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24 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

25 COUNTY OF LOS ANGELES

26 HOLLY WEDDING, et al.,

27 Plaintiffs,

28 vs.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM, et al.,

Defendants.

LEAD CASE NO. BC 517444
JCCP CASE NO. 4936

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR FINAL
APPROVAL OF SECOND CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Hearing:

Date: July 26, 2023
Time: 11:00 a. m.
Dept: 10 – Spring Street Courthouse

Trial: Not Yet Set
Complaint Filed: August 6, 2013

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that, on July 26, 2023, at 11:00 a.m. in Department 10 of the
3 Los Angeles Superior Court, Spring Street Courthouse, located at 312 North Spring Street, Los
4 Angeles, CA 90012, before the Hon. William F. Highberger, Plaintiffs, on behalf of themselves
5 and on behalf of the certified Settlement Class (“Plaintiffs”), will and hereby do move for an
6 order granting final approval of the Second Class Action Settlement between Plaintiffs and
7 defendant California Public Employees’ Retirement System (“CalPERS”) in the above-entitled
8 action (the “Second Settlement”).

9 Through this Motion, brought pursuant to Rule 3.769 of the California Rules of Court,
10 Plaintiffs seek an Order from the Court:

- 11 (1) Granting Final Approval of the Second Class Action Settlement;
- 12 (2) Granting the application for payment of attorneys’ fees, litigation expense
13 reimbursement, administration expense reimbursement, and service awards to the
14 named plaintiffs (further addressed in Plaintiffs’ concurrently filed Motion for
15 Award of Fees, Costs, and Service Awards); and
- 16 (3) Approving distribution of the Settlement funds to the Settlement Class.

17 This Motion will be based on this Notice of Motion and Motion, the attached
18 Memorandum of Points and Authorities, Plaintiffs’ Memorandum of Points and Authorities in
19 Response to Objections to Class Action Settlement, the concurrently filed Declaration of
20 Gretchen M. Nelson and the Exhibits thereto, the Declarations of Eileen Lodyga, Richard
21 Lodyga and Holly Wedding, the concurrently lodged [Proposed] Order Granting Final Approval
22 and [Proposed] Final Judgment and Exhibits thereto, and on the entire record in the proceedings
23 and on such oral argument as the Court may permit.

24 Date: July 3, 2023

 Respectfully submitted,

 SHERNOFF BIDART ECHEVERRIA LLP

 By: /s/ Michael J. Bidart

 MICHAEL J. BIDART

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REID EHRLICH

Date: July 3, 2023

Respectfully submitted,

KERSHAW TALLEY BARLOW PC

By: /s/ Stuart C. Talley

STUART C. TALLEY
Attorney for Plaintiffs and the Class

Date: July 3, 2023

Respectfully submitted,

NELSON & FRAENKEL LLP

By: /s/ Gretchen M. Nelson

GRETCHEN M. NELSON
Attorneys for Plaintiffs and the Class

Date: July 3, 2023

Respectfully submitted,

BENTLEY & MORE LLP

By: /s/ Gregory L. Bentley

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 By the Order issued on March 10, 2023, the Court provisionally certified a Settlement
4 Class and granted Plaintiffs’ unopposed Motion for Preliminary Approval of the Second Class
5 Action Settlement (the “Second Settlement”) between Plaintiffs and Defendant California Public
6 Employees Retirement System (“CalPERS”). That class for settlement purposes included “any
7 individual who was a California citizen in February 2013, and who purchased LTC1 and LTC2
8 policies that included the automatic inflation protection and were subjected to the Challenged
9 Increase (i.e., the 85% increase announced in February 2013 and implemented in 2015).”
10 Pursuant to that Preliminary Approval Order and as directed by the Court, notice was promptly
11 disseminated to the Settlement Class Members identified by CalPERS on April 7, 2023.¹
12

13 The Second Settlement was only reached after nearly a *decade* of hard-fought litigation,
14 extensive investigation and discovery; multiple dispositive, discovery, and *in limine* motions;
15 two phases of trial, which resulted in a lengthy Statement of Decision; and extensive, years-long
16 mediation discussions before one of the nation’s preeminent class-action mediators. It resolves
17 the claims asserted by Plaintiffs and the participating Settlement Class Members against
18 CalPERS regarding the Challenged Increase—i.e., the 85% rate increase on their LTC policies
19 announced in February 2013 and implemented in 2015.²

20 The notice program used to notify the Class of the Second Settlement was highly
21 effective and involved both e-mailed (where available) and U.S. mailed copies of the Long Form
22 Notice, a Letter from Plaintiffs and Class Counsel, and the Individual Award Letters for each
23

24 ¹ During the Notice period, an additional 218 Settlement Class Members were identified who were not included in
25 the initial data (174) or who needed to be recategorized (44). (Azari Decl., ¶ 22.) Notice was sent to those 218
26 individuals as soon as possible, with notice going out by hard copy mail on June 16, 2023. (*Id.*, ¶ 26.) Pursuant to
27 stipulation of the parties (and this Court’s Order, dated June 22, 2023), those 218 individuals have until July 21,
2023, to opt out or object and respond to the Second Settlement. Prior to the hearing on this matter, Plaintiffs will
file a short supplemental report that identifies any objections or opt-outs, and the benefit elections made by those
218 individuals.

28 ² The Second Class Action Settlement Agreement and Release was included as Exhibit 1 to the Declaration of
Gretchen Nelson in Support of Plaintiffs’ Motion for Preliminary Approval of Second Class Settlement.

1 Class Member based on their initial settlement category. (Declaration of Cameron R. Azari
2 (“Azari Decl.”), ¶¶ 18, 21, 23-24, 34, 36.) In addition, the Notice, Letter, Settlement Agreement,
3 and Preliminary Approval documents were posted on a dedicated website for Class Members to
4 access. (*Id.*, ¶ 37.) The Settlement website also contained detailed answers to frequently asked
5 questions which were also accessible through an automated voicemail system. (*Id.*, ¶¶ 37-38.) In
6 addition, reminder postcards were mailed/e-mailed to Class Members who needed to submit a
7 Lapse Claim Form (Category D/E) and Class Members that counsel expected would submit a
8 Claim Form seeking a premium refund (Category A members who chose the refund option in the
9 first settlement) on May 17-19 and 30-31. (*Id.*, ¶ 44.) Finally, Class Counsel set up a telephonic
10 hotline and email address where Class Members could ask questions or make inquiries directly to
11 Class Counsel and their staff. (*Id.*, ¶ 38.) At the time of filing, Class Counsel has responded to
12 *more than 7,000* unique Class Member contacts since March 2023—a significant number of the
13 Class Members who have contacted Class Counsel have expressed a very favorable view of the
14 Second Settlement and Plaintiffs’ and Counsels’ efforts. (Declaration of Gretchen Nelson
15 (“Nelson Decl.”), ¶¶ 104-105.)

17 The deadline for Participating Settlement Class Members to submit their response to the
18 Notice, as well as the deadline to submit a timely request for exclusion or to object to the Second
19 Settlement was June 6, 2023. The response to the Second Settlement was overwhelmingly
20 favorable—with 99.655% of eligible Settlement Class Members choosing to participate
21 (meaning only 274 Settlement Class Members timely chose to exclude themselves). Of the
22 Participating Settlement Class Members, only 50 filed objections—less than one-tenth of one
23 percent.³ And the Settlement Administrator received more than 30,000 unique claims (more than
24 37% of Participating Settlement Class Members). (Azari Decl., ¶ 41.) This is a striking response
25 rate, considering that 14,000 Category F and G members *are not required* to file claims, and the
26

27
28 ³ Plaintiffs’ responses to the various objections are further addressed in Plaintiffs’ Memorandum of Points and Authorities in Response to Objections to Class Action Settlement.

1 default for Category A, B, and C members who do not submit a claim is to select Option 2
2 (keeping their LTC policy, receiving \$1,000, and a moratorium on premium increases until
3 November 1, 2024)—an avenue no doubt thousands of Class Members chose to pursue by not
4 responding.

5 Moreover, a review of the Second Settlement demonstrates that it is eminently fair,
6 reasonable, and adequate under the circumstances. The Second Settlement provides for the
7 payment of approximately \$633 million⁴ for the benefit of the Class, including significant
8 refunds, payments, and other benefits depending upon the choices made by policyholders. (Azari
9 Decl., ¶ 43.) CalPERS is also paying up to an *additional* \$80 million for the payment of litigation
10 expenses, settlement administration expenses, service awards, and attorneys' fees.⁵ Given the
11 arguments raised in defense by CalPERS, the delay and expense that further litigation could
12 engender, the risks to the LTC Fund from a significant verdict, and that fees, costs, and expenses
13 do not reduce Class Members' recovery, this settlement is fair, reasonable, and adequate.
14

15 Further, the Settlement is entitled to a presumption of fairness because: (1) it is the
16 product of arm's length bargaining facilitated by years of negotiations before a highly
17 experienced mediator (the Hon. Layn Phillips (Ret.)); (2) prior to Settlement, the Parties have
18 conducted substantial, exhaustive investigation into the claims, defenses, and potential damages
19 over nearly ten years of contentious litigation, including significant discovery, class certification,
20 dispositive motions, and two phases of trial; (3) Class Counsel is experienced in complex and
21 class action litigation, including insurance and breach of contract cases, and (4) the number of
22 opt outs and objectors is low. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.).
23

24 _____
25 ⁴ This number is a reasonable estimate based on current information. However, this amount will change (likely in an
26 upward direction) based on Class Members changing categories by the final settlement date, the addition of the
27 newly identified class members noted above, and the inclusion of 80% of premiums paid between January 1, 2023
28 and the final settlement date in the awards of Class Members who selected Option 1.

⁵ This arrangement was specifically identified in the Notice, FAQs, and website for Class Members' review. (Azari
Decl., Attachment 2.)

1 For these and the reasons set forth in greater detail below, the Court should: (1) grant the
2 Motion for Final Approval of the Settlement; (2) approve distribution of the Settlement funds to
3 the Class; (3) grant the application for payment of attorneys' fees and out-of-pocket costs
4 incurred by Class Counsel and the service awards to the named plaintiffs; and; (4) approve
5 payment of the Settlement Administrator's costs.⁶

6 II. SUMMARY OF THE LITIGATION

7 A. The Complaint and the underlying facts

8 This is a class action lawsuit filed against CalPERS arising out of long-term-care
9 ("LTC") insurance policies that CalPERS sold to CalPERS' members and other state and local
10 government employees and their families from 1995 through 2004. LTC insurance is used to
11 cover the cost of nursing home care and other needs that can be related to a long-term disability
12 or assisted living that is required following an accident or as a person grows older. Under the
13 statute that allows CalPERS to sell these policies (Gov. Code §§ 21660, et seq.), the LTC
14 Program is supposed to be completely self-funded by policyholders with no contribution from
15 the state's general fund or taxpayers.

16 From 1995 through 2002, CalPERS marketed and sold the LTC1 policy, and it marketed
17 and sold the LTC2 policy from 2003 through 2004. There were three different types of LTC1
18 and LTC2 policies available for purchase: (1) PERS Comprehensive; (2) PERS Nursing
19 Home/Assisted Living Facility; and (3) PERS Partnership (not at issue in this litigation). Within
20 each type of policy, enrollees could select certain benefits, such as "lifetime benefits" (with no
21 cap on the number of years that benefits would be paid) or a set term for benefits to be paid (such
22 as 3 years). Enrollees could also select "inflation protection" benefits, which automatically
23 increased benefits by 5% each year that the policy was in force.

24 The contract between CalPERS and the policyholders is the Evidence of Coverage
25 ("EOC"). The LTC1 and LTC2 EOC states: "Your premiums will never increase due solely to a
26 change in Your age or health. PERS can, however, change Your premiums, but only if We
27

28 _____
⁶ Plaintiffs are concurrently filing a motion for approval of attorneys' fees, cost reimbursement, and service awards.

1 change the premium schedule on an issue age basis for all similar coverage issued in Your state
2 on the same form as this coverage.” In addition, the “BENEFIT: INFLATION PROTECTION”
3 section of the EOC states: “Your Premium Will Not Increase: Your premium rate will not
4 increase as a result of these annual [inflation protection] benefit increases.” (Emphasis in
5 original.)

6 In 2012, the CalPERS Board voted to increase premiums by 85% for those LTC1 and
7 LTC2 policyholders who had purchased inflation protection and/or lifetime benefits (the
8 “Challenged Increase”). The increase was announced to policyholders on February 11, 2013.

9 This lawsuit was filed in August 2013 by plaintiffs Elma Sanchez and Holly Wedding,
10 asserting breach of contract and other claims based on the Challenged Increase. Plaintiffs
11 maintain the increase was “as a result of” the inflation protection benefits, and thus the increase
12 was a breach of CalPERS’ contract.⁷ On December 18, 2013, a First Amended Complaint was
13 filed by Plaintiffs and Eileen and Richard Lodyga naming certain individual members of the
14 CalPERS Board as defendants, and also asserting claims against the Towers Watson Defendants,
15 the actuarial consultant retained to help CalPERS set up and run the LTC Program from 1992-
16 2004.⁸ The operative Third Amended Complaint was filed on August 26, 2020.

17 **B. Certification of the Class, notice, and the expiration of the opt-out period**

18 On September 15, 2015, Plaintiffs filed a Motion for Class Certification. On January 28,
19 2016, the Court [Hon. Jane Johnson] certified a class on the breach of contract and breach of
20 fiduciary duty claims against CalPERS and the professional negligence claim against the Towers
21 Watson Defendants. The Class certified by the Court’s January 28, 2016, Order is comprised of
22 all California citizens who purchased long-term care policies from CalPERS between 1995 and
23 2004, who were subject to the 85% premium increase announced to policyholders in or around
24

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26 ⁷ Ms. Sanchez withdrew as a named plaintiff in July 2015 for health reasons.

27 ⁸ A class settlement was achieved with the Towers Watson Defendants (the “Towers Settlement”), which was granted
28 final approval in 2018. Class Counsel did not take any fee from that settlement, although they were reimbursed out-
of-pocket costs in the amount of \$654,133.73 and an additional \$945,000 was set aside for future litigation expenses.
Through a series of four applications, Class Counsel received payment of \$1,588,108.87 from the future litigation
expense fund.

1 February 2013 and implemented beginning in 2015 (the “Class”). The certified Class included
2 more than 122,600 policyholders. The Court appointed Plaintiffs’ Counsel as Class Counsel and
3 Plaintiffs Holly Wedding, Eileen Lodyga, and Richard Lodyga as the Class Representatives.

4 Thereafter, the Court approved the form of notice to be disseminated to the Class and
5 approved Heffler Claims Group as the Notice Administrator. In response to the Class notice, 169
6 persons opted out of the Class.⁹

7 In 2018, CalPERS moved to decertify the Class. That motion was denied on May 15,
8 2018. CalPERS’ writ to the Court of Appeal was denied on December 12, 2018.

9 **C. The Parties engaged in extensive discovery and litigation efforts prior to resolution**

10 Discovery in this matter has been extensive. The Parties have conducted more than 42
11 days of depositions, including parties, Person(s) Most Knowledgeable, third-party witnesses, and
12 numerous expert depositions (including deposing all *seven* of the Parties’ expert witnesses in
13 December 2022); collectively responded to hundreds of special interrogatories, requests for
14 production, and requests for admission; and have produced, subpoenaed, received, or reviewed,
15 more than 90,000 pages of documents. CalPERS alone has produced more than 38,000 pages of
16 documents, with additional productions from Plaintiffs, the Towers Watson Defendants, third
17 party witnesses, and others. The parties have also engaged in lengthy rounds of expert disclosure
18 and discovery. Finally, the Parties have analyzed, prepared, reviewed, or filed more than 1,000
19 separate pleadings in this action, with more than 100 Orders issued across dozens of court
20 appearances, including dispositive motions (discussed below), discovery motions, motions *in*
21 *limine*, trial briefs, class certification motions, objections and responses to the Statement of
22 Decision, and other law and motion work spanning the nearly ten-year history of this case.

23 **D. This matter has involved multiple, pre-trial dispositive motions**

24
25
26 _____
27 ⁹ Unfortunately, due to a data issue, 104 of those prior opt outs were mistakenly sent Notice of the Second
28 Settlement. But they are explicitly excluded from the Second Settlement, as the agreement defines the Settlement
Class—“The Settlement Class does not include those individuals who opted out of the Class certified by the Court
on January 28, 2016, and who are identified on Exhibit D hereto.” (Second Settlement Agmt, p. 11, ¶ 1.48.). The
Notice made clear that any class member who opted out of the Class was excluded from the Settlement Class
certified for the Second Settlement. (Azari Decl., Attachment 2, p. 5, Question 4.)

1 Multiple dispositive motions were filed and heard in this matter, including a demurrer,
2 motions for summary judgment, motions for class certification and decertification, and others.
3 Among those, CalPERS’ Motion for Summary Judgment, was denied by the Court [Hon. Ann I.
4 Jones] as to the breach of contract and breach of the implied covenant of good faith and fair
5 dealing claims but granted as to the causes of action for breach of fiduciary duty (primarily based
6 on sovereign immunity) and rescission (based on both sovereign immunity and that the purported
7 claim was a remedy only, not a cause of action). As a result of that order, the individual members
8 of the CalPERS Board of Administration previously named as defendants were dismissed from
9 the case.

10 **E. The Prior Settlement with the Towers Watson Defendants**

11 The Towers Watson Defendants settled with the Class for \$9,750,000, with final approval
12 of that settlement granted by the Court [Hon. Ann I. Jones] on January 26, 2018. That settlement
13 fully, finally, and forever released Plaintiffs’ claims against the Towers Watson Defendants,
14 leaving CalPERS as the sole remaining Defendant. Notably, Class Counsel deferred accepting
15 any attorneys’ fees from this settlement.

16 **F. The Phase 1 Trial conducted before the Court, including the Court’s adjudication of
17 CalPERS’s Statute of Limitations Affirmative Defense (Phase 2)**

18 On April 4, 2019, the matter was transferred to the Hon. William F. Highberger for trial
19 on the breach of contract claim against CalPERS. The Court granted CalPERS’ motion on May
20 24, 2019, trifurcating trial into three phases: (1) a bench trial pertaining to contract interpretation
21 as a matter of law (“Phase 1”); (2) a jury trial on CalPERS’s affirmative defense of the statute of
22 limitations (“Phase 2”); and (3) if appropriate, a jury trial on the merits to determine if CalPERS
23 breached the EOC and the damages to be awarded to Plaintiffs and the Class, if any (“Phase 3”).

24 The bench trial for Phase 1 commenced before this Court on June 10, 2019. The court
25 trial proceeded over two days.¹⁰ Following the submission of evidence, Plaintiffs served a
26 [Proposed] Statement of Decision on June 19, 2019, and Defendant responded on June 25, 2019.

27
28 ¹⁰ The Court, pursuant to *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1381, adjudicated CalPERS’ statute
of limitation defense as a matter of law in Plaintiffs’ favor.

1 The Court conferred with counsel on July 1, 2019, and issued a draft [Proposed] Statement of
2 Decision the same day, noting it was a “Draft subject to revision.”

3 The Parties paused trial proceedings in order to engage in settlement discussions. Once
4 those discussions proved unfruitful, the matter was placed back on calendar for further briefing
5 and resolution of objections to the Statement of Decision. The Court held a final virtual hearing
6 on the objections on July 23, 2020, and issued its Final Statement of Decision on July 27, 2020.

7 In the Statement of Decision, the Court found that, under the Guaranteed Renewable
8 clause, CalPERS could implement benefit-specific premium rate increases, such as those
9 imposed on Class Members who had lifetime benefit only without automatic inflation protection.
10 (7/27/2020 Statement of Decision, p. 31:23-28.) But as to the “Inflation Protection clause,” the
11 Court found that the evidence was “consistent with an interpretation under the plain meaning of
12 the Inflation Protection clause that the EOC does not permit rate increases that are as a result of
13 increasing benefits owed to policyholders who purchased Inflation Protection,” and determined
14 that whether the rate increases at issue violated this contractual limitation was to be decided in a
15 further trial to a jury. (*Id.*, p. 35:2-7.) This left those individuals who purchased LTC1 and LTC2
16 policies with Inflation Protection benefits as the only Class Members with viable claims for the
17 Phase 3 jury trial. Class Members who purchased LTC1 and LTC2 policies without inflation
18 protection were subject to the Court’s ruling on the Guaranteed Renewable clause (i.e., that
19 CalPERS was permitted to increase premiums on a benefit-specific basis, such as for lifetime
20 benefits only policies).

21 In ruling on CalPERS’ Cross-Complaint, the Court found that “CalPERS cannot increase
22 premiums specifically ‘as a result’ of the increasing liabilities from the Inflation Protection
23 benefit’s annual increase in the daily/monthly maximum allowable benefit.” But the Court also
24 found that “CalPERS can implement across-the-board increases which include Inflation
25 Protection insureds as long as the reason for the increase is some matter of general applicability
26 to all insureds; e.g. lower-than-anticipated lapse rates of all insureds, longer than expected
27 longevity of all insureds, longer duration on claim by all categories of insureds, and/or a further
28 change in the discount rate.” (*Id.*, p. 38:16-25.)

1 On August 11, 2020, the Parties submitted a Stipulation for approval in which they
2 preserved all objections to the Final Statement of Decision, appellate rights, and the right to
3 further challenge the Final Statement of Decision on appeal. A jury would be required, in the
4 Phase 3 trial, to resolve whether CalPERS breached the contract (by increasing premiums as a
5 result of the increasing liabilities from the Inflation Protection benefit’s annual increase), and if
6 so, the amount of damages. The Parties engaged in significant additional expert
7 disclosure/discovery, prepared renewed expert reports, and began preparation for trial, which
8 was continued due, in part, to issues arising from the pandemic.

9 **G. The Second Settlement was only achieved after an extensive, arms’ length mediation**
10 **before an experienced mediator—the Hon. Layn Phillips (Ret.) – and followed a**
11 **failed initial Settlement**

12 In August 2019, the Parties agreed to conduct settlement negotiations before Judge Layn
13 Phillips (Ret.). The Court was informed of Judge Phillips’ retention to mediate the case and,
14 following initial mediation sessions in December 2019, the Court issued an Order on the Parties’
15 stipulation appointing Judge Phillips as a Settlement Master. Following this, the Parties had
16 numerous telephonic conferences and in person mediation sessions. Unfortunately, those
17 discussions did not result in a settlement and the Parties recommenced trial preparation.

18 In October 2020, the Parties re-engaged with Judge Phillips and ultimately, after
19 numerous telephonic conferences, there was an all-day mediation session held virtually on
20 March 27, 2021. Plaintiffs, Class Counsel, CalPERS’ Counsel, and representatives of CalPERS
21 participated in the mediation and the Parties’ actuaries were available and assisted throughout.
22 These efforts ultimately led to the Prior Settlement, which was preliminarily approved by the
23 Court in July 2021. After an extensive notice process, more than 30% of the Settlement Class
24 elected to opt out of the Prior Settlement because no viable replacement policy could be secured
25 and Class Members had to opt out to retain their CalPERS policies. In early 2022, the Prior
26 Settlement was terminated. In light of that termination, the parties began renewed efforts to
27 determine whether a new settlement could be achieved, while at the same time pressing forward
28 with extensive trial preparation.

1 Following termination of the Prior Settlement, Judge Phillips again engaged in mediation
2 efforts, including multiple telephonic and video conferences with Class Counsel and CalPERS'
3 Counsel, and ultimately assisted the parties in achieving the Second Settlement.

4 It cannot be disputed that Judge Phillips is a highly capable and experienced mediator. In
5 addition to his experience as both a former U.S. Attorney and a former U.S. District Judge, he
6 has spent the last decade mediating and resolving some of the largest class action settlements in
7 the country. The Parties engaged in *multiple* day-long mediation sessions with Judge Phillips as
8 well as multiple conference calls and video conferences throughout the years-long negotiations.

9 The Plaintiffs were available throughout this matter in person, telephonically and through
10 a virtual platform, and were apprised of the negotiations on an ongoing basis.

11 The Parties reached a settlement in principle in January 2023 that followed extensive
12 discussions with Judge Phillips and multiple proposals exchanged between Plaintiffs and
13 CalPERS from the period of March 2022 to November 2022. Throughout the negotiations, the
14 Parties were assisted by their actuarial and damages experts and at times the experts
15 communicated among themselves (with counsel participating) regarding various issues relating
16 to the damages and status of policyholders. The Second Settlement was preliminarily approved
17 by the Court on March 10, 2023.

18 **H. Class Counsel have extensive class action experience**

19 A detailed description of the experience of Class Counsel is set forth in the Declarations
20 of each firm regarding the qualifications of those working on this matter and the time incurred
21 thereto.

22 Based on that experience, information produced pursuant to both formal and informal
23 discovery, and Class Counsels' own independent investigation and evaluation, Class Counsel
24 believes that the settlement with CalPERS is fair, reasonable and adequate, and is in the best
25 interest of the Settlement Class in light of all known facts and circumstances, including the risk
26 of significant delay and uncertainty associated with the litigation, the various defenses asserted
27 by CalPERS, and the potential appellate issues and delays attendant to further appellate
28 proceedings.

1 **III. SETTLEMENT TERMS AND VALUE FOR CLASS MEMBERS**

2 Although the outcome of any litigation is difficult to predict, Plaintiffs’ claims against
3 CalPERS were subject to defenses which, if accepted by the trier of fact, could result in Plaintiffs
4 recovering nothing, or significantly less than the proposed Settlement. Plaintiffs’ claims are
5 dependent on a finding that the Challenged Increase was specifically “as a result” of the
6 increasing liabilities from the Inflation Protection benefit’s annual increase in the daily/monthly
7 maximum allowable benefits to Class Members. Plaintiffs’ claims are also dependent on
8 complex expert modeling and analysis as to the amount and type of damages that might be
9 recoverable, in conjunction with damages challenges by CalPERS as to the type, amount, and
10 ability to claim damages at trial.

11 Even assuming those obstacles could be overcome, which Plaintiffs firmly believe they
12 can, Plaintiffs’ experts have calculated the amount of damages (i.e., in new money to pay Class
13 Members for both the lost policy value inherent in the 85% increase, the reduction or elimination
14 of benefits, and CalPERS’s alleged misdeeds, as well as the excess premiums paid as a result of
15 the increase, added to simple 10% per annum interest) to be approximately \$3,000,000,000
16 (\$3B). Although an award of that magnitude would leave Class Members with their LTC policies
17 in place, CalPERS has repeatedly claimed that such a damage award would leave the LTC Fund
18 actuarially insolvent—a prospect this Court has described as a “suicide pact.” (7/27/2020
19 Statement of Decision, p. 4:21-24.) That contrasts with the proposed Settlement, which
20 according to the latest figures will provide for the payment of benefits of approximately \$633
21 million, excluding the value of the premium moratorium and the up to \$80 million additional
22 paid for fees/costs.¹¹ (Azari Decl., ¶ 43.) This includes up to 80% of all premiums paid by
23 Category A, B, and C members electing Option 1 (refund in exchange for surrendering their LTC
24 policies), a \$1,000 refund for those electing Option 2 (to keep their policy and also receive a
25
26

27 ¹¹ As noted above, the estimated value of the Second Settlement is based on the calculated payments and premium
28 refunds through December 31, 2022, and does not take into account additional premiums that have been paid from
that date and will be paid up to the date of Final Approval nor does it take into account the value of the non-
monetary benefits achieved.

1 premium increase moratorium) and the additional amounts paid to Category D and E (lapsed
2 Class Members), and F and G (deceased Class Members).

3 In addition, there is further a significant benefit achieved through the prosecution of this
4 litigation and the Court’s Statement of Decision, which made clear that the EOC precludes the
5 implementation of any increase that is “as a result” of the Inflation Protection Benefits. Thus,
6 this Second Settlement not only gives Class Members selecting Option 2, the cash award and a
7 temporary premium moratorium, but an additional benefit of the Court’s Statement of Decision
8 which makes clear that CalPERS no longer has an unfettered ability to increase premiums for
9 any reason or target specific policyholders for increases. Both of these findings provide a
10 substantial benefit to those Category A, B and C Settlement Class members who want to keep
11 their policies.¹²

12 The Court has recognized many of the difficulties associated with Plaintiffs’ proceeding
13 to a resolution at trial, including that “there is some wiggle room for CalPERS to increase
14 premiums paid by this group if it was for some other reason,” and finding a triable issue of fact
15 as to CalPERS’ reasons for imposing the premium increase on Inflation-Protection insureds,
16 while acknowledging that a jury may find that CalPERS’s reasons “were entirely acceptable,
17 entirely unacceptable, or a blend of the bad with the good.” (7/27/2020 Statement of Decision, p.
18 32:21-27.) Further, the Phase 1 bench trial did not give “this Court an opportunity to pass on the
19 correctness of some or all of Plaintiffs’ theories of compensable damage.” (*Id.*, p. 7:18-23.) As a
20 result, it is possible that certain damages claimed by Plaintiffs, especially those for “future harm”
21 caused by the premium increase, could be further limited or potentially eliminated by the Court
22 even before the Phase 3 trial can begin. The risks of continued litigation, and the vagaries of a
23 trial in a complex, multi-year case, are hard to predict, and subject Plaintiffs and the Class to
24 considerable risk.

25 Finally, even if Plaintiffs were to achieve a considerable outcome at trial, proving not
26 only the vast majority of their damage theories but also that the Challenged Increase breached

27 _____
28 ¹² CalPERS does not agree that this is a benefit provided by the prosecution of this litigation.

1 the EOC as interpreted by the Court, this litigation could still face the potential for years-long
2 appellate proceedings, including, based on the nature, scope, and extent of this litigation, the
3 potential for review by the California Supreme Court—let alone the time and risk posed should a
4 retrial be ordered. Then, even if Plaintiffs prevail on appeal, the judgment would likely leave the
5 LTC Fund insolvent and, without a bailout from the California Legislature, the ability of
6 CalPERS to pay future benefits would be put at risk. This could then lead to even more litigation
7 for Class Members whose benefits are denied. In contrast, the proposed Second Settlement,
8 although not providing everything the Settlement Class Members might desire, provides a
9 certain, considerable, and definite benefit.

10 **IV. ADMINISTRATION OF THE SETTLEMENT**

11 **A. Notice to Settlement Class Members**

12 CalPERS provided the Settlement Administrator (Epiq) with a list of 79,523 Settlement
13 Class Members, including each member’s mailing address, email address (if available),
14 daytime/evening phone number(s) (if available), settlement category, and potential settlement
15 payment amount.¹³ (Azari Decl., ¶ 21.) On April 7, 2023, Epiq sent each Settlement Class
16 Member by U.S. Mail, and also by email to those with available email addresses, the Court-
17 approved Notice package. (*Id.*, ¶¶ 21, 23, 34.)

18 Any Class Notice Packages sent by U.S. Mail and returned as undeliverable were re-
19 mailed to any new address available through USPS information or to better addresses that are
20 found using a third-party address lookup service. (*Id.*, ¶ 32.) As of July 3, 2023, Epiq has
21 remailed 469 Class Notice Packages and 271 were returned undeliverable. (*Id.*) For any Email
22 Class Notice for which a bounce code was received indicating that the message was
23 undeliverable, at least two additional attempts were made to deliver the Class Notice by email.
24

25
26
27 ¹³ Plaintiffs and Class Counsel also provided Epiq with updated contact information they had received from
28 hundreds of Class Members, including email and mailing addresses, during the course of the notice of the Second Settlement.

1 (*Id.*, ¶ 35.) After completion of the Email Class Notice efforts, 7,665 emails were not deliverable.
2 (*Id.*)

3 In addition, during the course of the Notice period, an additional 174 Settlement Class
4 Members were identified who were not identified in the original class member data from
5 CalPERS. (*Id.*, ¶ 22.) Epiq also sent those individuals the Notice materials by U.S. Mail, with
6 that Notice going out on June 16, 2023.¹⁴ (*Id.*, ¶ 26.) In total, 79,697 individuals were sent the
7 Court-approved Notice materials regarding the Second Settlement. (*Id.*, ¶ 22.)

8 The Court-approved Notice advised Settlement Class Members of their rights under the
9 Settlement, the time and place for the scheduled Final Approval Hearing and that in addition to
10 the Settlement Proceeds, CalPERS would pay an additional \$80 million to pay unreimbursed
11 costs incurred by Class Counsel in the prosecution of this matter, which were estimated to be no
12 more than \$2,500,000;¹⁵ Service Awards to the Plaintiffs, of no more than \$85,000 in total;
13 Settlement Administration Expenses for the Prior and Second Settlement, which are estimated to
14 be \$5 million; and attorneys' fees of no more than \$73 million. (Azari Decl., Attachment 2, p. 8,
15 Question 17.) Notably, the anticipated amount to be requested for attorneys' fees is
16 approximately 10.2% of what is now the estimated Total Settlement Amount (i.e., the \$633
17 million payable to class members, and the \$80 million for fees, costs, and expenses).¹⁶ The
18 Notice provided Class Counsel's contact information, the website information, a lengthy list of
19 FAQs, and a Letter from Class Counsel extensively detailing the history, evaluation, and
20

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22
23 _____
24 ¹⁴ The 174 newly identified and 44 recategorized Settlement Class Members were provided notice on June 16, 2023,
25 and the Parties agreed by Stipulation that those individuals would have until July 21, 2023 to respond to the Notice,
26 make an election (if available), or object or request exclusion from the settlement. (See Stipulation, filed 6/16/23.)

27 ¹⁵ From the proceeds of the prior settlement with the Towers Watson Defendants, Class Counsel was reimbursed
28 \$1,601,648.44 in costs. The total paid by Class Counsel for litigation costs from inception to present is in excess of
\$4 million.

¹⁶ The Notice reported that the estimated total amount to be paid by CalPERS to Settlement Class members and
including the \$80 million for fees, expenses and service awards would be \$820 million. (Azari Decl., Attachment 2,
p. 6, Question 7.)

1 reasoning for the Second Settlement. (Azari Decl., Attachment 2 [Notice] and Attachment 3
2 [Letter from Counsel and Plaintiffs to Class].)

3 As part of that Notice process, and in addition to the above, Plaintiffs devoted substantial
4 time and expense to educate Class Members about the Settlement, their rights under the
5 Settlement, and how to make a claim. Class Counsel, in conjunction with Epiq, created a website
6 that provided the ability to file a claim online, answered frequently asked questions about the
7 Settlement, and provided links to Claim forms as well as important Court filings and orders.
8 Class Counsel also received and responded to *thousands* of phone calls and emails asking for
9 information about the Settlement and how to make a claim, with the four Class Counsel firms
10 dividing those contacts amongst themselves so that Settlement Class Members would receive
11 informed and prompt responses. As of filing, Class Counsel responded to more than 7,000
12 unique Settlement Class Member contacts (including letters, emails, and phone calls) since
13 Preliminary Approval was granted in March 2023, with more expected in the coming months. A
14 significant number of those contacts were very supportive of the settlement, appreciative of the
15 effort that went into litigation and resolution, and thankful for the efforts of Plaintiffs and Class
16 Counsel. (Nelson Decl., ¶¶ 104-105.) Further, Class Counsel sent email and postcard reminders
17 to Class Members. (Azari Decl., ¶ 44.) And, it should be noted that following the announcement
18 of the Prior Settlement Agreement in 2021 where Class Members were essentially facing the
19 same decision (whether to surrender their policy for a premium refund or keep their policy going
20 forward), more than 50,000 phone calls from Class Members were handled by the Administrator
21 and Class Counsel and the average length of each of these phone calls was 17 minutes. In total,
22 more than 57,000 specific inquiries from Class Members have been addressed by phone over the
23 past 3 years.
24

25 As discussed above, Epiq established a dedicated website with the Notice, claim forms,
26 Settlement Agreement, and other documents about the Settlement. Class Members could submit
27

28

1 their claims using this website or by requesting a paper claim form from Epiq, which would be
2 promptly mailed to the Class Member to complete, sign, and return.

3 **B. 99.655% of the potential Class Members participated in the Settlement, with the**
4 **estimated settlement proceeds amounting to at least \$633 million, plus an additional**
5 **\$80 million to provide for litigation expenses, administration expenses, service**
6 **awards, and attorneys' fees**

7 The deadline to file a timely request for exclusion for the original group of 79,523 Class
8 Members expired on June 6, 2023. Of that group, only 274 Class Members timely excluded
9 themselves from the Settlement.¹⁷ (Azari Decl., ¶ 40.) This amounts to an opt-out rate of merely
10 0.345%—meaning 99.655% of the class chose to participate in the Second Settlement.

11 In addition, the 218 recently noticed Class Members have until July 21, 2023 to file a
12 request for exclusion. Plaintiffs will provide an update in advance of the Final Approval Hearing
13 accordingly. But even if every single one chose to exclude themselves (which is exceedingly
14 unlikely), the Second Settlement would still have a participation rate in excess of 99.3%.

15 As of July 3, 2023, Epiq has received a total of 30,442 claims, representing 37.8% of all
16 Class members. (Azari Decl., ¶ 41.) In addition, the Parties are negotiating and attempting to
17 resolve approximately 100 late claims that fall into one of three categories: (1) Class Members
18 who thought they filed timely, but due to a website error, their submission of an Option 1 claim
19 did not go through; (2) Class Members seeking to change their election; or (3) Class Members
20 who filed claims beyond the June 6 deadline, but did so due to various, understandable reasons,
21 (hospitalization, travel, or non-receipt of the Notice are the most common reasons).

22 Overall, the receipt of in excess of 30,000 claims is a striking number, considering that
23 more than 14,000 Category F and Category G members *do not file claims* (for deceased class
24 members, their settlement payments will be generated automatically and sent to the “Estate of
25 [Class Member]” upon the Settlement becoming final), and for Categories A, B, and C, the
26

27
28 ¹⁷ The Settlement Administrator also received 3 opt outs from individuals who are not Settlement Class Members (Peter Brier, Nurith Brier, and Barbara Kruithoff), as well as one opt-out that was postmarked June 13, 2023—i.e., 7 days after the expiration of the opt out period (Cornelia Barrow).

1 default option if a Class Member does not respond to the notice is that they are deemed to have
2 selected Option 2—keeping their LTC policy, receiving \$1,000, and receiving the premium
3 increase moratorium. Based on interactions with Class Counsel, where conservatively hundreds
4 of the 7,000 contacts were confirming that exact scenario, it is likely that thousands of Class
5 Members in Categories A, B, and C chose to do nothing and default to Option 2.

6 Based on the claims received, the current awards based on those claims, and the awards
7 to various members who either did not have to file a claim or chose not to file a claim and
8 defaulted to Option 2, the current estimated Settlement Proceeds amounts to \$633 million. (Azari
9 Decl., ¶ 43.) This amount will change by the time the settlement is final, to account for Class
10 Members passing away (and thus changing from Category A to F or G) or going on claim
11 (providing the option to switch from Option 1 to Option 2), or for the premiums paid by
12 Category A Class members after December 31, 2022. However, Class Counsel believe \$633
13 million is a reasonable estimate of the amount of the total settlement proceeds available to Class
14 Members based on available information. In addition, CalPERS will be paying an additional \$80
15 million to account for litigation expenses, administration expenses, Plaintiff service awards, and
16 attorneys' fees, as described further in this Motion.

17
18 **C. Of participating Settlement Class Members, only 50 filed objections to the
19 settlement—less than *one-tenth of one percent***

20 The deadline to file a timely objection for the original group of 79,523 Class Members
21 expired on June 6, 2023. Of the participating 79,249 Settlement Class Members (i.e., 79,523
22 minus the 274 opting out) from that group, Epiq received only 50 objections to the Second
23 Settlement.¹⁸ (Azari Decl., ¶ 40.) This amounts to an objection rate of *0.063%*—less than one-
24 tenth of one percent of the participating Settlement Class Members.

25 Although the objections focus on multiple aspects of the Settlement, they primarily fall
26 into three main categories. First, several Class Members object to the amounts awarded under
27 the Settlement Agreement and believe the awards should be higher. Second, several objections

28 _____
¹⁸ Epic also received 3 objections from non-class members—John Dutcher, Roger Haight, and Janet Haight.

1 voice concerns that the Settlement Agreement may impact the ability of the Long Term Care
2 Fund (the “LTC Fund”), to pay future claims. Finally, some of the Class Members have objected
3 to the amounts being sought by Class Counsel for fees and costs. However, for the reasons
4 described more fully in the Plaintiff’s Response to Objections to Class Action Settlement, the
5 objections are without merit.

6 While one can always wish for more money when settling a case, the objections that are
7 based on the view that the Settlement is insufficient fail to account for other highly relevant
8 factors that drove the Settlement in this case. They also appear to be based on a fundamental
9 misperception of the nature of the claims being asserted and the practical realities of continued
10 litigation. As for the objectors’ concerns about the financial viability of the LTC Fund,
11 Plaintiffs’ actuaries are confident that the Settlement will not significantly impact the ability of
12 the program to pay future benefits or cause future premium increases, and, in light of the risks of
13 continuing litigation, CalPERS’ actuaries agreed that CalPERS’ decision to enter into the
14 settlement was actuarially reasonable. Indeed, CalPERS’ General Counsel, Matthew Jacobs,
15 confirmed at the Preliminary Approval hearing that the “settlement, as reconstructed . . . has
16 been very much done with the best actuarial information now available,” and that the LTC Fund
17 “is now expected to be in a solvent steady state going forward even after some monies are paid
18 out of the account to terminate various current plan holders and otherwise buy peace [sic].”
19 (3/10/23 Preliminary Approval Transcript, pp. 10:21-11:8.) And, as explained in Plaintiff’s fee
20 application, the amount sought in fees is reasonable and justified given the effort and time
21 expended prosecuting this case, the result achieved, and the substantial financial risk incurred by
22 Class Counsel.

23 In addition, the 218 recently noticed Class Members have until July 21, 2023, to object.
24 Plaintiffs will provide an update in advance of the Final Approval Hearing accordingly in the
25 event that any objections are received from this group of Settlement Class Members.

26 **D. Administration costs**

27 Administration costs are not payable from the settlement proceeds available to
28 Participating Settlement Class Members. Instead, CalPERS is paying an additional \$80 million to

1 be used toward litigation expenses, administration expenses, service awards, and attorneys' fees.
2 Settlement Administration Expenses are estimated to be no more than \$5 million (in addition to
3 the \$900,000 paid by CalPERS). This represents the costs that the Class was informed of in the
4 Notice. (Azari Decl., Attachment 2, p. 8, Question 17.) The Class was also informed that "under
5 no circumstances will the amounts awarded for attorneys' fees and costs or the Service Awards
6 or Settlement Administration costs reduce the payments to be made to Settlement Class
7 Members under the New Settlement." (*Id.*)

8 **E. The Release for Participating Settlement Class Members extends only to claims**
9 **relating to or arising out of the Challenged Increase (the 85% premium increase**
10 **announced February 1, 2013 and imposed in 2015/2016)—with the Civil Code**
11 **§ 1542 waiver applying *only* to the Plaintiffs**

12 The scope of the release for Participating Settlement Class Members is set forth in
13 Paragraphs 1.5 and 1.39 (for the definition of "Claims" and "Released Claims") and Paragraph 8
14 ("Releases and Waivers of Rights") of the Second Settlement Agreement. (Settlement
15 Agreement, attached as Exhibit 1 to Declaration Gretchen M. Nelson filed February 27, 2023.)

16 The release is a release of all claims relating to or arising out of any and all claims which
17 were or could have been pled as part of this action based on the facts alleged therein and which
18 arise out of the Challenged Increase. Claims unrelated to the Challenged Increase or any claims
19 that may arise from any future premium increase are not being released.

20 The Settlement Agreement requires a Civil Code § 1542 release *only* from Plaintiffs—it
21 does not require such a release from the Participating Settlement Class Members. (*Id.*, ¶ 8.2.)

22 **F. Tax implications for Class Members**

23 Settlement payments, in whole or in part, may be taxable depending on the manner in
24 which the policyholder accounted for the premium payments during their policy period.
25 Settlement Class Members were informed, via the website in a section on Frequently Asked
26 Questions, that taxes will not be deducted from their settlement payments, and that a 1099 will
27 not be issued for the Second Settlement, because taxability is likely dependent on each
28 taxpayer's individual financial and income/deduction reporting circumstances. And, it should be

1 noted that Class Counsel has been advised that only in rare circumstances would settlement
2 proceeds be taxable to any individual Class Member.

3 **G. Injunctive Relief**

4 The Second Settlement provides that for a period up to November 1, 2024, CalPERS will
5 not impose a premium increase on Participating Settlement Class Members who elect to remain
6 with the CalPERS LTC program.

7 **H. The Proposed Order and Final Judgment**

8 The [Proposed] Order Granting Final Approval (the “[Proposed] Order”) is being lodged
9 concurrently with this motion. The [Proposed] Order provides that, pursuant to California Civil
10 Procedure Code section 384(b), within three hundred sixty-five (365) days of the Effective Date,
11 Class Counsel and the Settlement Administrator will submit a report to the Court outlining all
12 payments that have been made, the funds remaining in the Settlement Account, and identifying
13 any uncashed checks issued to Participating Settlement Class Members. At that time, Class
14 Counsel will request an Order from the Court directing the Settlement Administrator to pay any
15 funds for the uncashed checks to the State Controller’s Unclaimed Property Fund.
16 The 274 opt outs are identified in the [Proposed] Judgment.

17 **V. THE COURT SHOULD GRANT FINAL APPROVAL**

18 Class action settlements require Court approval. (Cal. Rules of Court, Rule 3.769(a).)
19 Rule of Court 3.769 establishes a two-step process for court approval. First, “the court
20 preliminarily approves the settlement and the class members are notified as directed by the
21 court,” and second, “the court conducts a final approval hearing to inquire into the fairness of the
22 proposed settlement.” (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.)

23 The Court already took the first step and granted preliminary approval, finding that the
24 Settlement is fair and warrants preliminary approval. (Order Granting Preliminary Approval of
25 Second Class Action Settlement, entered 3/10/23.) Plaintiffs request that this Court take the last
26 step by granting final approval of the Settlement.

27 **A. The Settlement is presumptively fair**

28

1 Settlements, in general, are highly favored by the courts. (*Stambaugh v. Superior Court*
2 (1976) 62 Cal.App.3d 231, 236.) Public policy generally favors the compromise of complex
3 class-action litigation. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723 n. 14.)

4 To determine fairness, the Court “should consider relevant factors, such as the strength of
5 plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of
6 maintaining class action status through trial, the benefits offered in settlement, the extent of
7 discovery completed and the stage of the proceedings, the experience and views of counsel, the
8 presence of a governmental participant, and the reaction of the class members to the proposed
9 settlement. [Citation.] The list of factors is not exhaustive and should be tailored to each case.
10 Due regard should be given to what is otherwise a private consensual agreement between the
11 parties.” (*Dunk, supra*, 48 Cal.App.4th at p. 1801.) Further, a “presumption of fairness exists
12 where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
13 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is
14 experienced in similar litigation; and (4) the percentage of objectors is small.” [Citation.]”
15 (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245 [quoting *Dunk*, at p. 1802].)
16

17 The presumption of fairness applies here. In granting preliminary approval, the Court
18 found:

19 The Second Settlement appears to be fair, adequate and reasonable to the
20 Settlement Class. The Second Settlement falls within the range of reasonableness
21 and appears to be presumptive valid, subject only to any objections that may be
22 raised at the Fairness Hearing.
(Order Granting Preliminary Approval of Second Class Action Settlement, entered
3/10/23, at p. 3:3-6.)

23 There have been no changes of law or fact since then to cause the Court to change that
24 finding. This settlement was only reached through extensive arm’s length bargaining after *many*
25 mediation sessions with one of the preeminent mediators in the country regarding complex,
26 contested litigation (the Hon. Layn Phillips (Ret.)); Plaintiffs’ investigation, discovery, and
27 dispositive motion work have spanned nearly a *decade* of highly contested litigation and a trial,
28

1 allowing the Court and counsel to act intelligently with respect to this settlement; and Class
2 Counsel is highly experienced in similar, high-stakes litigation. (See also *supra*, section II.)

3 As to the fourth factor, as of the filing of this motion, only a very small percentage of
4 Settlement Class Members—0.345%—opted out, meaning that 99.655% of potential Settlement
5 Class Members chose to participate. Of those participating individuals, an even smaller
6 percentage—less than one-tenth of one percent—chose to object to the settlement. Indeed,
7 across the more than 7,000 unique class member contacts since March 2023, a significant (and
8 vastly larger) population of Class Members found the settlement to be favorable, fair, and in their
9 best interests. As discussed briefly herein and in Plaintiffs’ Response to the Objections, the Court
10 should overrule the objections and find the Settlement to be presumptively fair.

11 **B. The Settlement is fair, reasonable, and adequate under the circumstances**

12 In evaluating the fairness, adequacy, and reasonableness of a class settlement, the Court
13 considers the strength of plaintiffs’ case, the risk, expense and likely duration of further
14 litigation, the settlement amount, the stage of the proceedings, the views of class counsel, and the
15 reaction of the class members. (*In re Microsoft I-V Cases, supra*, 135 Cal.App.4th at p. 723;
16 *Dunk, supra*, 48 Cal.App.4th at 1801.)

17 The Settlement meets the criteria for final approval because it represents the product of
18 reasoned judgment, nearly a decade of highly contentious litigation, and extensive negotiations
19 assisted by the best efforts of one of the premiere mediators for high-stakes, class-action and
20 mass-tort litigation in the country.

21 Even though Plaintiffs firmly believe that their claims against CalPERS are meritorious,
22 there are risks associated with further litigation. There is no guarantee of success at trial, either
23 as it relates to establishing that the Challenged Increase was “as a result” of the Inflation
24 Protection benefits or in establishing the type, and amount, of damages that might be awardable.
25 The risks of continued litigation, and the vagaries of a trial by jury in a complex, multi-year case,
26 are hard to predict, and subject Plaintiffs to the risk of an unfavorable outcome at trial.

27 There is a further reason for granting final approval—the current status of the CalPERS
28 LTC program, which Plaintiffs believe would be at financial risk should the litigation result in a

1 \$3 billion judgment *and* all Class Members keeping their LTC policies (and the attendant
2 liabilities that go with those policies). In 2020, CalPERS announced a further rate increase that
3 was implemented in 2021 and 2022 and resulted in a 90% increase. If Plaintiffs are successful at
4 trial, the amount of a verdict may further jeopardize the LTC Fund, and whether the State of
5 California will step in to fund any verdict is uncertain. Should the LTC Fund be placed in further
6 financial difficulty it may be unable to pay benefits or be forced to further increase premiums.
7 This outcome would then lead to even more years of litigation.

8 The procedural history of the case also confirms the reality of the foregoing risks. Since
9 the filing of the case, the Class claims have been pared down through dispositive motions and the
10 Phase 1 trial. The Parties are facing a lengthy, costly, and complicated Phase 3 trial which, as
11 with all trials, entails the risk of a loss. Even if Plaintiffs prevailed, the specter of an appeal
12 would remain, and the Court would remain free to decertify at any time up to and during trial.

13 The benefits obtained under the Second Settlement are substantial, especially when the
14 potential value of the Settlement Class' claim against CalPERS is weighed against the risks that
15 CalPERS would prevail at trial or on appeal. These benefits must be weighed against the risks of
16 continued litigation, including the risk that Plaintiffs might not prevail on their claims.

17 In sum, the Second Settlement has no deficiencies that would require the Court to reject
18 it. The benefits obtained under the Second Settlement are substantial, especially when weighed
19 against the risks that CalPERS would prevail at trial or on appeal, the considerable expense and
20 delay of continued litigation, and the risks that a significant verdict would pose to the viability of
21 the LTC Fund.

22 The proposed Settlement, moreover, is presumptively fair and does not disclose grounds
23 to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of the
24 class representatives, or excessive compensation for attorneys, and it falls within the range of
25 final approval. And the reaction by Class Members has been overwhelmingly positive—
26 including an extraordinarily high participation rate and extremely low rate of opt outs or
27 objections.
28

1 **VI. CONCLUSION**

2 For all the foregoing reasons, Plaintiffs Holly Wedding and Richard and Eileen Lodyga
3 respectfully request that the Court grant the motion, issue an Order Granting Final Approval of
4 the Settlement, approve the form and manner of Notice used to notify the Class as satisfying due
5 process, and enter the Judgment as proposed.
6

7 Date: July 3, 2023

Respectfully submitted,

8 SHERNOFF BIDART ECHEVERRIA LLP
9

10 By: /s/ Michael J. Bidart

11 MICHAEL J. BIDART
12 REID EHRLICH

13 Date: July 3, 2023

Respectfully submitted,

14 KERSHAW TALLEY BARLOW PC
15

16 By: /s/ Stuart C. Talley

17 STUART C. TALLEY
18 Attorney for Plaintiffs and the Class

19 Date: July 3, 2023

Respectfully submitted,

20 NELSON & FRAENKEL LLP
21

22 By: /s/ Gretchen M. Nelson

23 GRETCHEN M. NELSON
24 Attorneys for Plaintiffs and the Class

25 Date: July 3, 2023

Respectfully submitted,

26 BENTLEY & MORE LLP
27

28 By: /s/ Gregory L. Bentley

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