hours with their experts who produced their extensive written
18 “federal style” reports in October and November 2020. The depositions of the experts were
19 scheduled to commence in December when CalPERS reached out with a proposed settlement.
20 After further extensive mediation proceedings before the Honorable Layn Phillips, the Parties
21 ultimately agreed to a settlement submitted to the Court for preliminary approval in July 2021.

22 **8. The First Settlement**

23 The First Settlement was agreed to in principal in around March, 2021, and documented
24 and presented for preliminary approval in July 2021. Settlement Class Members could surrender
25 their policies for a 100% return of all premiums paid, or transfer their premium refunds for a
26 potential Replacement LTC Policy not issued by CalPERS. However, no replacement policy had
27 been obtained at the time of preliminary approval and Class members were informed that a
28 replacement policy might not be available. Further, the First Settlement required any Class Member

1 who wished to retain their CalPERS LTC policy to opt out of the First Settlement and the settlement
2 allowed CalPERS to terminate the settlement if more than 10% of the Class excluded themselves.

3 The Court granted preliminary approval in July 2021 and notice of the First Settlement
4 was mailed to Class members in August 2021. In the months following that settlement, Counsel
5 devoted hundreds of hours to educating Class Members about the First Settlement and assisting
6 them with claims. Counsel hosted 5 webinars for Class, attended by more than 6,000 potential
7 Class Members. Counsel also made an effort to call thousands of Class Members for whom they
8 had phone numbers and who had not submitted a claim to inform them of the First Settlement
9 and ask if they had questions or needed help submitting a claim.

10 All this took months of time with a multitude of lawyers and paralegals working to ensure
11 as many class members as possible were informed of the First Settlement, the applicable
12 deadlines, had their questions answered, and had the information to make a decision. Throughout
13 the notice period (which lasted approximately 6 months) attorneys and paralegals responded to
14 calls and emails from Class Members asking questions about the Settlement.

15 Counsel also spent countless hours working with insurance brokers in an effort to obtain an
16 alternative replacement LTC policy. In all, insurance brokers retained by Counsel contacted 90
17 insurance carriers with the proposal and not one carrier would accept the risk. Counsel met
18 repeatedly with the brokers and also with representatives of various insurance carriers to supply
19 information and to answer questions regarding the settlement and other issues.

20 In November 2021, Counsel were informed that no replacement policy would be
21 forthcoming. Class members who had elected the potential replacement policy were informed and
22 were provided additional time to make a new election as to whether to exclude themselves from
23 the Class and retain their CalPERS LTC policy or surrender the policy and accept a premium
24 refund.

25 By February of 2022, the Parties were aware that more than 30% of the Settlement Class
26 had requested to be excluded from the Settlement Class because they wanted to retain their
27 CalPERS LTC policies. And in April 2022, the First Settlement was formally terminated.
28

1 **9. The Second Settlement**

2 Before and after the formal termination of the First Settlement, the Parties re-engaged with
3 Judge Phillips to determine whether a revised settlement could be achieved. Extensive analysis
4 was undertaken of the financial issues and, Counsel also redoubled their efforts to engage the State
5 of California in the negotiations.

6 At the same time, Plaintiffs also redoubled their efforts to bring the case to a conclusion
7 through the third phase of trial. These efforts continued to be stymied by the pandemic. Further,
8 although expert reports had been completed prior to the First Settlement, the Parties realized that
9 the delay required new reports due to the passage of time. By December 15, 2022 all expert reports
10 and depositions were concluded and all that remained were the filing of motions in limine and other
11 pre-trial documents. Trial was set to commence in May 2023.

12 Late in December 2022, an agreement in principal was reached as to the Second Settlement.
13 The Parties pressed quickly to document the Second Settlement which was presented for
14 Preliminary Approval to the Court on March 10, 2023. The Court granted preliminary approval
15 and notice was given in April, 2023.

16 Once again, Counsel did not just sit back but rather engaged fully in the notice process and
17 responding to Class members questions and concerns. In all from April 2023 to July 2023, Class
18 counsel have communicated with over 7,000 Class members either telephonically or by email.
19 Given the average age of the Class Members, each telephone call lasted on average 15 minutes.
20 Further, Class counsel have responded to hundreds of inquiries from policyholders who are not
21 Class members but who wish desperately to be included in the Settlement.

22 Counsel are not surprised, therefore, that the Class Members' reaction has been
23 overwhelmingly positive. Counsel has spoken with thousands of Class Members who were
24 supportive of Counsel's efforts and the results obtained. Numerous Class Members have expressed
25 the appreciation for the extensive efforts that Counsel have made in this case and their satisfaction
26 with the Settlement. In fact, a common question Class Members ask Counsel is when will the
27 Settlement be final and when will they be paid.

1 It is also extremely important to note that due to the age of the Class Members, many have
2 died since the Settlement was reached in December and many more will die in the coming months
3 and years. This fact was one of many factors that led Plaintiffs to reach this agreement so that Class
4 Members will actually benefit from the Settlement.

5 **III. The Court should award Plaintiffs’ Counsel the requested fee award.**

6 **A. Legal standard: the lodestar method.**

7 “Given the unique reliance of our legal system on private litigants to enforce substantive
8 provisions of law through class and derivative actions, attorneys providing the essential
9 enforcement services must be provided incentives roughly comparable to those negotiated in the
10 private bargaining that takes place in the legal marketplace, as it will otherwise be economic for
11 defendants to increase injurious behavior.” (*Lealao v. Beneficial California, Inc.* (2000) 82
12 Cal.App.4th 19, 47.) In the class action context, the substantial benefit rule provides that an award
13 of attorneys’ fees is justified when a party, proceeding in a representative capacity, obtains a result
14 which creates a “substantial benefit” of a pecuniary or non-pecuniary nature. (*Robbins v. Alibrandi*
15 (2005) 127 Cal.App.4th 438, 448; *Serrano v. Priest* (1977) 20 Cal.3d 25, 38 [*Serrano III*].)¹⁵ In
16 determining whether the amount of attorneys’ fees is reasonable, the court aims to “mimic the
17 market in legal services” and set the fee “at a level that will approximate what the market would
18 set.” (*Lealao*, at p. 47-48 [citation omitted]; see also *id.*, at p. 49 [fee award should emulate a
19 “credible measure of the market value of the legal services provided”].)

20 The lodestar approach remains the “primary method” for establishing the amount of
21 attorneys’ fees to be awarded. (*Lealao, supra*, 82 Cal.App.4th at p. 26; see also Pearl, Cal. Attorney
22 Fee Awards (3d ed Cal CEB), § 8.3 [hereinafter, “Pearl, Cal. Attorney Fee Awards”].) “The lodestar
23 (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel
24 by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that

25 ¹⁵ No question exists that the substantial benefit doctrine applies. The doctrine permits an award of
26 attorney fees “where the litigation has conferred a substantial benefit on the members of an
27 ascertainable class.” (*Serrano III, supra*, 20 Cal.3d at p. 40, fn. 10.). The Court certified an
28 ascertainable Settlement Class, and the Settlement secures substantial monetary benefits for the
class. (See generally, Pearl, Cal. Attorney Fee Awards, § 5.38 [collecting cases holding that
“substantial benefits” includes both pecuniary and nonpecuniary benefits].)

1 amount by applying a positive or negative ‘multiplier’ to take into account a variety of other factors,
2 including the quality of the representation, the novelty and complexity of the issues, the results
3 obtained, and the contingent risk presented.” (*Lealao*, at p. 26; see also Pearl, Cal. Attorney Fee
4 Awards, § 9.1.) As the leading treatise explains, it is “critical” to understand that the multiplier “is
5 not intended as a bonus, reward, or penalty,” but rather “recognizes that reasonable attorney fees
6 take into account factors other than just hours and rates,” and “requesting a multiplier does not
7 affect the reasonableness of the fee claim.” (Pearl, Cal. Attorney Fee Awards, § 10.1.) Just the
8 opposite, California courts regularly approve multipliers between two and four times the lodestar
9 “‘or even higher’” and have approved multipliers in excess of seven. (*Ibid.* [quoting *Wershba v*
10 *Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255, and citing *Cotchett, Pitre & McCarthy v*
11 *Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1423].)

12 **B. Plaintiffs’ lodestar is reasonable.**

13 As discussed above, the lodestar is obtained by multiplying the hours reasonably worked
14 by a reasonable hourly rate for those services. “Generally speaking, hours are reasonable if they
15 were ‘reasonably expended in pursuit of the ultimate result achieved in the same manner that an
16 attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a
17 matter.’ [Citation]” (Pearl, Cal. Attorney Fee Awards § 9.4.2; see also *ibid.*, citing *Vargas v Howell*
18 (9th Cir 2020) 949 F3d 1188, 1194, 1198 [fees may include time spent on “dead-ends” and unfiled
19 motions].) “Further, detailed timesheets are not required of class counsel to support fee awards in
20 class action cases.” (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64.)

21 In determining a reasonable rate for the attorney’s services, courts usually consider the
22 prevailing rate charged by attorneys of similar skill and experience for comparable legal services
23 in the community; the nature of the work performed; and the attorney’s customary billing rates.
24 (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 643.) Counsel bears the burden of demonstrating that the
25 rates requested are “in line with the prevailing market rate of the relevant community.” (*Carson v.*
26 *Billings Police Dep’t* (9th Cir. 2006) 470 F.3d 889, 891.) Generally, “the relevant community is
27 the forum in which the district court sits.” (*Camacho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523
28 F.3d 973, 979.) “Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees

1 in the community, and rate determinations in other cases ... are satisfactory evidence of the
2 prevailing market rate.” (*United Steelworkers of Am. v. Phelps Dodge Corp.* (9th Cir. 1990) 896
3 F.2d 403, 407; see also Pearl, Cal. Attorney Fee Awards, § 9.122 [“in absence of contradictory
4 evidence, requested rates presumed reasonable”].)

5 From the inception of this litigation to date, Plaintiffs’ counsel collectively devoted over
6 48,600 hours to this case and have a lodestar of \$36,575,585. The breakdown for each firm is set
7 forth below. A breakdown of hours spent by each attorney and paralegal for each firm, and their
8 hourly rates, is set forth in the declarations of each of the firms. (See, Declaration of Michael
9 Bidart; Declaration of Stuart Talley, Declaration of Greg Bentley; Declaration of Gretchen M.
10 Nelson, filed concurrently.)

Firm	Hours	Lodestar
Shernoff Bidart Echeverria	11,678.35	\$10,704,299.05
Kershaw Talley Barlow LLP	20,554.00	\$14,622,700.00
Nelson & Fraenkel LLP (including Kreindler)	9,354.77	\$10,923,023.00
Bentley More LLP	7,112.70	\$6,325,563.40
Total	48,699.82	\$36,575,585.40

19 The lodestar is reasonable. It reflects almost a decade of work by a small team of
20 experienced lawyers working on a complex case to achieve an unprecedented result. Without a
21 doubt, this case presented the difficult and complex issues of law and fact that “typically requires
22 more attorney hours, and a more skillful and experienced attorney will command a higher hourly
23 rate.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138-1139.) The results reflect that Counsel
24 spent hours on relevant activities like fact investigation and legal research to put this novel and
25 complex case together, the thousands of hours it took to litigate a years-long and contentious
26 discovery process, the hundreds of hours it took to brief, argue and oppose challenges to class
27 certification, not to mention the hundreds of hours Counsel had to devote to the first phases of trial
28

1 and obtaining a settlement and then educating Class Members about the settlement.

2 The years of work on difficult and risky issues justify a significant fee award since that work
3 secured a settlement providing significant monetary benefits. Counsel’s work also led to a change
4 in CalPERS’ conduct that Counsel would not have obtained had they “been more of a slacker.”
5 (*Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1112; see also *ibid.* [“By and large,
6 the court should defer to the winning lawyer’s professional judgment as to how much time he was
7 required to spend on the case”]; *Roberts v City & County of Honolulu* (9th Cir 2019) 938 F3d 1020,
8 1026 [“court should consider in light of the entire record whether a reasonable attorney with his
9 client’s interests in mind would have” performed the claimed work]; *Norman v Housing Auth.* (11th
10 Cir 1988) 836 F2d 1292, 1306 [reasonable hours is “not the least time in which it might theoretically
11 have been done”].)

12 Further, where a court uses a fee percentage cross check to confirm the reasonableness of
13 the lodestar-multiplier amount—see *infra* section D—the court is not required to closely scrutinize
14 each claimed attorney-hour and instead uses information on attorney time to focus on whether the
15 fee award appropriately reflects the attorney’s time and effort. (*Laffitte v. Robert Half Internat. Inc.*
16 (2016) 1 Cal.5th 480, 505 [“courts conducting lodestar cross-checks [of a percentage fee] have
17 generally not been required to closely scrutinize each claimed attorney-hour,” and instead focus on
18 “whether the fee award appropriately reflects the degree of time and effort expended by the
19 attorneys.’ [Citation.]”].)

20 **C. A 1.99 multiplier is more than justified in this case.**

21 Once the court determines the “lodestar,” it must next decide on the appropriate
22 “multiplier.” (*Ketchum, supra*, 24 Cal.4th at pp. 1137-1139.) The lodestar generally expresses the
23 rate for legal services “where payment is certain regardless of outcome.” (*Id.*, at p. 1138.) The
24 multiplier reflects the risk of nonpayment. (*Ibid.*; Pearl, Cal. Attorney Fee Awards, § 10.1.1
25 [multiplier “recognizes that reasonable attorney fees take into account factors other than just hours
26 and rates”].) The factors to consider include: (1) the novelty and difficulty of the questions
27 involved; (2) the skill displayed in presenting them; (3) the extent to which the nature of the
28 litigation precluded other employment by the attorneys; and (4) the contingent nature of the fee

1 award. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579.) The “results obtained” is
2 also an appropriate factor. (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 834, 835; see
3 also Pearl, Cal. Attorney Fee Awards, § 10.3.1 [discussing authorities reflecting how factors are
4 non-exclusive].)

5 California courts have found that multipliers of 4.0 and even higher in class actions are
6 reasonable. (*Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76 [remanding case for a lodestar
7 enhancement of “two, three, four or otherwise”]; *Wershba, supra*, 91 Cal.App.4th at p. 255
8 [“multipliers can range from 2 to 4 or even higher”]; *Cotchett, supra*, 187 Cal.App.4th at p. 1423
9 [approving fee award representing multiplier in excess of 7].)¹⁶ A 1.99 multiplier is more than
10 appropriate here in light of the results obtained on behalf of the Class and the significant risk of
11 loss that Plaintiffs’ counsel faced in this litigation.

12 **a. The substantial contingent risk favors the requested multiplier.**

13 As explained above, Counsel assumed substantial risk in pursuing this case. From day one,
14 CalPERS took the position that the case lacked merit and that it would obtain a complete dismissal.
15 This is perhaps not surprising since, at its core, Plaintiffs challenged CalPERS’ right to implement
16 premium increases. Notwithstanding, in the face of fierce opposition to every motion and at the
17 first and second phases of trial, Counsel prevailed. Over a massive opposition to class certification,
18 Counsel prevailed. Over a lengthy motion for summary judgment by CalPERS, Counsel prevailed.
19 Over efforts to prevent Counsel from reviewing documents, Counsel prevailed. Over efforts to
20 decertify the class and a writ to the Court of Appeal, Counsel prevailed. And, significantly, at the
21 first two phases of the trial, Counsel prevailed not only defeating CalPERS’ statute of limitations
22 defense but also in overcoming CalPERS’ long running argument that the EOC allowed it to
23 implement the 85% premium increase.

24 _____
25 ¹⁶ A significant difference exists between California and federal law on lodestar multipliers, with
26 California courts rejecting federal cases restricting lodestar multipliers. “California trial courts have
27 considerably wider latitude than their federal counterparts in the selection of factors that may be
28 used to adjust the lodestar,” and thus adjustments “will be far more common under California law.”
(*Lealao, supra*, 82 Cal.App.4th at pp. 42-43; see also Pearl, Cal. Attorney Fee Awards, § 10.18.2
[explaining how California courts have rejected federal restrictions on lodestar multipliers,
including the federal view that multipliers for risk encourage non-meritorious cases].)

1 This case falls within the high range of the risk continuum, therefore, and Counsel obtained
2 this significant result only because of the skill, diligence, and experience they brought to bear.
3 Despite setbacks and issues, Counsel persisted, however, and did so without outside help and
4 without the benefit of information generated by a government investigation or the pressure to settle
5 that such investigations bring to bear. The only pressure CalPERS felt to resolve this case on terms
6 favorable to Class Members came from the facts and legal arguments Counsel developed at great
7 effort, expense, and risk.

8 The exceptional success Counsel obtained justifies the requested 1.99 multiplier. (Pearl,
9 Cal. Attorney Fee Awards, § 10.37 [“excellence of the results obtained” is a fact that can increase
10 the lodestar]; *Lealao, supra*, 82 Cal.App.4th at p. 52 [fee awards should reward “commendable
11 conduct by counsel”]; *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 747
12 [“Attorney skill is a traditional touchstone for deciding whether to adjust a lodestar”].) In class
13 actions, “reasonable multipliers of 2.0 to 4.0 are often applied.” (*Pellegrino v. Robert Half Intern.,*
14 *Inc.* (2010) 182 Cal.App.4th 278 [citation omitted].)

15 If this case does not justify an enhancement, then none will and “competent counsel will
16 be reluctant to accept fee award cases” in other risky cases seeking to vindicate the rights of class
17 members. (*Ketchum, supra*, 24 Cal.4th at p. 1133 [citation omitted]; see also *Lealao*, at p. 53 [noting
18 how “small” awards can “chill the private enforcement essential to the vindication of many legal
19 rights”].)

20 With respect to those Class Members who seek to cash out for a premium refund, the
21 average benefit available is measured in thousands of dollars. And as for those who wish to remain
22 with CalPERS, although the settlement amount may not be all that they would wish for, more
23 importantly, this case prompted changes in how CalPERS can impose premium increases in the
24 future. (Pearl, Cal. Attorney Fee Awards, § 10.39 [success includes broader effects of litigation
25 “such as sparking a change in policy”].) Counsel obtained these unparalleled results because of
26 their experience and because they devoted significant time and expense, at significant risk of
27 receiving nothing in return, to fight for them. The novelty and complexity of the issues presented,
28

1 and the skill Counsel displayed in presenting them, strongly warrant the upward adjustment of a
2 1.99 risk multiplier.

3 **b. The contingent nature and preclusion of other work favor the fee**
4 **request.**

5 The contingent nature of Counsel's representation and the preclusion of other work caused
6 by the substantial effort necessary to prosecute this complex case warrant the upward adjustment.
7 Indeed, the court's reasoning in *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, to
8 affirm an upward adjustment applies equally here:

9 It is not simply that counsel turned away paid work for a time in order to represent
10 the class, but that counsel risked never receiving compensation *at all*. The claims
11 and defenses in this case raised a significant number of complex legal issues of first
12 impression, and class counsel took a substantial risk that it would not prevail on
13 these issues and thus would not recover a full fee.

14 (*Id.* at p. 1217 [emphasis in original].)

15 Moreover, the work Counsel did after preliminary approval of the First Settlement and the
16 Second Settlement to educate Class Members and ensure they received notice and understood the
17 Settlement also warrants an upward adjustment. As noted above, Counsel participated in 5 webinars
18 as to the First Settlement and responded to more than 7,000 telephone calls from Class Members
19 after the Second Settlement was announced. Counsel will no doubt continue to respond to calls
20 and will also expend extensive time following final approval to make certain that the Settlement is
21 administered appropriately and that Class Member issues are addressed.

22 Also, the Court-approved Notice sent to Class Members made clear that CalPERS would
23 pay no more than \$80 million for attorneys' fees, costs, administration costs and Service Awards.
24 The Class was informed that administration costs were estimated to be \$5 million, litigation costs
25 would be no more than \$2.5 million and the service awards would be \$85,000. (Azari Decl., Ex.
26 2 [Notice], ¶ 17.) Thus, the Class understood that Counsel would seek an award of approximately
27 \$72 million in fees.

28 The strong support the Settlement has received from Class Members further supports
applying a 1.99 lodestar multiplier. (*Lealao, supra*, 82 Cal.App.4th at p. 51 [adjusting lodestar to
reflect the value of the benefit received by the class justified by fact that the class was notified its

1 counsel would seek a fee of about 24 percent of the recovery, no member of the class objected
2 and only two opted out].)

3 **D. A percentage fee cross check confirms that the lodestar is reasonable.**

4 While the lodestar multiplier is the starting point to determine a fee award, *Lealao* held that
5 trial courts have discretion to use the percentage fee to cross-check the lodestar-based fee. (*Lealao*,
6 *supra*, 82 Cal.App.4th at p. 49; *Laffitte, supra*, 1 Cal.5th at p. 504 [“choice of a fee calculation
7 method is generally one within the discretion of the trial court”].) “All that has been required,” to
8 use a percentage fee method “is that the benefits received by the class, or the range thereof, can be
9 monetized without undue speculation.” (*Lealao*, at pp. 31-31.) Moreover, a percentage fee cross
10 check is “not only consistent with” Supreme Court precedent, “but [it] ameliorates those aspects of
11 the lodestar approach that have come under criticism while avoiding the pitfalls of pure percentage
12 fees.” (*Id.* at p. 50.) *Laffitte* expressly recognized, moreover, the benefit of using one method to
13 cross check the other to ensure the award reflects fees in the legal marketplace that a lawyer taking
14 the case on a contingent basis might expect. (*Id.* at p. 504 [explaining benefits of cross checking a
15 percentage fee through a lodestar calculation]; see also Pearl, Cal. Attorney Fee Awards, § 8.9.6
16 [discussing cases acknowledging use of percentage fee to cross check lodestar].)

17 A percentage fee cross check confirms that Counsel’s fee request is reasonable. The
18 Settlement that Counsel obtained delivered at least \$633 million in value to the Class. (*Lealao*, at
19 pp. 31-31.) This does not include the prior settlement with Towers of \$9,750,000 for which Counsel
20 did not take a fee nor does it include the value of the court imposed limitations on any premium
21 increase CalPERS intends to implement in future.. Courts regularly account for the “true value” of
22 the settlement to class members when awarding fees, particularly when the settlement results in a
23 defendant changing practices that directly benefit class members. (See e.g., *Herrera v. Wells Fargo*
24 *Bank, N.A.* (C.D.Cal. Nov. 16, 2021) 2021 U.S.Dist.LEXIS 221364, at *20 [taking “true value of
25 the settlement” into account by including valuable changes in business practices when awarding a
26 percentage fee].)

27 A one-third contingency fee is typical in class action cases, with the percentage ranging up
28 to 45% and higher where, as here, counsel did significant work for the clients in the face of

1 significant risks they would not be paid anything. (*Braud v. Transp. Serv. Co.* (E.D.La. Aug. 17,
2 2010) 2010 U.S.Dist.LEXIS 93433, at *33 [customary contingency fees “range between 33.33%
3 and 45%” and “at times this award is even higher” if there have been appeals to an appellate court];
4 *Hall v. Accolade, Inc.* (E.D.Pa. Mar. 24, 2020) 2020 U.S.Dist.LEXIS 52632, at *27 [same]; *Rivas*
5 *v. BG Retail, LLC* (N.D.Cal. Jan. 16, 2020) 2020 U.S.Dist.LEXIS 8712, at *23 [observing how
6 contingency fees range up to 50% as an “upper limit”].) California law reflects this range, with cases
7 stating that “‘fee awards in class actions *average* around one-third of the recovery’ regardless of
8 ‘whether the percentage method or the lodestar method is used.’ [Citation.]” (*Amaro v. Anaheim*
9 *Arena Mgmt, LLC* (2021) 69 Cal.App.5th 521, 545 [emphasis added]; see also *Chavez v. Netflix,*
10 *Inc.* (2008) 162 Cal.App.4th 43, 66 fn. 11 [“Empirical studies show that ... fee awards in class
11 actions average around one-third of the recovery”].)

12 This is not an average class action. As discussed above, it sits at the upper range of the risk
13 continuum, and thus an upward adjustment from the average one-third contingency fee would be
14 justified. Nonetheless, applying a one-third fee to the \$633 million in estimated value of the
15 Settlement delivers to the Class results in a fee award of \$211 million, thus confirming that the
16 lodestar with a 1.99 multiplier delivers a more than reasonable fee. (*Lealao, supra*, 82 Cal.App.4th
17 at p. 47-48 [the object is to set a fee award at a level that will approximate what the market would
18 set].) It further confirms what other courts have already found, namely that a 1.99 multiplier in a
19 class action of this complexity is not “out of line with prevailing case law.” (*Chavez, supra*, 162
20 Cal.App.4th at p. 66 [approving 2.5 multiplier]; see also *Wershba, supra*, 91 Cal.App.4th at p. 255
21 [multipliers can range from 2 to 4 or even higher]; *City of Oakland v. Oakland Raiders* (1988) 203
22 Cal. App. 3d 78 [affirming 2.34 multiplier].)

23 **IV. Only 13 Settlement Class Members have Voiced any Objection to Plaintiffs’** 24 **Requested Attorneys Fees and the Service Awards**

25 While there have been 50 objections voiced to the Settlement, only 13 have objected to the
26 payment of fees. Plaintiffs address these objections further in their Memorandum of Points and
27 Authorities in Response to Objections to Class Action Settlement. There, as noted, the objections
28 were primarily concerned that the payment of any fees, expenses, or awards to Plaintiffs would

1 adversely affect the financial viability of the LTC Fund.. However, this Settlement was only
2 achieved after the Parties conducted their respective due diligence to determine the impact the
3 Settlement would have on the LTC Fund and there is no evidence that the payment of attorneys'
4 fees, costs or service awards will prevent the Fund from paying future benefits.

5 **V. Counsel are entitled to reimbursement of their out of pocket expenses and the**
6 **requested administrative expenses are reasonable.**

7 Class Counsel's out-of-pocket costs total \$2,285,174.39. (Nelson Decl., ¶¶ 131-132.) These
8 costs relate to expert fees, mediation fees, filing fees, travel and travel-related costs, deposition and
9 court reporter costs, the document review platform, and costs associated with informing Class
10 Members about the Settlement, and gathering Class Members' updated contact information. Courts
11 routinely award litigation costs and expenses to be paid from a settlement in class actions. (See
12 generally *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1383 [approving over
13 \$1 million in costs and expenses]; *In re Businessland Secs. Litig.* (N.D. Cal. 1991) 1991 WL
14 427887, *2-3 [approving award of expenses].) Here the expenses are reasonable considering the
15 duration of this case; the complicated nature of the litigation which has required the retention of
16 experts on various issues; the organization necessary to manage the litigation; the retention of a
17 special master to force CalPERS to produced responsive documents; and multiple mediations
18 before highly experienced mediators.

19 The estimated \$5,500,488.89 in Settlement Administration costs is also reasonable. As this
20 Court is aware, the First Settlement was a complicated and difficult settlement to administer that
21 required extensive outreach by the Settlement Administrator. Although that settlement terminated
22 (through no fault of the Settlement Administrator), the Settlement Administrator is entitled to be
23 paid for the massive amount of work that it performed. Also, the Notice sent to Class Members
24 informed them that reimbursement of Counsel's unpaid expenses "no greater than" \$2.5 million,
25 and settlement administration expenses of "approximately \$5 million," would be deducted from the
26 \$80 million fund to be paid for fees and expenses by CalPERS. (Azari Decl., Ex. 2, ¶ 17.)
27
28

1 **VI. The requested service awards are reasonable.**

2 “‘[I]ncentive awards are fairly typical in class action cases,’ [citations],” as they “‘are
3 intended to compensate class representatives for work done on behalf of the class, to make up for
4 financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their
5 willingness to act as a private attorney general.’ [Citation.]” (*Cellphone Termination Fee Cases*,
6 *supra*, 186 Cal.App.4th at pp. 1393-1394.) “‘[C]riteria courts may consider in determining whether
7 to make an incentive award include: 1) the risk to the class representative in commencing suit, both
8 financial and otherwise; 2) the notoriety and personal difficulties encountered by the class
9 representative; 3) the amount of time and effort spent by the class representative; 4) the duration of
10 the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a
11 result of the litigation.’ [Citation.]” (*Id.* at pp. 1394-1395.)

12 A \$85,000 incentive award in total for the Plaintiffs is fair and reasonable. They are the
13 genesis of this litigation. Plaintiffs did not believe that CalPERS was complying with its obligations
14 and believed firmly that the premium increase was unlawful. So they took action. They contacted
15 Counsel to ask them to investigate whether they had any recourse against CalPERS to protect their
16 policies. Neither class representative had a prior relationship with Counsel. Moreover, Plaintiffs
17 decided to pursue this case as named Plaintiffs knowing they would likely have to spend hundreds
18 of hours and be subjected to lengthy and grueling depositions and other discovery.

19 Plaintiffs spent over 200 hours each at least to pursue this litigation. They gathered essential
20 information for Counsel’s research on the merits of the claims and reviewed drafts of the pleadings
21 prior to filing. Once the case was filed, both Plaintiffs gathered hundreds pages of their own
22 documents to produce in discovery and responded to no less than 13 sets of written discovery each.
23 They also devoted substantial time to preparation and multiple days of depositions each. They have
24 been involved in every aspect of this case, helped Counsel analyze various issues, and stayed
25 involved in settlement negotiations, reviewed the complaints, reviewed other documents including
26 the Settlement Agreements and exhibits prior to signing. (See generally, Nelson Decl., ¶¶ 133-136;
27 Declarations of Holly Wedding, Eileen Lodyga and Richard Lodyga.)

1 Plaintiffs' role as the driving force that led to this case and this Settlement, and their service
2 to their fellow Class Members, has been nothing short of extraordinary. But for their decision to
3 take action, there would be no case against CalPERS, no Settlement, and no benefit to Class
4 Members. Given their service, the requested incentive award is reasonable compensation "for the
5 expense or risk they have incurred in conferring a benefit on other members of the class."
6 [Citation.]" (*Cellphone Termination Fee Cases, supra*, 186 Cal.App.4th at p 1394.) The requested
7 award is also in line with incentive awards in other cases. (*Carlin v. DairyAmerica, Inc.* (E.D.Cal.
8 2019) 380 F. Supp. 3d 998, 1005 [\$45,000 incentive awards]; *In re High-Tech Empl. Antitrust*
9 *Litig.* (N.D.Cal. Sep. 2, 2015) 2015 U.S.Dist.LEXIS 118052 [incentive awards ranging from
10 \$80,000 to \$120,000]; *Marchbanks Truck Serv. v. Comdata Network, Inc.* (E.D.Pa. July 14, 2014)
11 2014 U.S.Dist.LEXIS 184691 [incentive awards of \$75,000 and \$150,000]; *Van Vranken v. Atl.*
12 *Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 295 [\$50,000 incentive award].)

13 **VII. Conclusion**

14 For these reasons, Plaintiffs respectfully request that the Court grant the motion and award
15 \$80 million to be paid by CalPERS for attorneys' fees, costs, Settlement Administration expenses
16 and Service Awards. The funds will utilized to pay approximately \$72,129,336 in attorneys' fees,
17 \$2,285,174.39 in cost reimbursement, \$5,500,488.89 to reimburse Epiq for the cost of settlement
18 administration for both this Settlement and the First Settlement, and \$85,000 total in Service
19 Awards to Plaintiffs.

20 Date: July 3, 2023

Respectfully submitted,

21 SHERNOFF BIDART ECHEVERRIA LLP

22 By: /s/ Michael J. Bidart

23 MICHAEL J. BIDART
24 REID EHRLICH

1 Date: July 3, 2023

Respectfully submitted,

2 KERSHAW TALLEY BARLOW PC

3 By: /s/ Stuart C. Talley

4 STUART C. TALLEY
5 Attorney for Plaintiffs and the Class

6 Date: July 3, 2023

Respectfully submitted,

7 NELSON & FRAENKEL LLP

8 By: /s/ Gretchen M. Nelson

9 GRETCHEN M. NELSON
10 Attorneys for Plaintiffs and the Class

11 Date: July 3, 2023

Respectfully submitted,

12 BENTLEY & MORE LLP

13 By: /s/ Gregory L. Bentley

14 GREGORY L. BENTLEY
15 MATTHEW W. CLARK

16 *Attorneys for Plaintiffs and the Class*
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