

1 Wilmer J. Harris, SBN 150407
2 wharris@sshhlaw.com
3 **SCHONBRUN SEPLOW**
4 **HARRIS & HOFFMAN LLP**
5 715 Fremont Ave., Suite A
6 South Pasadena, CA. 91030
7 Telephone No.: (626) 441-4129
8 Facsimile No.: (626) 283-5770

9 [Additional counsel on following page]

10 Attorneys for Plaintiffs

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF LOS ANGELES – CENTRAL**

13 ROGER HARRIS, DUANE BROWN, AND
14 BRIAN LINDSEY,

15 Plaintiffs,

16 vs.

17 FARMERS INSURANCE EXCHANGE
18 AND MID CENTURY INSURANCE
19 COMPANY,

20 Defendants.

Case No. BC579498

*[Assigned to the Hon. Maren Nelson in Dept.
17 of Spring Street Courthouse]*

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: October 10, 2019

Time: 9:00 a.m.

Department: 17

Complaint filed: April 22, 2015

Trial Date: None Set

1 Jay Angoff, Esq.
Cyrus Mehri, Esq.
2 **MEHRI & SKALET PLLC**
1250 Connecticut Ave. NW, Suite 300
3 Washington, DC 20036
4 Tel: (202) 822-5100
5 Fax: (202) 822-4997
6 jay.angoff@findjustice.com
cyrus@findjustice.com

7 Peter Kahana, Esq.
Jeff Osterwise, Esq.
8 **BERGER MONTAGUE, P.C.**
1818 Market Street, Suite 3600
9 Philadelphia, PA 19103
10 Tel: (215) 875-3000
11 Fax: (215) 875-4613
pkahana@bm.net
12 josterwise@bm.net

13 Jonathan K. Tycko, Esq.
Andrea Gold, Esq.
14 **TYCKO & ZAVAREEI LLP**
1828 L Street NW, Suite 1000
15 Washington, DC 20036
16 Tel: (202) 973-0900
17 Fax: (202) 973-0950
jtycko@tzlegal.com
18 agold@tzlegal.com

19 *Attorneys for Plaintiffs*

20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1

2 I. INTRODUCTION..... 6

3 II. BACKGROUND..... 6

4 A. Summary of Claims and Procedural History..... 6

5 B. Summary of Plaintiffs’ Settled Claims..... 8

6 C. The Settlement Agreement..... 9

7 1. Overview of Terms..... 9

8 2. Forms of Notice..... 10

9 3. Opt-Outs and Objections..... 11

10 4. Attorneys’ Fees, Costs, and Plaintiff Service Awards..... 12

11 III. ARGUMENT 13

12 A. The Settlement Terms are Fair, Reasonable, and Adequate..... 14

13 1. The Proposed Settlement Was Reached After Substantial Discovery, and Arm’s-

14 Length Negotiations Between Experienced Counsel..... 14

15 2. The Settlement Is Well Within the Range of Approval..... 15

16 a. Recovery for the Class Is Substantial..... 15

17 b. The Settlement Provides an Immediate Benefit to the Settlement Class..... 16

18 c. Plaintiffs Face Risks in the Absence of Settlement..... 16

19 B. Certification of the Settlement Class Is Appropriate..... 17

20 1. The Proposed Class is Ascertainable and Numerous..... 18

21 2. The Community of Interest Requirements Are Met..... 18

22 a. Common Questions Predominate..... 18

23 b. The Named Plaintiffs’ Claims Are Typical..... 19

24 c. The Settlement Class is Adequately Represented..... 19

25 d. Class Action is the Superior Vehicle for Adjudication..... 20

26 C. The Court Should Approve Dissemination of the Class Notices..... 20

27 IV. CONCLUSION 20

28

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *7-Eleven Owners for Fair Franchising v. Southland Corp.*,

4 (2000) 85 Cal.App.4th 1135..... 20

5 *Aguiar v. Cintas Corp. No. 2*,

6 (2006) 144 Cal.App.4th 121..... 20

7 *Brinker Restaurant Corp. v. Superior Court*,

8 (2012) 53 Cal.4th 1004..... 18

9 *Bufile v. Dollar Financial Group, Inc.*,

10 (2008) 162 Cal.App.4th 1193..... 18

11 *Cellphone Termination Fee Cases*,

12 (2009) 180 Cal.App.4th 1110..... 13

13 *Chavez v. Netflix, Inc.*,

14 (2008) 162 Cal.App.4th 43..... 20

15 *City of Detroit v. Grinnell Corp.*,

16 (2d Cir. 1974) 495 F.2d 448..... 15

17 *Classen v. Weller*,

18 (1983) 145 Cal.App.3d 27..... 19

19 *Daniels v. Centennial Group, Inc.*,

20 (1993) 16 Cal.App.4th 467..... 19

21 *Donabedian v. Mercury Ins. Co.*,

22 (2004) 116 Cal.App.4th 968..... 9, 17

23 *Dunk v. Ford Motor Co.*,

24 (1996) 48 Cal.App.4th 1794..... 13

25 *Duran v. Obesity Research Institute, LLC*,

26 (2016) 1 Cal.App.5th 635..... 20

27 *Goldberger v. Integrated Resources, Inc.*,

28 (2d Cir. 2000) 209 F.3d 43..... 16

1 *Kullar v. Foot Locker Retail, Inc.*,
2 (2008) 168 Cal.App.4th 116..... 14
3 *Linder v. Thrifty Oil Co.*,
4 (2000) 23 Cal.4th 429..... 17
5 *MacKay v. Superior Court*,
6 (2010) 188 Cal.App.4th 1427..... 9, 17
7 *McGhee v. Bank of America*,
8 (1976) 60 Cal.App.3d 442..... 19
9 *Mercury Ins. Co. v. Lara*,
10 (2019) 35 Cal.App.5th 82..... 9
11 *Miller v. Woods*,
12 (1983) 148 Cal.App.3d 862..... 19
13 *Noel v. Thrifty Payless, Inc.*,
14 (2019) 7 Cal.5th 955..... 18
15 *Richmond v. Dart Industries, Inc.*,
16 (1981) 29 Cal.3d 462..... 18
17 *Rose v. City of Hayward*,
18 (1981) 126 Cal.App.3d 926..... 18
19 *Walker v. Allstate Indem. Co.*,
20 (2000) 77 Cal.App.4th 750..... 9, 17
21 *Wershba v. Apple Computer, Inc.*,
22 (2001) 91 Cal.App.4th 224..... 13, 15
23 **Statutes**
24 Bus. & Prof. Code, § 17200 6
25 Code Civ. Proc., § 382 17, 18
26 Ins. Code, § 1861.10..... 7
27 **Rules**
28 Cal. Rules of Court, rule 3.769..... 13

1 **I. INTRODUCTION**

2 Plaintiffs Roger Harris, Duane Brown, and Brian Lindsey individually and on behalf of the
3 Settlement Class,¹ seek preliminary approval of a proposed Settlement of Plaintiffs’ claims against
4 Defendants Farmers Insurance Exchange and Mid-Century Insurance Company (collectively
5 “Farmers” or “Defendants”). The Settlement Agreement between Plaintiffs and Defendants
6 (collectively, the “Parties”), if approved, will resolve all claims of Plaintiffs and the members of
7 the Settlement Class in exchange for substantial monetary and non-monetary benefits.

8 The proposed Settlement of this action is the product of extensive arm’s-length negotiations
9 by experienced and informed counsel and warrants preliminary approval, as the terms are fair,
10 reasonable, and adequate. Accordingly, Plaintiffs request that the Court: (1) preliminarily approve
11 the proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) appoint
12 Plaintiffs as Class Representatives, (4) appoint Plaintiffs’ counsel as Class Counsel, (5) direct the
13 Notice to be distributed to the Settlement Class, and (6) schedule a Final Approval Hearing.
14 Defendants do not oppose the relief sought in this motion.

15 **II. BACKGROUND**

16 **A. Summary of Claims and Procedural History.**

17 On April 22, 2015, Plaintiffs filed their class action complaint alleging five causes of action
18 pertaining to Farmers’ alleged use of price optimization/elasticity of demand (a.k.a., a method of
19 taking into account an individual’s or class’s willingness to pay a higher premium relative to other
20 individuals or classes) when pricing their automobile insurance, in violation of California’s Unfair
21 Competition Law, Bus. & Prof. Code, § 17200 et seq. (“UCL”) and the California Insurance Code,
22 and as unjust enrichment. Plaintiffs filed a First Amended Complaint on October 29, 2015.

23 On November 30, 2015, Farmers filed a Demurrer to the First Amended Complaint
24 (“Demurrer”). On December 30, 2015, Plaintiffs filed their Response in Opposition to Farmers’
25 Demurrer, and on January 8, 2016, Farmers filed its Reply in support of its Demurrer.

26 _____
27 ¹ Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those
28 set forth in the Parties’ Settlement Agreement, attached to the Declaration of Jay Angoff (“Angoff
Decl.”) as Ex. 1.

1 After hearing argument by the parties, on January 25, 2016, the Court sustained in part and
2 denied in part Farmers’ Demurrer. The Court overruled Farmers’ Demurrer to Plaintiffs’ causes of
3 action under the UCL and for unjust enrichment. The Court sustained without leave to amend
4 Farmers’ Demurrer as to Plaintiffs’ cause of action for violation of Ins. Code, § 1861.10. The Court
5 granted Farmers’ request for a stay of the case pending proceedings before the California
6 Department of Insurance (the “Department”) pursuant to the primary jurisdiction doctrine.

7 For several months, the Department sought to determine whether Farmers was using price
8 optimization or elasticity of demand when pricing its automobile insurance, but was unable to
9 resolve the issue. Thus, on April 14, 2017, the California Insurance Commissioner announced that
10 he would hold a hearing on “whether Farmers has violated California insurance law by using illegal
11 price optimization” titled *In the Matter of the Rating Practices of Farmers Insurance Exchange and*
12 *Mid-Century Insurance Company* (CDI File No. NC-2017-00003). The matter was assigned to
13 Chief Administrative Law Judge Rosi. The Commissioner invited Plaintiffs to participate in the
14 Department Proceeding and stated that he would convey his findings to this Court. Plaintiffs and
15 Consumer Watchdog (“CWD”) subsequently intervened in the Department Proceeding.

16 The Department Proceeding continued for over two years and included significant motion
17 practice and discovery. Plaintiffs’ Counsel reviewed over 70,000 pages of documents produced by
18 Farmers and deposed seven Farmers employees with knowledge of Farmers’ development of
19 automobile insurance premiums in California. In addition to this formal discovery, in June 2018,
20 Plaintiffs’ counsel and Plaintiffs’ expert witness J. Robert Hunter, a former Texas insurance
21 commissioner, also participated in a day-long meeting with Farmers’ counsel, several of Farmers’
22 witnesses, representatives from the Department, and representatives of CWD. During this meeting,
23 Plaintiffs’ counsel and Mr. Hunter questioned Farmers’ witnesses concerning relevant issues.

24 Following depositions and document discovery, the Parties exchanged proposed pre-filed
25 direct testimony they intended to enter into evidence during the evidentiary hearing phase of the
26 Department Proceeding. This pre-filed direct testimony included a report from Plaintiffs’ expert
27 Mr. Hunter, as well as reports from experts for Farmers, the Department of Insurance, and CWD.
28 Farmers also proposed direct testimony from several of its fact witnesses who had been deposed in

1 the matter. The proposed direct testimony, taken together, comprehensively presented the Parties’
2 positions on most of the key issues in this case and their evidence in support of those positions.

3 Following exchange of the proposed direct testimony, the Parties made motions to strike
4 various parts of each other’s testimony. After Judge Rosi ruled on those motions, the Department
5 Proceeding was ripe for the evidentiary hearing, which had been set for January 7, 2019.² However,
6 in December 2018, the Parties agreed to a mediation before the Hon. Harry W. Low (Ret.) and
7 requested that the evidentiary hearing in the Department Proceeding be continued. On February 19,
8 2019, the Parties participated in a full day mediation with Justice Low.³ The mediation did not
9 result in a settlement on that date. For the next several months, the Parties continued their
10 negotiations both in writing and over the telephone, with the participation of Judge Low.

11 On June 5, 2019, the Parties executed a Memorandum of Understanding wherein the Parties
12 agreed to the material terms of the settlement. On June 6, 2019, Plaintiffs and Farmers filed a
13 Stipulated Request for a Stay of the Department Proceeding pending the Settlement of the Action.
14 And, on June 7, 2019, the Parties filed a Notice of Settlement with the Court advising the Court of
15 the Memorandum of Understanding and requesting a stay of all proceedings until the filing of the
16 Settlement Agreement and a Motion for Preliminary Approval. The Parties executed the Settlement
17 Agreement on August 29, 2019.

18 **B. Summary of Plaintiffs’ Settled Claims**

19 As alleged in the Second Amended Complaint, filed concurrently herewith, the claims in
20 this case involve Farmers’ failure to disclose, to Plaintiffs and the Settlement Class and to the
21 Department of Insurance, Farmers’ use of policy holders’ elasticity of demand as a rating factor
22 when seeking approval of Farmers’ 2008 Private Passenger Auto Class Plans (“Class Plans”). In
23 particular, Plaintiffs allege that Farmers used higher-than-indicated relativities for the persistency
24 rating factor for policy holders who had been insured by Farmers consecutively for at least 9 years

25 _____
26 ² In November 2018, Farmers filed a Petition for Writ of Administrative Mandamus related to the
27 conduct and scope of the Department Proceeding. Farmers had also filed a similar petition in August
28 of 2017, which the Court had denied.

³ Justice Low also attended the June 2018, during which meeting Plaintiffs’ Counsel presented a
framework for settlement to Farmers’ counsel.

1 because Farmers knew that these policy holders were likely to renew their policies at higher-than-
2 indicated rates. Plaintiffs allege that such consideration of elasticity of demand violated California
3 law and caused Plaintiffs and members of the Settlement Class to pay higher prices for their
4 automobile insurance coverage than the risk they present would justify.

5 Farmers raised or would be expected to raise several defenses. Chief among Farmers'
6 defenses was that the rates set forth in the Class Plans were approved by the Department, that
7 Farmers charged those rates to its policy holders (including Plaintiffs and the members of the
8 Settlement Class), and that California law prohibits a challenge to approved rates and rating factors
9 and the imposition of any retrospective civil liability based on the use of rates and rating factors
10 approved by the Commissioner. Farmers' defense is based on its interpretation of *Walker v. Allstate*
11 *Indem. Co.* (2000) 77 Cal.App.4th 750 and *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427.
12 Plaintiffs counter with *Mercury Ins. Co. v. Lara* (2019) 35 Cal.App.5th 82 and *Donabedian v.*
13 *Mercury Ins. Co.* (2004) 116 Cal.App.4th 968.

14 **C. The Settlement Agreement.**

15 **1. Overview of Terms.**

16 Subject to approval by the Court, the Settlement Agreement will create a \$15,000,000.00
17 common fund paid by Farmers, inclusive of the amount paid to Settlement Class Members, any and
18 all attorneys' fees, costs and expenses awarded to Class Counsel, any Service Awards to the Class
19 Representatives, all costs and expenses incurred by the Settlement Administrator and any *cy pres*
20 payment, as monetary consideration for the release of Plaintiffs' and the Settlement Class' claims.
21 In no circumstance will any portion of this fund revert to the Defendant.

22 In addition, Plaintiffs achieved significant injunctive relief. Farmers agrees that it will not
23 use any form of price optimization software or program, nor in any way consider elasticity of
24 demand in connection with, or in the development of, California private passenger auto rates or class
25 plans, unless and until such time as such practices are explicitly authorized under California law or
26 by the California Department of Insurance. It further agrees that it will not initiate a challenge, in
27 any way, to the Commissioner's legal authority to regulate the use of price optimization software or
28 the consideration of elasticity of demand or price sensitivity in connection with, or in the

1 development of, rates and class plans for California private passenger auto. Farmers has already
2 removed the challenged persistency rating factor from its most recently filed class plan.

3 The Parties estimate that there are approximately 750,000 Settlement Class Members, thus
4 the Settlement provides each Settlement Class Member \$20.00 in monetary compensation, before
5 deduction of any Court-approved attorneys' fees, expenses, claims administration costs, and Service
6 Awards to the Class Representatives. The entire Net Settlement Amount will be distributed to the
7 Settlement Class Members and will be divided equally among them. In order to reduce the costs of
8 administration of the Settlement, Farmers shall retain that portion of the Settlement Amount that is
9 allocated to Settlement Class Members who are current customers of Farmers and who renew their
10 policies with Farmers (as defined in the Settlement Agreement, "Renewing Current Policy
11 Holders"). Farmers will, at its own cost and expense, directly credit the policies of those Renewing
12 Current Policy Holder Settlement Class Members at the time of renewal of their Policies.⁴ All other
13 Settlement Class Members will be paid their distribution of the Settlement Amount by the
14 Settlement Administrator by paper check.

15 In reaching the Settlement, Plaintiffs' counsel considered the positive value that Class
16 Members are receiving real money, either by check or by policy credit, without having to take the
17 step of submitting a claim. Thus, nearly all Settlement Class Members will benefit, and Settlement
18 Class participation in the settlement should be near perfect—save the possibility that a few
19 Settlement Class Members cannot be found or fail to cash their checks.

20 Should any funds remain after the close of the check negotiation period, then those funds
21 will be donated to a charitable *cy pres* recipient or recipients selected by Class Counsel with input
22 from Farmers. Class Counsel shall seek the Court's approval of distribution to any *cy pres* recipient.

23 **2. Forms of Notice.**

24 Notice shall be provided to Settlement Class members in four different ways⁵:

- 25 1. Email Notice to Settlement Class members for whom Farmers has email addresses and who
26

27 ⁴ Farmers shall report to the Court as to the status of all Settlement Class Member Payments made
28 to Renewing Current Policy Holders on a semi-annual basis.

⁵ The proposed forms of notice are at Angoff Decl., Ex. 1, Exhibits 3-6.

- 1 have agreed to accept their Policy statements and/or information by email;
- 2 2. Postcard Notice to those Settlement Class members who have not agreed to accept their
- 3 Policy statements and/or information by email or for whom Farmers does not have current
- 4 email addresses;⁶
- 5 3. Long-Form Notice with details regarding the Settlement on the Settlement Website;
- 6 4. Publication Notice published in California in the following publications to apprise
- 7 Settlement Class members of the Settlement: the Los Angeles Times, East Bay
- 8 Times/Mercury News, Sacramento Bee, San Diego Union-Tribune, San Francisco
- 9 Chronicle, Facebook (California IP addresses only) and Google Display Network (California
- 10 IP addresses only).

11 All of the Notices either inform Settlement Class members of basic information about the

12 Settlement or inform Settlement Class members where they can obtain such information, such as

13 by: (1) visiting the URL of the Settlement Website

14 (www.FarmersPriceOptimizationSettlement.com), which will include the Long-Form Notice and

15 copies of relevant case-related documents; (2) calling the Settlement Administrator's automated

16 toll-free telephone line for Settlement-related inquiries; or (3) writing to the Settlement

17 Administrator at the Post Office box dedicated to the Settlement.

18 Farmers, at its own expense and with the assistance of the Settlement Administrator as

19 appropriate, will create a list of Settlement Class members and their electronic mail and/or postal

20 addresses based on readily available information already within its possession. The Settlement

21 Administrator shall send out Email Notice and the Post Card Notice to Settlement Class members,

22 as applicable. The Settlement Administrator will complete all mailing and re-mailing of the Email

23 Notice and Postcard Notice by no later than 60 days before the Final Approval Hearing.

24 **3. Opt-Outs and Objections.**

25 The Notices will inform all Settlement Class members of their right to opt out of the

26 _____

27 ⁶ The Settlement Administrator use the National Change of Address Database prior to sending the

28 Postcard Notice to Settlement Class Members, will perform reasonable address traces for all Postcard Notices that are returned as undeliverable, and will send Postcard Notices to all Settlement Class Members' whose emails are returned as undeliverable.

1 Settlement or to object to the Settlement and/or to Class Counsel's application for attorneys' fees,
2 costs and expenses and/or Service Awards to the Class Representatives, and of the associated
3 deadlines to opt out or object. Settlement Class members who choose to opt out must send a written
4 notice to the Settlement Administrator, post-marked prior to end of the Opt-Out Period, stating the
5 individual's desire to opt out of the Settlement.⁷ To object, a Settlement Class Member must mail
6 the objection to the Clerk of the Court, Class Counsel, and Farmers' counsel by no later than the last
7 day of the Opt-Out Period. The objection must contain the information required by the Settlement
8 Agreement, which will also be specified in the Notice, including the Settlement Class member's
9 name, address, and phone number; the basis and explanation of the objection; whether the
10 Settlement Class member is represented by counsel and, if so, by whom; the Settlement Class
11 member's and/or her counsel's prior experience objecting to class action settlements; whether the
12 Settlement Class member intends to appear at the final approval hearing, with or without counsel;
13 and the Settlement Class member's signature.

14 **4. Attorneys' Fees, Costs, and Plaintiff Service Awards.**

15 The Settlement Agreement contemplates Class Counsel petitioning the Court for attorneys'
16 fees in an amount not to exceed one-third of the Settlement Amount, as well as documented,
17 customary costs incurred by Class Counsel. Class Counsel may also petition the Court for up to
18 \$5,000 each for Plaintiff as a Service Award. Any approved awards will be deducted from the
19 Settlement Amount prior to distribution to the Settlement Class Members. Class Counsel will
20 formally petition the Court for these amounts fourteen (14) days prior to the Opt-Out Deadline and
21 will post a copy of the motion papers on the Settlement Website so that Settlement Class members
22 are able to review them prior to the deadline to opt out or object to the Settlement. Neither the
23 attorneys' fees nor the proposed Service Awards were negotiated before the other settlement terms
24 were agreed upon, and neither final approval, nor the size of the settlement amount, are contingent
25 upon the full amount of any requested fees or service awards being approved.

26
27
28 ⁷ The Opt-Out Period will be specified in the Notice and shall end no later than 30 days before the Final Approval Hearing.

1 **III. ARGUMENT**

2 A class action may not be settled or compromised without “the approval of the court after
3 hearing.” Cal. Rules of Court, rule 3.769. The purpose of this requirement is “[t]o prevent fraud,
4 collusion or unfairness to the class,” and the court must determine whether “the settlement is fair,
5 adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800–1801,
6 (internal quotation omitted). “Public policy generally favors the compromise of complex class
7 action litigation.” *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110 (internal
8 quotation omitted).

9 Review is accomplished through a two-step process. At the preliminary approval stage, the
10 Court need only “scrutinize the proposed settlement agreement to the extent necessary to reach a
11 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
12 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
13 adequate to all concerned,” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245
14 (internal quotation marks omitted.) “[A] presumption of fairness exists where: (1) the settlement
15 is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
16 counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the
17 percentage of objectors is small.” *Id.* (citing *Dunk, supra*, 48 Cal.App.4th at p. 1802). “In
18 determining whether a class settlement is fair, adequate and reasonable, the trial court should
19 consider relevant factors, such as the strength of plaintiffs’ case, the risk, expense, complexity and
20 likely duration of further litigation, the risk of maintaining class action status through trial, the
21 amount offered in settlement, the extent of discovery completed and the stage of the proceedings,
22 the experience and views of counsel, the presence of a governmental participant, and the reaction of
23 the class members to the proposed settlement.” *Id.* “Th[is] list of factors is not exclusive and the
24 court is free to engage in a balancing and weighing of factors depending on the circumstances of
25 each case.” *Id.* In the event a court finds that the settlement falls within the range of possible
26 approval, notice is issued and a final approval hearing scheduled.

27 For the reasons set forth below, the Court should: (1) preliminarily approve the Parties’
28 proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) approve the

1 Notices for distribution, (4) appoint Plaintiffs as Class Representatives and Plaintiffs' counsel as
2 Class Counsel, and (5) set a date for the Final Approval Hearing.

3 **A. The Settlement Terms are Fair, Reasonable, and Adequate.**

4 **1. The Proposed Settlement Was Reached After Substantial Discovery, and**
5 **Arm's-Length Negotiations Between Experienced Counsel.**

6 As set forth above, the Parties engaged in substantial discovery. Farmers produced more
7 than 70,000 pages of documents, and Plaintiffs' Counsel took the depositions of seven Farmers
8 employees with relevant knowledge of the facts of this dispute. Through discovery and briefing of
9 various motions, every aspect of this litigation was explored including Defendants' defenses to
10 liability and damages. The Settlement was reached only after a full-day mediation session and
11 extensive negotiation thereafter with a well-respected mediator, Justice Low, who is a former
12 California Insurance Commissioner. Additionally, attorneys' fees and Service Awards for the Class
13 Representatives were not discussed or negotiated until all other material settlement terms had been
14 agreed upon, eliminating the possibility of a trade-off between compensation for the Settlement
15 Class and compensation for Class Counsel or the Plaintiffs.

16 Furthermore, both Plaintiffs and Defendants are represented by counsel who have significant
17 experience in class action litigation and settlements, and in insurance-related litigation. The
18 judgment of Class Counsel is entitled to deference. *See Kullar v. Foot Locker Retail, Inc.* (2008)
19 168 Cal.App.4th 116, 129 ("The court ... should give considerable weight to the competency and
20 integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement
21 agreement represents an arm's-length transaction entered without self-dealing or other potential
22 misconduct.").

23 All three of the named plaintiffs were informed about the material terms of the Settlement
24 before a memorandum of understanding was entered into and all three support the Settlement as
25 favorable to consumers. See Angoff Decl., Exs. 5-7.

26 The Department of Insurance also participated in the mediation and subsequent negotiation.
27 The Department carefully reviewed the Settlement Agreement and has informed Judge Rosi that it
28 is supportive of the terms of the Settlement. Further, the Department informed Judge Rosi that,

1 following this Court granting the Settlement preliminary approval, the Department intends to seek
2 dismissal of the Department Proceeding, without prejudice with the right to seek reinstatement of
3 the Department Proceeding if the Settlement does not become final.

4 **2. The Settlement Is Well Within the Range of Approval.**

5 **a. Recovery for the Class Is Substantial.**

6 The Settlement is a considerable recovery, especially when evaluated in the context of the
7 number of procedural hurdles between the Plaintiffs and a final judgment, as well as Farmers’
8 potential defenses.

9 In terms of monetary relief, Plaintiffs’ counsel estimates that the Settlement Class could
10 have recovered approximately \$42 million if it had prevailed on its strongest theory of recovery.
11 Specifically, in February 2015, the Commissioner issued a bulletin stating that “any use of Price
12 Optimization in the ratemaking/pricing process or in a rating plan is unfairly discriminatory in
13 violation of California law,” and instructing “[a]ny insurer that ha[d] a factor or factors based on
14 Price Optimization in its rating plan [to] remove the factor or factors in its next filing,” which was
15 required to be submitted within six months from the date of the bulletin. Although Farmers denies
16 that it used any price optimization in its ratemaking or pricing process, it made its next filing in
17 March 2017, nineteen months after the Commissioner’s deadline to submit a filing removing price
18 optimization. If Plaintiffs were successful in proving that Farmers’ pre-March 2017 class plans
19 relied on price optimization that was not disclosed to the Department of Insurance, Plaintiffs would
20 then have their best opportunity to overcome Farmers’ *Walker/MacKay* defense to seek damages
21 for Farmers’ delay in removing price optimization from its class plans following the
22 Commissioner’s bulletin. The Settlement achieves almost 36% of those damages, which is an
23 excellent result. *See Wershba, supra*, 91 Cal.App.4th at p. 250 (“A settlement need not obtain 100
24 percent of the damages sought in order to be fair and reasonable. Compromise is inherent and
25 necessary in the settlement process. Thus, even if the relief afforded by the proposed settlement is
26 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar
27 to a class settlement because the public interest may indeed be served by a voluntary settlement in
28 which each side gives ground in the interest of avoiding litigation.”) (quotations omitted); *City of*

1 *Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 455 n.2 (“[T]here is no reason, at least in
2 theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of
3 a single percent of the potential recovery.”), *abrogated on other grounds by Goldberger v.*
4 *Integrated Resources, Inc.* (2d Cir. 2000) 209 F.3d 43.

5 While Plaintiffs sought damages for the Settlement Class beyond the estimated \$42 million,
6 obtaining those damages was uncertain given not only Farmers’ *Walker/MacKay* defense, but also
7 Plaintiffs’ reliance on circumstantial evidence to prove that Farmers’ used certain relativities in its
8 class plans based on its understanding of consumers’ elasticity of demand.

9 Notably, injunctive relief in the form of commitments by Farmers not to use any form of
10 price optimization in connection with California private passenger auto rates or class plans, nor to
11 initiate a challenge to the Commissioner's legal authority to regulate the use of price optimization,
12 is a substantial benefit to both the Settlement Class and to California drivers in general.

13 **b. The Settlement Provides an Immediate Benefit to the Settlement Class.**

14 Settlement of Plaintiffs’ and the Settlement Class’ claims now assures that they will receive
15 an immediate cash benefit. Conversely, if they chose to continue to litigate their claims, they likely
16 would not see any recovery for several years.

17 Before returning to this Court to prove their claims, Plaintiffs would have had to participate
18 in an evidentiary hearing before ALJ Rosi. It is likely that such hearing would be conducted in at
19 least two phases with post-hearing briefing after each phase. Plaintiffs then would have had to wait
20 for a decision from CALJ Rosi, and then a decision from the Commissioner accepting or rejecting
21 CALJ Rosi’s findings. If CALJ Rosi found in Plaintiffs’ favor and the decision was adopted by the
22 Commissioner, Farmers could have appealed that decision. Only after the conclusion of that appeal
23 would Plaintiffs have been able to return to this Court, where litigation would resume with its usual
24 delays and risks of appeal. Plaintiffs believe that this process could have taken years to complete.
25 The Settlement avoids this substantial delay to providing some relief to the Settlement Class.

26 **c. Plaintiffs Face Risks in the Absence of Settlement.**

27 The strength of this recovery comes into even sharper focus when the risks of further
28 litigation are considered. Before returning to this Court to prove the merits of the claims and obtain

1 an order certifying this case as a class action, Plaintiffs would have had to convince the
2 Commissioner, through an administrative hearing before CALJ Rosi, that Farmers was illegally
3 considering policy holders' elasticity of demand when developing its automobile insurance
4 premiums. Plaintiffs further would have had to convince the Commissioner that Farmers was
5 considering elasticity of demand without disclosing that practice to the Department of Insurance
6 when making its rate filings. While Plaintiffs believe they could have met their burden, the
7 Department Proceeding presented material risks to Plaintiffs and the Settlement Class, which the
8 Settlement allows them to avoid.

9 If Plaintiffs had received a favorable ruling from the Department Proceeding, and prevailed
10 on any appeals Farmers would have filed thereafter, Plaintiffs would still have been required to
11 overcome Farmers' defenses based on its interpretation of *Walker, supra*, 77 Cal.App.4th 750 and
12 *MacKay, supra*, 188 Cal.App.4th 1427. While Plaintiffs believe their claims are viable under
13 California law, including under *MacKay* and pursuant to *Donabedian, supra*, 116 Cal.App.4th 968,
14 the possibility that this Court, or a higher court on appeal, would disagree presented a material risk
15 to Plaintiffs continuing to litigate their claims.

16 Finally, if Plaintiffs were able to overcome Farmers' defenses under California insurance
17 law, Plaintiffs still would have faced the obstacles to proving damages and obtaining class
18 certification that are typical in any class action. In sum, the Settlement Amount appropriately
19 accounts for the risks the Settlement Class would face in continued litigation, including the delays
20 in appealing any adverse decision on any of these issues.

21 **B. Certification of the Settlement Class Is Appropriate.**

22 Plaintiffs request that the Court certify the Settlement Class for settlement purposes under
23 Code Civ. Proc., § 382, which authorizes class action where “[t]he question is one of a common or
24 general interest, of many persons, or when the parties are numerous, and it is impracticable to bring
25 them all before the court.” “To obtain certification, a party must establish the existence of both an
26 ascertainable class and a well-defined community of interest among the class members.” *Linder v.*
27 *Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. “The community of interest requirement embodies three
28 factors: (1) predominant common questions of law or fact; (2) class representatives with claims or

1 defenses typical of the class; and (3) class representatives who can adequately represent the class.”
2 *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. “In addition, the assessment of
3 suitability for class certification entails addressing whether a class action is superior to individual
4 lawsuits or alternative procedures for resolving the controversy.” *Bufile v. Dollar Financial Group,*
5 *Inc.* (2008) 162 Cal.App.4th 1193, 1204.

6 **1. The Proposed Class is Ascertainable and Numerous**

7 Numerosity is satisfied here because the class is so large that joinder of all members would
8 be impracticable. Code Civ. Proc., § 382. There are an estimated 750,000 Settlement Class
9 Members. Classes of as few as 28 members have been certified. *See Rose v. City of Hayward*
10 (1981) 126 Cal.App.3d 926, 934.

11 As for ascertainability, “a class [i]s ascertainable when it is defined in terms of objective
12 characteristics and common transactional facts that make the ultimate identification of class
13 members possible when that identification becomes necessary.” *Noel v. Thrifty Payless, Inc.* (2019)
14 7 Cal.5th 955 (quotations omitted). Here, Settlement Class Members are ascertainable from
15 Farmers’ records and can identify themselves from the definition of the Settlement Class. *See Bufile,*
16 *supra*, 162 Cal.App.4th at p. 1208 (class could be ascertained from defendant’s records).

17 **2. The Community of Interest Requirements Are Met.**

18 **a. Common Questions Predominate.**

19 “The ultimate question the element of predominance presents is whether the issues which
20 may be jointly tried, when compared with those requiring separate adjudication, are so numerous or
21 substantial that the maintenance of a class action would be advantageous to the judicial process and
22 to the litigants.” *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (internal
23 quotations omitted). Here, Plaintiffs contend there are class-wide issues that predominate over any
24 individual concerns. First is the question of whether Farmers considered policy holder’s elasticity
25 of demand when setting automobile insurance premiums in California. Second is the question of
26 whether such consideration violated California law. Third is the question of whether Farmers
27 disclosed its use of elasticity of demand to Settlement Class members or the Department of
28 Insurance. Fourth is the question of if and how Settlement Class members were damaged by

1 Farmers' consideration of elasticity of demand. These common questions predominate here.

2 **b. The Named Plaintiffs' Claims Are Typical.**

3 Typicality requires that the named plaintiff's interests in the action be significantly similar
4 to those of other class members. A representative plaintiff's claims are typical if they (1) arise from
5 the same event, practice, or course of conduct that gives rise to the claims of other class members,
6 and (2) are based on the same legal theories. *See Miller v. Woods* (1983) 148 Cal.App.3d 862, 874.
7 When the same underlying conduct affects the named plaintiffs and the class sought to be
8 represented, the typicality requirement is met irrespective of varying fact patterns that may underlie
9 individual claims. *See Daniels v. Centennial Group, Inc.* (1993) 16 Cal.App.4th 467, 473. The
10 class representatives' claims do not need to be "identical" to the claims of other members of the
11 class. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46 ("[I]t has never been the law in California
12 that the class representative must have *identical* interests with the class members."). In this case,
13 Plaintiffs have the same claims as the members of the Settlement Class and were subject to the same
14 allegedly unlawful practices.

15 **c. The Settlement Class is Adequately Represented.**

16 "Adequacy of representation depends on whether the plaintiff's attorney is qualified to
17 conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the
18 class." *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. Plaintiffs have no interests
19 that are antagonistic to the Settlement Class. To the contrary, they each have actively participated
20 in this litigation to seek relief on behalf of the Settlement Class, including by providing relevant
21 facts and documents to their Counsel and by evaluating and approving the terms of the Settlement.

22 Proposed Class Counsel are highly qualified. Each Class Counsel firm is experienced in
23 complex class action litigation and consumer litigation in general. See Angoff Decl., Exs. 2-4. In
24 addition, Jay Angoff of Mehri & Skalet has substantial expertise in insurance matters, having served
25 previously as Missouri's Insurance Commissioner and New Jersey's Deputy Commissioner, as well
26 as the first Director of the unit implementing the Affordable Care Act at the U.S. Department of
27 Health and Human Services.

28

1 **d. Class Action is the Superior Vehicle for Adjudication.**

2 Finally, “class treatment in this case is plainly the superior means for resolving the litigation
3 for both the parties and the court.” *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 138.
4 A class action is superior where individual claims are too small to warrant separate actions, and
5 where duplicative or repetitious litigation is avoided through the use of the class device. *See id.*
6 Here, the claims of all Settlement Class members are identical and are based on the same common
7 core of facts, but involve a modest amount of damages, so it is clear that adjudicating this matter as
8 a class action will achieve economies of time, effort, and expense, and promote uniformity of results.

9 **C. The Court Should Approve Dissemination of the Class Notices.**

10 “In determining how to disseminate class notice of settlement—whether by direct mail, e-
11 mail, publication, or something else—the standard is whether the notice has a reasonable chance of
12 reaching a substantial percentage of the class members.” *Duran v. Obesity Research Institute, LLC*
13 (2016) 1 Cal.App.5th 635, 648 (internal quotations omitted). Attached to the Settlement Agreement,
14 the Parties have submitted their proposed notices and they are described above at Section II.C.2.
15 The Email Notice and Postcard notice inform Settlement Class members of the terms of the
16 Settlement and their rights and deadlines by which to exercise them. The Long Form Notice
17 includes additional detail. The notices are written in plain English and the Long Form Notice is
18 modeled after the Federal Judicial Center’s class action model notice. *See www.fjc.gov.*

19 Because Settlement Class members primarily, if not exclusively, interacted with Defendants
20 electronically and via email, email notice is appropriate. *See Chavez v. Netflix, Inc.* (2008) 162
21 Cal.App.4th 43, 57–58. The Notice Program satisfies the requirement of Rule 3.766(d) and should
22 be approved as it “fairly apprise[s] the prospective members of the class of the terms of the proposed
23 settlement and of the options that are open to them in connection with [the] proceedings.” *7-Eleven*
24 *Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1164.

25 **IV. CONCLUSION**

26 In sum, the Court should grant the Plaintiffs’ motion and enter the preliminary approval order.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: August 30, 2019

SCHONBRUN SEPLOW
HARRIS & HOFFMAN LLP

MEHRI & SKALET PLLC

BERGER MONTAGUE, P.C.

TYCKO & ZAVAREEI LLP

By:  _____
Jay Angoff
Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 715 Fremont Avenue, Suite A, South Pasadena, CA 91030.

On August 30, 2019, I caused the service of the following document(s) described as:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

to the person(s) listed on the Service List.

[By E-MAIL or ELECTRONIC TRANSMISSION VIA CASE ANYWHERE]
Pursuant to a court order, I electronically transmitted the document(s) listed above via Case Anywhere to the individual(s) listed on the Service List. The Case Anywhere system sends an e-mail notification of the electronic transmission to the parties and counsel of record who are registered with the Case Anywhere system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 30, 2019, at South Pasadena, California.



Kristina Akopyan

SERVICE LIST

<p>1 2 Peter Kahana, Esq. pkahana@bm.net 3 Jeff Osterwise, Esq. josterwise@bm.net 4 BERGER & MONTAGUE, P.C. 1818 Market Street, Suite 3600 5 Philadelphia, PA 19103 6 Tel.: (215) 875-3000 7 Fax: (215) 875-4613 8 9 <i>Attorneys for Plaintiffs</i></p>	<p>Richard G. De La Mora, Esq. rdelamora@mail.hinshawlaw.com James C. Castle, Esq. jcastle@mail.hinshawlaw.com HINSHAW & CULBERTSON, LLP 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 Tel.: (213) 614-7343 Fax: (213) 614-7399 <i>Attorneys for Defendants</i> Farmers Insurance Exchange and Mid Century Insurance Co.</p>
<p>10 Jonathan K. Tycko, Esq. jtycko@tzlegal.com 11 Andrea Gold, Esq. agold@tzlegal.com 12 TYCKO & ZAVAREEI LLP 1828 L Street, NW 13 Washington, DC 20036 14 Tel.: (202) 973-0900 15 Fax: (202) 973-0950 16 <i>Attorneys for Plaintiffs</i></p>	<p>Harvey Rosenfield, Esq. harvey@consumerwatchdog.org Pamela Pressley, Esq. pam@consumerwatchdog.org CONSUMER WATCHDOG 6330 San Vicente Blvd, Suite 250 Los Angeles, CA 90048 Tel.: (213) 897-2000 Fax: (213) 897-5775 <i>Attorneys for Consumer Watchdog</i></p>
<p>17 Jay Angoff, Esq. jay.angoff@findjustice.com 18 Cyrus Mehri, Esq. Cyrus@findjustice.com 19 Christine Monahan, Esq. CMonahan@findjustice.com 20 MEHRI & SKALET PLLC 1250 Conneticut Ave. NW, Suite 300 21 Washington, DC 2003 22 Tel.: (202) 822-5100 23 Fax: (202) 822-4997 24 <i>Attorneys for Plaintiffs</i></p>	<p>Laura Robbins, Esq. laura.robbs@doj.ca.gov Andrea Schoor, Esq. andrea.schoor@doj.ca.gov CALIFORNIA DEPARTMENT OF JUSTICE 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Tel.: (213) 897-2000 Fax: (213) 897-5775 <i>Attorneys for California Department of Insurance, Dave Jones, in his capacity as Insurance Commissioner of the State of California</i></p>