

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

Date: December 12, 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 Hassan A. Zavareei, Esq. (CA Bar. No. 181547)
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
hzavareei@tzlegal.com
18 agold@tzlegal.com

19 *Attorneys for Plaintiffs*
20
21
22
23
24
25
26
27
28

1 **TABLE OF CONTENTS**

2 I. INTRODUCTION..... 5

3 II. RESPONSE TO THE COURT’S REQUEST FOR ADDITIONAL BRIEFING..... 5

4 A. The Court’s Preliminary Concerns..... 5

5 B. Settlement Terms..... 6

6 1. Amount of the Settlement. 6

7 a. Strength of the case on the merits, balanced against the amount offered in settlement.

8 6

9 b. Plaintiffs’ potential \$42 million recovery. 7

10 c. Recovery Per Class Member..... 9

11 d. Allocation of Net Settlement Amount. 9

12 2. Attorneys’ fees, costs, expenses and enhancement payments. 11

13 3. Preliminary approval order, final approval order, and judgment..... 11

14 C. Notice to Class Members. 12

15 1. The content of the notice complies with Cal. Rules of Court, Rule 3.766(d)..... 12

16 2. The manner of giving notice complies with Cal. Rules of Court, Rule 3.766(e). 13

17 D. Objection/Opt-Out Procedure. 15

18 E. *Cy Pres* Distribution..... 16

19 III. CONCLUSION 17

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

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

Cases

Cellphone Termination Fee Cases,
(2010) 186 Cal.App.4th 1380..... 13

Chavez v. Netflix, Inc.,
(2008) 162 Cal.App.4th 43..... 14

Donabedian v. Mercury Ins. Co.,
(2004) 116 Cal.App.4th 968..... 7

Duran v. Obesity Research Institute, LLC,
(2016) 1 Cal.App.5th 635..... 13

Edwards v. First American Corporation (C.D. Cal., June 20, 2016, No. CV07-03796-SJO
(FFMX),
2016 WL 8943464..... 10

Edwards v. First American Corporation (C.D. Cal., Oct. 14, 2016, No. CV-07-03796 SJO
(FFMX),
2016 WL 9176564..... 10

Hendricks v. StarKist Co.,
(N.D. Cal., July 23, 2015, No. 13-CV-00729-HSG) 2015 WL 4498083..... 10

Kimber Baldwin Designs, LLC v. Silv Communications, Inc.,
(S.D. Ohio, Nov. 13, 2017, No. 1:16-CV-448) 2017 WL 5247538..... 11

MacKay v. Superior Court,
(2010) 188 Cal.App.4th 1427..... 7

McCabe v. Six Continents Hotels, Inc.
(N.D. Cal. Feb. 8, 2016, No. 12-CV-04818 NC) 2016 WL 491332..... 11

McCabe v. Six Continents Hotels, Inc.,
(N.D. Cal., June 30, 2015, No. 12-CV-04818 NC) 2015 WL 3990915..... 11

Statutes

Code Civ. Proc., § 384 16, 17

Ins. Code, § 1860.1..... 7

Rules

Cal. R. Ct., Rule 3.766(d)..... 12

Cal. R. Ct., Rule 3.766(e)..... 13

Cal. R. Ct., Rule 3.766(f) 14

Other Authorities

4 Newberg on Class Actions § 13:6 (5th ed.) 16

1 **I. INTRODUCTION**

2 On August 30, 2019, Plaintiffs Roger Harris, Duane Brown, and Brian Lindsey filed a
3 motion seeking preliminary approval of a proposed class action settlement of Plaintiffs’ claims
4 against Defendants Farmers Insurance Exchange and Mid-Century Insurance Company
5 (collectively “Farmers” or “Defendants”). On October 18, 2019, the Court requested additional
6 briefing on several items, which Plaintiffs address below.

7 For the reasons stated in their motion for preliminary approval and for the reasons stated
8 herein, Plaintiffs request that the Court: (1) preliminarily approve the proposed Settlement,¹ (2)
9 certify the Settlement Class for settlement purposes only, (3) appoint Plaintiffs as Class
10 Representatives, (4) appoint Plaintiffs’ counsel as Class Counsel, (5) direct the Notice to be
11 distributed to the Settlement Class, and (6) schedule a Final Approval Hearing.

12 **II. RESPONSE TO THE COURT’S REQUEST FOR ADDITIONAL BRIEFING**

13 **A. The Court’s Preliminary Concerns.**

14 Accompanying this memorandum is the Supplemental Declaration of Jay Angoff, which
15 includes as Exhibit 1 the Parties’ Amended Settlement Agreement and as Exhibit 2 a redline
16 reflecting the changes made to the Parties’ original settlement agreement. That agreement has been
17 executed by all Parties and their counsel, including Hassan A. Zavareei as Class Counsel. Mr.
18 Zavareei has been admitted to practice law in California for 24 years.

19 The California Insurance Commissioner is not a party to the Amended Settlement
20 Agreement. Based on representations made by representatives of the California Department of
21 Insurance to the Parties and to Chief Administrative Law Judge Kristin Rosi, Plaintiffs understand
22 that the Commissioner intends to seek dismissal of the Department Proceeding if and after the Court
23 grants preliminary approval of the Settlement. Supp. Angoff Decl., ¶ 6. In the event that the
24 Department Proceeding is not dismissed prior to Final Approval of the Settlement, the Amended
25 Settlement Agreement provides the Parties the right, upon written notice to the opposing party and
26

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

1 filing such notice with the Court, to terminate the Settlement. Supp. Angoff Decl., Ex. 1, ¶ 93(e).
2 Plaintiffs expect this issue to be resolved well in advance of their motion for final approval of the
3 Settlement.

4 Finally, the proposed Second Amended Complaint filed with Plaintiffs' motion for
5 preliminary approval contained redacted terms because the information redacted was designated
6 confidential by Farmers pursuant to a protective order issued by Judge Rosi in the Department
7 Proceeding. However, following the Court's inquiry regarding the redactions, the Parties conferred,
8 and Farmers agreed to lift the confidentiality designations for the redacted allegations. Therefore,
9 an unredacted proposed Second Amended Complaint is attached as Exhibit 1 to the Amended
10 Settlement Agreement.

11 **B. Settlement Terms.**

12 **1. Amount of the Settlement.**

13 **a. Strength of the case on the merits, balanced against the amount offered**
14 **in settlement.**

15 The evidence that Farmers considered elasticity of demand in developing the auto insurance
16 class plans relevant to this case is strong. Notably, after reviewing internal documents and testimony
17 by Defendants' employees responsible for developing Defendants' California auto insurance filings,
18 California Department of Insurance Senior Casualty Actuary Edward D. Cimini, Jr. testified in a
19 sworn statement that "Farmers engaged in price optimization in the construction of its Private
20 Passenger Auto Class Plan with regard to the selection of rate relativities for the optional rating
21 factor of Persistency." Supp. Angoff Decl., Ex. 1 at Ex. 1, ¶ 7.

22 In addition, it is reasonable to expect that Judge Rosi would have been sympathetic to
23 Plaintiffs' case, given, among other things, the following statement in her Post Scheduling
24 Conference Order:

25 That the Commissioner approved Farmers' class plan and rates is a matter of public
26 record and uncontroverted. It may also be true that Farmers' customers' premiums
27 were based upon the approved class plan. But that conclusion does not end the
28 inquiry. If, as Plaintiffs suggest, Farmers applied price optimization in formulating
its rates and class plan, such application violates the Insurance Code regardless of
whether the Commissioner approved the rates and class plan.

1 Post-Sched. Conf. Order at 6.

2 Notwithstanding the potential finding that Farmers violated the Insurance Code, however,
3 *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, and this Court’s interpretation of *Mackay*,
4 have created a substantial risk that a finding that Farmers engaged in price optimization by Judge
5 Rosi would not translate into any monetary recovery for Plaintiffs in this case.

6 *Mackay* held that Ins. Code, § 1860.1 “protects from prosecution under laws outside the
7 Insurance Code only ‘act[s] done, action[s] taken [and] agreement[s] made pursuant to the authority
8 conferred by’ the ratemaking chapter.” *MacKay, supra*, 188 Cal.App.4th at p. 1449. As the court
9 recognized in *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 979–81, 990, because
10 1860.1 was enacted to immunize insurers from the antitrust laws so that they can act in concert to
11 set rates, the language “pursuant to the authority conferred by this chapter” in section 1860.1 can
12 only refer to insurer actions taken pursuant to the authority section 1860.1 conferred on insurers to
13 set rates collectively; it does not and could not refer to insurer actions taken pursuant to the authority
14 conferred on the Commissioner to regulate rates, because the Commissioner had no such authority
15 when section 1860.1 was enacted.

16 Despite that legislative history, *Mackay* held that 1860.1 does immunize unilateral conduct
17 from private challenge, and this court, in *First American Title Co. Cases*, No. JCCP 4751, at 19-20
18 (L.A. Super. Ct. July 23, 2018), agreed with the *Mackay* court. Plaintiffs therefore had to weigh the
19 strength of their case on the merits, and the likelihood of success before Judge Rosi, against the
20 possibility of no recovery in this case while Plaintiffs spend years seeking to eliminate *Mackay* as a
21 barrier to recovery. The \$15 million settlement is the product of those competing considerations. It
22 is also the product of a months-long mediation process before former Justice and former Insurance
23 Commissioner Harry Low and intensive and intense negotiations between the parties.

24 **b. Plaintiffs’ potential \$42 million recovery.**

25 Even under the broadest interpretation of the immunity conferred by *Mackay*, there is a
26 strong argument that any use of price optimization by Farmers between August 18, 2015 and March
27 31, 2017 was not approved by the Department and therefore would not be immunized by *Mackay*.
28 That is because on February 18, 2015, the Department ordered any insurer using price optimization

1 — defined as “any method of taking into account an individual’s or class’s willingness to pay a
2 higher premium relative to other individuals or classes” — to “adjust its rates in California [to] cease
3 this practice,” including by filing within six months a new class plan omitting any “factors based on
4 Price Optimization.” Cal. Dep’t of Ins., Notice Regarding Unfair Discrimination in Rating: Price
5 Optimization (Feb. 18, 2015) (hereinafter, the “Bulletin”).

6 The Bulletin thus required Farmers to file a new class plan which did not take into account
7 willingness-to-pay no later than six months after February 18, 2015, i.e., by August 18, 2015.
8 Farmers, however, did not file a new class plan until March 31, 2017. Plaintiffs allege that Farmers
9 therefore engaged in price optimization without the Department’s approval between August 18,
10 2015 and March 31, 2017. Damages to the class during that period were approximately \$42 million,
11 based on the following arithmetic:

12 Annual injury:	\$26 million ²
13 Period during which injury occurred:	1.625 years ³
14 Total injury during class period:	\$42.25 million ⁴

15 While Plaintiffs do not concede that damages caused by Defendants’ conduct prior to August
16 18, 2015 would be unavailable at trial, Plaintiffs might well not have recovered anything for
17 Farmers’ conduct prior to August 18, 2015. *See, e.g., Farmers Ins. Exch. v. Jones*, No. BS170584,
18 at 2 (L.A. Super. Ct. Nov. 7, 2017) (this Court observing that Plaintiffs’ claims, to the extent based
19 on “the rate filing and class plan approved by the Insurance Commissioner” would be “subject[] ...
20 to dismissal under *MacKay*”). As a result, the prospect of this Court ruling on the sufficiency of
21 Plaintiffs’ proposed Second Amended Complaint, likely conflicting testimony, and subsequent
22 lengthy appeals all but eliminated negotiating leverage for Plaintiffs for recovering damages for
23 conduct prior to August 18, 2015.

26 ² Supp. Angoff Decl., Ex. 3, Prefiled Direct Testimony of Allan I. Schwartz, actuarial expert for
27 intervenor Consumer Watchdog, Oct. 4, 2018, at 22.

28 ³ The class period of Aug. 18, 2015 through Oct. 31, 2017, is approximately 19.5 months, which is
equal to 1.625 years.

⁴ \$26 million X 1.625.

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

c. Recovery Per Class Member.

Plaintiffs’ representation in their August 30, 2019 memorandum in support of their motion for preliminary approval that the Settlement would provide \$20 per Settlement Class Member was based on dividing the \$15 million Settlement Amount by an estimated 750,000 Settlement Class Members. The estimate of the number of Settlement Class Members was Farmers’ good faith best estimate at the time the Settlement Agreement was signed.

Subsequent to Plaintiffs’ filing their motion for preliminary approval, Farmers has determined that the number of Settlement Class Members is approximately 615,000. Accordingly, the Settlement provides approximately \$24.39 per Settlement Class Member, prior to deduction of any attorneys’ fees, costs and expenses, Service Awards, and costs of notice and settlement administration. Assuming the Court awards the maximum amounts for attorneys’ fees, costs and expenses, Service Awards, and costs of notice and settlement administration, the Net Settlement Amount will provide approximately \$15.02 per Settlement Class Member.

d. Allocation of Net Settlement Amount.

The Parties agreed to allocate the Net Settlement Amount in equal payments to each person who has or had an ownership interest in any Farmers policy or policies, except that persons who jointly have or had an ownership interest in any Farmers policy or policies would not receive separate payments from the Net Settlement Amount.

Plaintiffs carefully considered other alternatives, received input from Justice Low during the negotiation process, and concluded that other approaches were impractical or raised equity concerns because they were inconsistent with Plaintiffs’ theory of liability.

One alternative was to allocate a fixed amount to each Settlement Class Member for each year he or she had been with Farmers, beginning with their ninth year. In those years the Settlement Class Member would have paid more than the indicated rate. Under that proposal, a policyholder with 9 years of tenure with Farmers as of the class period would receive X, a policyholder with 10 years of tenure as of the class period would receive 2X, an 11-year policyholder as of the class period would receive 3X, and so forth, except that policyholders with Farmers for 16 or more years would all receive 8X. All policyholders with 16 or more years of tenure with Farmers would receive

1 8X, because Farmers established its persistency discount in 2003, thus limiting the number of years
2 a policyholder could have been charged at the higher-than-indicated rate for people with 9 or more
3 years of persistency to 8 (i.e., 2003-2019).

4 Plaintiffs rejected this approach primarily because it is inconsistent with Plaintiffs' strongest
5 theory of liability that Farmers' class plan was "unapproved" during the 19.5 month period between
6 Aug. 18, 2015 and Oct. 31, 2019. Certain Settlement Class Members would be unfairly rewarded
7 if the allocation plan compensated them for injury occurring prior to Aug. 18, 2015, because the
8 likelihood that they could recover damages for that time period was remote.

9 Plaintiffs also considered the alternative of distributing to each Settlement Class Member an
10 amount proportional to the net amount they would have received had Farmers charged them the
11 risk-based rate during the 19.5 month period between Aug. 18, 2015 and Oct. 31, 2019. This option
12 would be costly and difficult to administer, requiring the settlement administrator to obtain and
13 process voluminous data to make complex calculations to re-calculate premiums for each Settlement
14 Class Member, and perhaps do so more than once for Settlement Class Members who made policy
15 changes during the 19.5 month period. With this level of complexity there was substantial risk of
16 error in the calculations.

17 Even though the Settlement Amount represents a laudable result in light of the litigation
18 risks, the amount available for distribution to Settlement Class Members does not warrant
19 undertaking a complicated and expensive allocation process that may ultimately result in an
20 allocation that does not materially differ from paying equal amounts to each Settlement Class
21 Member. *See Hendricks v. StarKist Co* (N.D. Cal., July 23, 2015, No. 13-CV-00729-HSG) 2015
22 WL 4498083, at *7–8 (approving a flat payment per class member given the "modest payment
23 amounts at issue," and noting that "some courts recognize that an allocation formula need only have
24 a reasonable, rational basis, particularly if recommended by experienced and competent counsel."
25 (internal quotation marks omitted)); *Edwards v. First American Corporation* (C.D. Cal., June 20,
26 2016, No. CV07-03796-SJO (FFMX) 2016 WL 8943464, at *8 (granting preliminary approval of
27 an allocation plan providing an equal payment to each claimant), final approval granted by ;
28 *Edwards v. First American Corporation* (C.D. Cal., Oct. 14, 2016, No. CV-07-03796 SJO (FFMX))

1 2016 WL 9176564; *McCabe v. Six Continents Hotels, Inc.* (N.D. Cal., June 30, 2015, No. 12-CV-
2 04818 NC) 2015 WL 3990915, at *3, 8–10 (preliminarily approving a settlement providing equal
3 payments to each claimant), final approval granted by *McCabe v. Six Continents Hotels, Inc.* (N.D.
4 Cal. Feb. 8, 2016, No. 12-CV-04818 NC) 2016 WL 491332; *Kimber Baldwin Designs, LLC v. Silv*
5 *Communications, Inc.* (S.D. Ohio, Nov. 13, 2017, No. 1:16-CV-448) 2017 WL 5247538, at *1
6 (granting final approval where “[e]ach Class Member submitting a valid claim [would] receive an
7 equal settlement payment”).

8 **2. Attorneys’ fees, costs, expenses and enhancement payments.**

9 The Parties have revised Paragraph 89 of the Settlement Agreement (paragraph 90 of the
10 Amended Settlement Agreement) to state that Class Counsel agree to cap their request for attorneys’
11 fees at 33% of the gross Settlement Amount. Supp. Angoff Decl., Ex. 1, ¶ 90. Class Counsel also
12 agree to cap their request for reimbursement of costs and expenses at \$275,000. The Settlement
13 Administrator has agreed to cap the total cost of notice and claims administration at \$522,387. Supp.
14 Azari Decl., ¶ 7.

15 Plaintiffs and Class Counsel entered into written retainer agreements specifying that, in the
16 event of a settlement on behalf of a class, Class Counsel would apply to the Court for reimbursement
17 of their costs and payment of their attorneys’ fees pursuant to applicable law, including that Class
18 Counsel would have the right to seek reimbursement of fees and costs pursuant to the common fund
19 doctrine. Supp. Angoff Decl., ¶ 4. In connection with the Settlement, Plaintiffs have agreed in
20 writing that Class Counsel may request up to 33% of the gross Settlement Amount as attorneys’
21 fees. Supp. Angoff Decl., Ex. 1, ¶ 90. Separately, Class Counsel has entered into a written
22 agreement concerning the manner in which they will allocate among themselves any attorneys’ fees
23 awarded by the Court in this Settlement. Supp. Angoff Decl., Ex. 3 at Ex. B. Plaintiffs have given
24 their written approval of Class Counsel’s fee splitting agreement. *Id.*

25 **3. Preliminary approval order, final approval order, and judgment.**

26 The Court advised that will prepare its own forms of orders preliminarily and finally
27 approving the Settlement. Accordingly, the Amended Settlement Agreement does not include
28 proposed preliminary and final approval orders as exhibits.

1 Per the Court’s instruction, the Parties revised paragraph 76(d) of the Settlement Agreement
2 (paragraph 77(d) of the Amended Settlement Agreement) so that that Amended Settlement
3 Agreement is not conditioned upon entry of a judgment of dismissal. Supp. Angoff Decl., Ex. 1, ¶
4 77(d).

5 In response to the Court’s inquiry concerning paragraph 76(e) of the Settlement Agreement
6 (paragraph 77 of the Amended Settlement Agreement), the Parties have deleted language from that
7 paragraph seeking an injunction against absent class members. Supp. Angoff Decl., Ex. 1, ¶ 77.

8 **C. Notice to Class Members.**

9 **1. The content of the notice complies with Cal. Rules of Court, Rule 3.766(d).**

10 In compliance with the California Rules of Court, Rule 3.766(d), each form of proposed
11 notice to the Settlement Class includes “(1) A brief explanation of the case, including the basic
12 contentions or denials of the parties; (2) A statement that the court will exclude the member from
13 the class if the member so requests by a specified date; (3) A procedure for the member to follow in
14 requesting exclusion from the class; (4) A statement that the judgment, whether favorable or not,
15 will bind all members who do not request exclusion; and (5) A statement that any member who does
16 not request exclusion may, if the member so desires, enter an appearance through counsel.” Supp.
17 Azari Decl., ¶¶12-19; Cal. R. Ct. 3.766(d).⁵

18 Providing summary information to Settlement Class members via email or postcard notice,
19 with full notice available on a settlement website, is not only proper, but also it is preferable to
20 providing initial notice by mailing a long, full notice. For instance, email and postcard notice
21 eliminate the need for an envelope, an unnecessary barrier to the class member actually reading the
22 information being conveyed. Supp. Azari Decl., ¶ 9. Email and postcard notice also satisfy the
23 objective of quickly providing enough information to potential Settlement Class Members so that
24 they can determine if the lawsuit affects them and if they wish to review more detailed information
25 about the case and their rights. Supp. Azari Decl., ¶ 13

26 _____
27 ⁵ Due to space limitations, the Postcard Notice does not provide step-by-step instructions informing
28 Settlement Class Members how to request exclusion from the Settlement Class. However, it informs
them of their right to request exclusion, the deadline to do so, and directs them to the Settlement
Website for additional information.

1 Per the Court’s instruction, all forms of Notice have been revised to provide an estimate as
2 to the amount each class member will receive. The forms of Notice previously submitted to the
3 Court included all relevant deadlines. The Court also instructed that the contents of the notice
4 provide all requested deductions from the settlement, including all attorney’s fees, costs,
5 enhancement award totals, and administration costs (stated in “maximum” amounts), the payment
6 formula, and the full release language. These items have been added to the Email and Long Form
7 Notice, to the extent they were not in the versions previously submitted to the Court. Given space
8 limitations for the Postcard Notice, and the considerations described above with respect to the
9 negative impact of providing Settlement Class Members with too much information in the initial
10 notice, these items have not been added to the Postcard Notice.

11 **2. The manner of giving notice complies with Cal. Rules of Court, Rule**
12 **3.766(e).**

13 The proposed Notice Program complies with Cal. Rules of Court, rule 3.766(e). “In
14 determining how to disseminate class notice of settlement—whether by direct mail, e-mail,
15 publication, or something else—the standard is whether the notice has a reasonable chance of
16 reaching a substantial percentage of the class members.” *Duran v. Obesity Research Institute, LLC*
17 (2016) 1 Cal.App.5th 635, 648 (internal quotations omitted). The Notice Program is designed to,
18 and has a reasonable chance of, reaching a substantial percentage of the Settlement Class Members.

19 Sending individual notice via first class mail in the form of a well-drafted postcard has
20 become a common practice in class actions at both the class certification and settlement stages.
21 Supp. Azari Decl., ¶ 8. The Settlement Class member addresses will be provided by Farmers from
22 its customer records, Supp. Angoff Decl., Ex. 1, ¶ 72, and in order to ensure the most accurate
23 mailings possible, the addresses will be certified using the Coding Accuracy Support System
24 (“CASS”) and verified through Delivery Point Validation (“DPV”). Supp. Azari Decl., ¶ 11.
25 Postcard notice has been successfully used in class action notice programs. Supp. Azari Decl., ¶¶
26 8-11. *See also Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1392 (upholding
27 short-form notice directing class members to website to learn full details of settlement).

28 Email notice is also an effective form of notice, especially where the class members are

1 accustomed to communicating with the defendant via email, as the Settlement Class Members do
2 with Farmers. *See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 57–58; Supp. Azari Decl., ¶
3 15. It has been successfully used in class action notice programs. Supp. Azari Decl., ¶ 16. Here,
4 the email notice is likely to reach Settlement Class Members because the email addresses will be
5 provided by Farmers, the email notice will be designed to avoid spam filters, and least two additional
6 attempts will be made to deliver the email noticed that bounce-back. Supp. Azari Decl., ¶ 17.
7 Further, Postcard notices will be sent to Settlement Class Members whose email notices are
8 ultimately undeliverable. Supp. Angoff Decl., Ex. 1, ¶ 74 .

9 The Notice Program is not limited to the Email and Postcard Notices. In addition, there will
10 be a substantial Publication Notice directed to California consumers. Supp. Angoff Decl., Ex. 1, ¶
11 71. This additional notice increases the likelihood that notice of the Settlement will reach a
12 substantial percentage of the Settlement Class Members. *See* Cal. R. Ct. 3.766(f) (publication notice
13 permitted “if it appears that all members of the class cannot be notified personally”). In short, the
14 Notice Program provides the best notice practicable under the circumstances of this case and
15 conforms to all aspects of the California Code of Civil Procedure and the California Rules of Court,
16 and comports with the guidance for effective notice set out in the Manual for Complex Litigation,
17 Fourth. Supp. Azari Decl., ¶ 22.

18 In response to specific questions posed by the Court, the deadline for Farmers to provide the
19 class data to the Settlement Administrator is November 30, 2019. The Settlement Administrator
20 will complete the mailed notice (email and postcard) as well as the publication notice within 60 days
21 of the date that preliminary approval is granted. Supp. Azari Decl., ¶ 20. This time period includes
22 the time necessary to complete the NCOA update, send the initial mailing, process any undeliverable
23 items, search for updated address information and re-mail any previously undeliverable notices. *Id.*
24 Settlement Class Members will be provided notice of any final judgment in the case on the
25 Settlement Website. The Long Form Notice will inform Settlement Class Members that the final
26 judgment will be posted to the website when it is entered. Supp. Azari Decl., ¶ 21. A tagline will
27 be added to the Postcard and Email Notices, in Spanish, that will let the recipient know that a Spanish
28 language version of the Long Form Notice is available at the Settlement website.

1 Supp. Azari Decl., ¶¶ 12,19.

2 **D. Objection/Opt-Out Procedure.**

3 The revised Settlement Agreement significantly simplifies the process for Settlement Class
4 Members to object to the proposed settlement. Specifically, per the terms of the amended Settlement
5 Agreement, Settlement Class Members may submit an objection at any time during the Opt-Out
6 Period⁶ by mailing the objection to the Settlement Administrator. Supp. Angoff Decl., Ex. 1, ¶ 69.
7 The Amended Settlement Agreement also does not require a Settlement Class Member’s objection
8 to include any legal authority, any information concerning the Settlement Class Member’s (or their
9 counsel’s) history of objecting to class action settlements, or any agreements between the Settlement
10 Class Member and their counsel. Supp. Angoff Decl., Ex. 1, ¶ 70. While the Amended Settlement
11 Agreement requires an objecting Settlement Class Member to state whether they intend to personally
12 appear and/or testify at the Final Approval Hearing, it does not require an objecting Settlement Class
13 Member to attend the Final Approval Hearing. *Id.*

14 The Court also inquired about the purpose of paragraph 93 in the original Settlement
15 agreement (now paragraph 94 in the Amended Settlement Agreement), which provides Farmers the
16 right to terminate the Settlement if the number of Settlement Class members who opt-out exceeds a
17 5% of the Settlement Class.⁷ Opt-out rights are essential to protect the due process rights of absent
18 class members. However, there is some tension between protecting those rights and encouraging
19 settlement. Defendants entering into class action settlements that provide absent class members the
20 right to opt-out of the settlement face the dilemma that they may pay a large sum of money to resolve
21 the case only to later face extensive, costly litigation brought by absent class members who opted-

22
23 ⁶ At the Court’s request, the Amended Settlement Agreement does not calculate the end of the Opt-
24 Out Period based on the date of the final approval hearing, since that date may change. The Parties
25 have agreed to calculate the Opt-Out deadline from the date of the preliminary approval order since
26 that date will be fixed. Supp. Angoff Decl., Ex. 1, ¶ 35. In addition, the specific date of the Opt-
27 Out deadline will be specified in each form of notice. *Id.* Based on the terms of the Amended
Settlement Agreement, the deadline to opt-opt out of or object to the settlement shall be 120 days
after Preliminary Approval, making the deadlines at least 60 days after completion of the Notice
Program. Supp. Angoff Decl., Ex. 1, ¶ 75.

28 ⁷ In response to the Court’s inquiry, the Parties’ Amended Settlement Agreement discloses this opt-
out threshold at which Farmers may terminate the Settlement.

1 out of the settlement. This risk is amplified when, like in this case, there is no reverter to the
2 defendant from the settlement fund to account for class members that opt-out of the settlement.
3 Here, Farmers will not receive an offset from the Settlement Amount to defend itself against any
4 claims brought by absent class members that opt-out of the Settlement. As a result, Farmers faces
5 a risk of paying to litigate the same claims twice—once in this class action and a second time in
6 cases brought by the Settlement Class members that opt-out. Courts “generally approve settlements
7 that contain blow up provisions, likely because, by insuring defendants from bad outcomes, they
8 encourage settlement.” 4 Newberg on Class Actions § 13:6 (5th ed.) (Terms of act in class action
9 settlement agreements—“Blow Up” provision).

10 To encourage settlements, class action settlements almost always include a “blow up
11 provision” such as Paragraph 93. The five percent blow up provision in this case would require
12 approximately 30,000 class members to opt out, a highly unlikely scenario. Such an extraordinary
13 number of opt outs would be a material change requiring the Parties to reevaluate the Settlement
14 terms.

15 **E. *Cy Pres* Distribution.**

16 The Parties have revised paragraph 86 of the Settlement Agreement (now paragraph 87 in
17 the Amended Settlement Agreement) to align the Settlement with California statutory provisions
18 and case law. Consistent with Code Civ. Proc., § 384, the Parties have revised the Settlement
19 Agreement to permit the Court to re-open any judgment to order a *cy pres* payment of any residual
20 funds and interest thereon. In addition, the Parties have selected a *cy pres* recipient that meets the
21 requirements of Section 384. Specifically, the Parties have chosen the Center for Auto Safety as the
22 *cy pres* recipient of any residual funds from the Settlement because the Center for Auto Safety is
23 “an independent, non-profit organization dedicated to advocating for auto safety, quality, and fuel
24 economy on behalf of our members and all drivers, passengers, and pedestrians,” that, among other
25 things, has worked to “[s]trengthen safety and highway standards that have dropped the death rate
26 on America’s roads from 5.2 per 100 million vehicle-miles traveled to under 1.2.” *About the Center*,
27 The Center for Auto Safety, <https://www.autosafety.org/about-cas/> (last visited Nov. 20, 2019). The
28 Center for Auto Safety has a focus on reducing the cost of insurance for consumers in California

1 and across the country. For example, for forty years the Center has published the “The Car Book”
2 and uses digital platforms to give consumers vehicle by vehicle ranking of prospective insurance
3 coverage price rankings to enable educated consumer decision-making on auto insurance. No party
4 or counsel has an interest in or involvement with the Center for Auto Safety.

5 Consistent with Code Civ. Proc., § 384, the claims administrator will report to the Court on
6 the existence of and expected distribution of any *cy pres* funds. No *cy pres* distribution will be made
7 without Court order.

8 **III. CONCLUSION**

9 For the reasons discussed above and in Plaintiffs’ motion for preliminary approval, the Court
10 should enter an Order granting preliminary approval of the proposed Settlement.

11
12 DATED: November 20, 2019

SCHONBRUN SEPLOW
HARRIS & HOFFMAN LLP

13
14 MEHRI & SKALET PLLC

15 BERGER MONTAGUE, P.C.

16 TYCKO & ZAVAREEI LLP

17
18 By:  _____
19 Jay Angoff
20 Attorneys for Plaintiffs

21
22
23
24
25
26
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

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 November 20, 2019, I caused the service of the following document(s) described as:

**PLAINTIFFS' SUPPLEMENTAL 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 November 20, 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 <i>Attorneys for Plaintiffs</i></p>	<p>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>9 Andrea Gold, Esq. agold@tzlegal.com 10 TYCKO & ZAVAREEI LLP 1828 L Street, NW 11 Washington, DC 20036 12 Tel.: (202) 973-0900 13 Fax: (202) 973-0950 14 <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>16 Jay Angoff, Esq. jay.angoff@findjustice.com 17 Cyrus Mehri, Esq. Cyrus@findjustice.com 18 MEHRI & SKALET PLLC 1250 Conneticut Ave. NW, Suite 300 19 Washington, DC 2003 20 Tel.: (202) 822-5100 21 Fax: (202) 822-4997 22 <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>