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17 Attorneys for Plaintiffs
18 ARTHUR BODNER and MICHAEL FELKER,
19 On behalf of themselves and all others similarly situated

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 FOR THE COUNTY OF LOS ANGELES, SPRING STREET COURTHOUSE

22 ARTHUR BODNER and MICHAEL FELKER, on)
23 behalf of themselves and all others similarly)
24 situated)
25 Plaintiffs,)
26)
27 v.)
28 BLUE SHIELD OF CALIFORNIA LIFE AND)
HEALTH INSURANCE COMPANY, Does 1)
through 25, Inclusive,)
Defendants.)

CASE NO. BC516868
Assigned to Honorable Elihu M. Berle, D 6, Rm 211
PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN ORDER GRANTING: (1) FINAL APPROVAL OF CLASS-ACTION SETTLEMENT; (2) ATTORNEY FEES, LITIGATION EXPENSES, CLASS REPRESENTATIVE INCENTIVE AWARDS, AND (3) SETTLEMENT ADMINISTRATIVE EXPENSES
Date: May 28, 2020
Time: 10:00 a.m.
Place: Department 6

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

2 PLEASE TAKE NOTICE that on May 28, 2020 at 10:00 a.m., or as soon thereafter as the matter
3 may be heard, before the Honorable Elihu Berle, presiding in Department 6 of the Superior Court of
4 California for the County of Los Angeles, located at Room 211, Spring Street Courthouse, 312 North Spring
5 Street, Los Angeles, CA 90012, Plaintiffs Arthur Bodner and Michael Felker, on behalf of themselves and
6 the Class, will move the Court for an Order:

7 (1) Granting final approval of the settlement of this certified class action lawsuit against Defendant
8 Blue Shield of California Life and Health Insurance Company;

9 (2) Awarding attorney fees to Class Counsel in the amount of **\$4,166,250**;

10 (3) Awarding litigation costs in the amount of **\$655,433.46**;

11 (4) Providing service awards for Plaintiffs Arthur Bodner and Michael Felker, as Class
12 Representatives, in the amount of **\$10,000** each; and

13 (5) Authorizing the payment of **\$98,508** in settlement administrative expenses to KCC Class Action
14 Services, Inc.

15 This Motion is based on this Notice, the attached memorandum of points and authorities; the
16 Declarations of Joshua S. Davis, Antony Stuart, Kathryn Trepinski, Michael Felker, Arthur Bodner and
17 Matthew Neylon, the Court's files and records in this action; and upon such other matters and additional
18 evidence as may be presented at or before the hearing.

19 DATED: March 30, 2020

GIANELLI & MORRIS
STUART LAW FIRM
LAW OFFICE OF KATHRYN TREPINSKI

20
21 By: Joshua S. Davis

22
23 ROBERT S. GIANELLI
24 JOSHUA S. DAVIS
25 Attorney for Plaintiffs ARTHUR BODNER
26 and MICHAEL FELKER, on behalf of
27 themselves and all others similarly situated
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On January 28, 2020, this Court granted preliminary approval of the \$12.5 million common fund
4 class action settlement of this matter. This is a non-reversionary cash settlement and Class Members¹ need
5 *not* submit a claim to receive a payment. The \$12.5 million settlement represent between 43% to 50% of
6 Blue Shield’s potential maximum liability for unpaid health insurance benefits and is an excellent result. In
7 granting the preliminary approval motion, this Court found that the settlement falls within the range of
8 reasonable settlements for possible final judicial approval. The Court directed that notice of the settlement
9 be provided to Class Members. Nothing has occurred since preliminary approval that mandates any
10 variance from the Court’s prior determinations that the settlement is fair, reasonable and adequate.

11 On February 28, 2020, the Settlement Administrator, KCC Class Action Services, sent the Court-
12 approved class notice, with each Class Members’ specific estimated settlement amount, to all 24,739 Class
13 Members. Objections are due on April 28, 2020. Few, if any objections are anticipated.

14 The common fund total settlement of \$12.5 million includes the amounts that will be
15 paid for notice and settlement administration costs, class representative service awards, attorney fees and
16 litigation expenses. Pursuant to the Settlement Agreement, and as detailed in the disseminated notice of the
17 Settlement, the firms of Gianelli & Morris, Stuart Law Firm and the Law Offices of Kathryn Trepinski
18 (“Class Counsel”) seek an award of 33 and 1/3% of the \$12.5 million common fund, for a total of
19 **\$4,166,250** in attorney fees, and reimbursement of **\$655,433.46** in litigation expenses. The requested fee
20 award is supported by the common-fund doctrine, under which courts routinely approve class action
21 attorney fee awards averaging around one-third of the recovery. The award is also supported by a lodestar
22 cross-check method. The litigation expenses were all reasonably incurred and necessary to obtain the
23 Settlement in this case.

24 Plaintiffs also seeks approval of service awards of **\$10,000** for Plaintiffs Michael Felker and
25 Arthur Bodner (the “Class Representatives”) for their significant efforts in pursuing this case, and to
26 authorize payment of the settlement administrative expenses in the amount of **98,508**.

27
28 ¹ All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Preliminary Approval Order.

1 **II. STATEMENT OF FACTS**

2 **A. Litigation history**

3 For a detailed history of the litigation and a summary of the settlement negotiations, see
4 Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, and the supporting declaration of
5 Class Counsel to that motion, which is incorporated by reference into this Motion.

6 **B. The Settlement**

7 The common fund total settlement is \$12.5 million, which includes the amounts that will be
8 paid for notice and settlement administrative expenses, class representative service awards, attorney fees,
9 and litigation expenses. (See Amended Settlement Agreement filed on January 9, 2020 (“Settlement
10 Agreement” or “Settlement”), ¶¶ 10(j) and 11.) There is no reversion to Blue Shield of any of the common
11 fund monies and the distribution to Class Members will be made without the necessity of claim forms. (*Id.*,
12 ¶¶ 16, 19.) The Court granted preliminary approval of the Settlement on January 28, 2020. The Court
13 provisionally certified the following Class:

14 “All individuals who are or were enrolled in, a Blue Shield Vital Shield series of
15 policies, including but not limited to Vital Shield 2900, Vital Shield 2900-G, Vital
16 Shield Plus 2900, Vital Shield Plus 2900-G, Vital Shield 2900 Plus Generic Rx, Vital
17 Shield Plus 2900 Generic Rx-G, Vital Shield 900, Vital Shield 900-G, Vital Shield
18 Plus 900, Vital Shield Plus 900-G, Vital Shield 900 Plus Generic Rx, Vital Shield
19 Plus 900 Generic Rx-G, Vital Shield Plus 400, Vital Shield Plus 400-G, Vital Shield
20 Plus 400 Generic Rx, Vital Shield Plus 400 Generic Rx-G, and were mailed notice as
set forth herein, excluding persons for whom both of the following is true: (1) the
person did not incur any expanded deductible or co-insurance/co-payment maximum
up to and including January 1, 2019; and (2) the person was not enrolled in a Vital
Shield Policy as of January 1, 2019.” (the “Class or Class Members”)

21 **C. Distribution of the Settlement**

22 From the gross settlement amount of \$12.5 million (the “Gross Settlement Amount”), the attorney
23 fees and costs, administrative expenses and service awards to the Class Representatives will first be
24 deducted, to result in a net settlement fund, which is approximately \$7.56 million (the “Net Settlement
Fund”). (Settlement, ¶ 10(l).)

25 Class Members who do not request exclusion from the Class will receive a *pro rata* distribution
26 from the Net Settlement Fund based on their Actual Damages incurred, through December 31, 2018, which
27 is the last year for which there is complete claims data. (Settlement, ¶¶ 10(l), 15-16; Ex. 4 to Settlement, p.
28 1.) Actual Damages refers to the difference between what each Class Member received in health insurance

1 benefit payments from Blue Shield, and what they would have received if Plaintiffs prevailed on all
2 theories and defenses. (Ex. 4 to Settlement, p. 1.)

3 There are several exceptions to the pro rata distribution, guaranteeing certain minimum payments.
4 Class Members who are no longer Vital Shield members after December 31, 2018, and whose pro-rata
5 distribution is less than \$10.00, will receive a \$10.00 distribution. (Ex. 4 to Settlement, p.1) Class Members
6 enrolled in a Vital Shield policy after December 31, 2018, but who did not have Actual Damages by that
7 date, will receive a \$50.00 distribution. (*Id.*) Class Members enrolled in a Vital Shield policy after
8 December 31, 2018 who had Actual Damages by that date, will receive their pro rata distribution or \$50.00,
9 whichever is greater. (*Id.*)

10 **D. How the distribution plan was determined**

11 In preparation for trial in this matter, Plaintiffs retained forensic accountants who independently
12 analyzed claims data from January 1, 2010 through December 31, 2018 to determine potential damages in
13 this case for every single Class Member. (Davis Decl., ¶ 35.) Blue Shield similarly retained an expert who
14 also examined the claims data. Both experts estimated overall damages for the Class at between \$25 million
15 and \$29 million. (*Id.*) Both parties' damage models also made determinations for each individual Class
16 Members' Actual Damages (*Id.*)

17 Following the final mediation at which the \$12.5 million settlement was reached, the Parties
18 continued to work cooperatively to resolve any discrepancies in individual Class Members' Actual
19 Damages to ensure the results were accurate and to prepare a distribution list. (Davis Decl., ¶ 36.) The
20 formula used to calculate each Class Members' Actual Damages and estimated Settlement Check², is
21 attached as Exhibit 4 to the Settlement.

22 The parties, with the advice of their respective experts and consultants, have satisfied themselves
23 that the common fund of \$12.5 million and *pro-rata* distribution to the Class Members based upon Actual
24 Damages fairly and equitably distributes the settlement proceeds among the Class Members. (Davis Decl.,
25 ¶ 41.)

26 **E. Attorney fees**

27 The Settlement provides that Class Counsel will be paid 33 and 1/3% of the common fund

28 ² Settlement Check means the check(s) containing the sum that each Class Member is entitled to receive as payment under this Settlement and the approved Distribution Plan, as defined in the Settlement Agreement.

1 for attorney fees. (Settlement, ¶ 24.) Class Counsel will be also be reimbursed for litigation expenses
2 incurred in this lawsuit up to \$655,433.46. (*Id.*, ¶ 25.)

3 **F. Class Counsel invested substantial time and resources to reach this successful**
4 **settlement**

5 Class Counsel undertook this complicated and challenging class action case on a contingency
6 basis. (Davis Dec., ¶ 10.) As detailed in the motion for preliminary approval and in the concurrently filed
7 declarations of Class Counsel, this case has been vigorously litigated for more than six years, requiring a
8 substantial expenditure of time and resources. Class Counsel worked a total of 4,054.8 hours and incurred
9 \$655,433.46 in litigation expenses to obtain the successful Settlement. (See Davis Dec., ¶¶ 48, 66; Stuart
10 Dec., ¶ 13; Trepinski Dec., ¶ 19.)

11 **III. NOTICE WAS ADEQUATE AND EFFECTIVE.**

12 On January 28, 2020, this Court appointed KCC Class Action Services, LLC as the Settlement
13 Administrator. (Order Granting Preliminary Approval, p. 4.) On February 12, 2020, Blue Shield provided
14 KCC with a list of the last known mailing addresses for the 24,739 Class Members identified in the
15 distribution list attached as Exhibit 4 to the Settlement. (Declaration of Matthew Neylon, ¶2.) KCC
16 processed the mailing addresses through the National Change of Address database and obtained updated
17 addresses. (*Id.*) KCC entered the data referenced above into a proprietary database to be used for mailing
18 the Class Notice to Class Members. (*Id.*)

19 On February 28, 2020, KCC caused the class notice, approved by the Court in the form attached
20 as Exhibit A to the declaration of Matthew Neylon (the “Class Notice”), to be mailed via the United States
21 Postal Service by first class mail, postage prepaid, to the 24,739 Class Members identified in the data
22 provided by Blue Shield. (Neylon Dec., ¶3.) Each Class Notice was custom-tailored to the Class Member
23 to identify their estimated settlement amount as set forth in the Distribution List. (*Id.*)

24 KCC also posted information regarding the Settlement on the website
25 <http://blueshieldclassaction.com>, including the full Settlement Agreement. (Neylon Dec., ¶4.) KCC also
26 established a telephone hotline to get information regarding the Settlement. (*Id.*, ¶5.)

27 ///

28 ///

1 **IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE CLASS ACTION**
2 **SETTLEMENT**

3 The Court already determined, preliminarily, that the Settlement is fair, reasonable, and
4 adequate; is free of collusion or other indicia of unfairness; and falls within the range of possible final
5 judicial approval. The points and authorities, declarations, and documents submitted in support of the
6 preliminary approval and the Court's findings and conclusions remain equally applicable at this final
7 approval stage and are incorporated into this motion by reference.

8 As on preliminary approval, the inquiry now remains essentially the same—the Court's final
9 responsibility in reviewing a proposed class action settlement is to ensure that the settlement is fair,
10 adequate, and reasonable. If so, it should be approved. *7-Eleven Owners for Fair Franchising v. Southland*
11 *Corp.* (2000) 85 Cal.App.4th 1135, 1145, quoting *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,
12 1801 (internal quotations and citations omitted). "Strong judicial policy ... favors settlements, particularly
13 where complex class litigation is concerned," so long as there is no indicia of collusion or unfairness
14 among the negotiating parties. *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276, *cert.*
15 *den.*, (1992) 506 U.S. 953.

16 In making this determination, the Court should consider all relevant factors, particularly:

17 (1) the strength of plaintiffs' case, (2) the risk, expense, complexity, and likely
18 duration of further litigation, (3) the risk of maintaining class action status through
19 trial, (4) the amount offered in settlement, (5) the extent of discovery completed and
20 the stage of proceedings, (6) the experience and views of counsel, and (7) the
21 reaction of the class members to the proposed settlement.

22 *7-Eleven Owners, supra*, 85 Cal.App.4th at 1146 (citation omitted). Where a good-faith settlement is
23 reached through arm's-length bargaining, after qualified opposing counsel have properly developed their
24 claims and defenses, and the number of objectors is small, there is a presumption of fairness. *Id.*

25 Nothing has occurred since preliminary approval that mandates any variance from the Court's
26 prior determinations that the Settlement was reached through arm's-length negotiation, without collusion or
27 other indicia of unfairness to the Class, after extensive discovery and litigation. Nor does any subsequent
28 event affect the Court's preliminary assessments that the strength of the claims at issue; the risk,
complexity, and likely duration of continued litigation; and Class Counsel's experience and views of the
Settlement all support Settlement approval.

Independent of the foregoing, there can be no question that the Settlement is fair and reasonable.

1 The Settlement provides very significant monetary relief to a class of former and current Vital Shield
2 members, none of whom have previously asserted their rights individually. Although the Class response is
3 not yet known, few objections or exclusions are anticipated. Apart from a moderate service award, the
4 Class Representatives are not seeking or receiving any relief apart from that to which each Class Member is
5 entitled. Negotiations occurred only after extensive litigation, discovery, and investigation to meaningfully
6 assess the case. Indeed, the Settlement was reached shortly before trial was set to commence. Further, the
7 Settlement was achieved only through extensive arm's length negotiations under the guidance of two
8 highly-respected mediators. These factors confirm that the presumption of fairness applies.

9 **A. Strength of Plaintiffs' case and the risks of litigation**

10 As indicated on preliminary approval, Plaintiffs believe that the class claims are legally
11 meritorious, and present a reasonable probability of a favorable determination on behalf of the Class, as is
12 amply borne out by the significant amount offered in settlement by Blue Shield. At the same time, there is
13 undeniably significant litigation risk that is avoided by the Settlement. (*See, generally*, Davis Dec., ¶¶ 17,
14 20, 22, 24, 38-40; Jan. 21, 2020 Rpt. Transcript of Proceedings, p. 7:6-7.)

15 For instance, Blue Shield has forcefully argued the Vital Shield policies unambiguously and
16 expressly informed its enrollees how the deductible and out-of-pocket maximum provisions operated.
17 (Davis Dec., ¶ 17.) In its summary judgment ruling, the Court stated it might in fact agree with Blue
18 Shield's construction of the Vital Shield policies, when it held Blue Shield's handling of Mr. Bodner's
19 claims "appears to comport with the policies." (May 22, 2018 Rpt. Transcript of Proceedings, p. 37:13;
20 Davis Dec., ¶ 20.) If this Court were to so interpret the Vital Shield policies at the first phase of the
21 bifurcated trial on declaratory relief, and so instruct the jury in phase 2, there is a high probability the jury
22 would find no breach of contract or bad faith. (*Id.*)

23 The Court also indicated when denying Blue Shield's Motion in *Limine* No. 1, that the
24 question was a close call, and it still might sustain objections to Plaintiffs' evidence of damages at trial
25 absent further evidence of the amount Class Members paid their providers or for which providers pursued
26 them. (Davis Dec., ¶ 24.) This could have resulted in a significant reduction in damages given the
27 difficulties inherent in such proof. (*Id.*)

28 Plaintiffs believe such defense arguments would be overcome. (Davis Dec., ¶ 39.) But any
realistic assessment of the case must admit that the outcome of these legal and factual disputes is uncertain,

1 that true litigation risk exists for all parties, and that at a minimum, trial and inevitable appeal would
2 present a substantial delay in obtaining any relief for the Class. (*Id.*)

3 **B. The expense and duration of further litigation**

4 Plaintiffs face further time and expense in pursuing this case through trial and appeal. This
5 complex case has been litigated fully and intensively by the parties for over six years. The firms involved
6 are sophisticated litigators, who are well acquainted with appellate proceedings. If the case were tried, it is
7 a near certainty that post-trial appellate proceedings would ensue. Therefore, this Settlement is timely and
8 appropriate. (Davis Dec., ¶ 40.)

9 **C. The Settlement amount**

10 A settlement is fair, adequate and reasonable so long as it falls within the “ballpark of
11 reasonableness.” 4 *Newberg on Class Actions* § 13:51 (5th ed. 2019). Here, maximum potential damages
12 are between \$25 million and \$29 million. The Gross Settlement Amount of \$12.5 million represents about
13 43% to 50% of the total potential damages in this lawsuit, assuming Plaintiffs prevailed on every theory
14 and defeated every defense. Given the significant risk that Plaintiffs would not prevail in this case at all,
15 that the Court could exclude evidence of damages, or that any damage reward would be significantly
16 reduced, this is an excellent result for Class Members. It is well within or exceeding the range of
17 settlements commonly approved by California state and district courts. *See, e.g., In re Mego Fin. Corp.*
18 *Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (recovery of 16.67% of the potential recovery adequate in light of
19 the plaintiffs’ risks); *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. 2014) 303 F.R.D. 611, 623-624
20 (finding settlement of between 9% and 27% of total potential liability to be fair, adequate and reasonable);
21 *Glass v. UBS Fin. Serv.* (N.D. Cal. 2007) 2007 WL 221862, at *4 (approving settlement that constituted
22 only approximately 25 to 35% of estimated actual loss to the class); *Nichols v. Smithkline Beecham Corp.*
23 (E.D. Pa. 2005) 2005 WL 950616, *16 (approving settlement of between 9.3% and 13.9% of claimed
24 damages).

25 **D. Equitable distribution of Settlement benefits**

26 At the final approval stage, “[a]n allocation formula need only have a reasonable, rational basis,
27 particularly if recommended by experienced and competent class counsel.” *In re Am. Bank Note*
28 *Holographics, Inc. Sec. Litig.* (S.D.N.Y. 2001) 127 F.Supp.2d 418, 429-430.

1 Here, as set forth above, the Settlement provides for an equitable *pro rata* distribution of
2 settlement benefits among the Class Members. There is no claims process. Instead, cash benefits will be
3 automatically distributed to the 24,739 Class members. The administrative mailing and payment
4 procedures are designed to maximize the likelihood of actual receipt of benefits by each class member. The
5 average settlement check will be \$377.00. (Davis Dec., ¶ 37.)

6 **E. The extent of discovery and proceedings completed**

7 As summarized in the motion for preliminary approval, and detailed in the concurrently filed
8 declarations of Class Counsel, this case has been actively litigated for more than six years. (Davis Dec., ¶¶
9 9-35.) Among many other litigation activities, there have been 14 depositions, and more than 611,576
10 pages of documents have been produced and reviewed. (*Id.* at ¶¶ 12-13.) A class was certified after
11 extensive class certification briefing. (*Id.* at ¶¶ 14-15.) Class Counsel obtained and analyzed, with
12 assistance from forensic accountants and health economists, the class data and claims history for every
13 single Vital Shield enrollee. (*Id.* at ¶¶ 27-28, 35.) Class Counsel, with expert assistance, further built a
14 program to reprocess all the enrollee claims to determine what they would have received in health
15 insurance benefits if Plaintiffs prevailed in this lawsuit, and how that differed from what they did receive,
16 in order to derive each Class Members' Actual Damages. (*Id.*)

17 **F. Absence of “obvious defects” or indicia of unfairness.**

18 The litigation in this case was fully adversarial, with counsel for each side vigorously advocating
19 their clients' respective positions, as reflected in the Court's docket. The Settlement was reached only after
20 near total pre-trial litigation, with the assistance of two highly respected mediators, Robert Kaplan and
21 Edwin Oster, who guided several mediation sessions. (Davis Dec., ¶¶ 9-29.)

22 **G. Experience and views of counsel.**

23 Class Counsel is experienced in prosecuting insurance class actions, including class actions against
24 health plans over the denial of health benefits. (Davis Dec. at ¶¶ 4-5, 44.) Class Counsel are well suited to
25 realistically assess the fair and reasonable value of the claims at issue. (*Id.*) Class Counsel believe the
26 Settlement represents a fair and reasonable resolution to this matter in light of the various risks and costs to
27 the respective parties of continued litigation. (*Id.* at ¶ 43.)
28

1 **H. Reaction of the Class Members.**

2 Class Member objections are not due until April 28, 2020. Plaintiffs anticipate there will be few, if
3 any objections.

4 In sum, this Settlement meets the standard for final approval in California, and should be finally
5 approved.

6 **V. THE COURT SHOULD GRANT FINAL APPROVAL TO THE ATTORNEY FEES AND**
7 **COSTS SET FORTH IN THE SETTLEMENT AGREEMENT**

8 **A. Class Counsel’s requested fee award is reasonable and should be granted.**

9 Pursuant to the Settlement Agreement, and as detailed in the disseminated notice of Settlement,
10 Class Counsel seeks an award of 33 and 1/3% of the \$12.5 million common fund, for a total of **\$4,166,250**
11 in attorney fees. The requested fee award is fair and reasonable in light of the significant time and resources
12 that Class Counsel have invested and will continue to invest in overseeing the administration of the
13 Settlement, the considerable risks Class Counsel have undertaken in pursuing this case on a contingency
14 basis, and the outstanding result achieved. Class Counsel’s request for one-third of the common fund falls
15 well within the range of fee awards commonly granted by courts in California.

16 **1. Class Counsel’s requested fees are fair and reasonable under the**
17 **common fund doctrine**

18 It is well recognized that an attorney “who recovers a common fund for the benefit of persons
19 other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing*
20 *v. Van Gemert* (1980) 444 U.S. 472, 478. The California Supreme Court has endorsed the common-fund
21 attorney-fee doctrine for non-reversionary settlements in *Laffitte v. Robert Half Int’l* (2016) 1 Cal.5th 480,
22 503. In doing so, the Court held “[w]e join the overwhelming majority of federal and state courts” that
23 support calculating Class Counsel’s fees as a percentage of the common fund. *Id.* The Court explained that
24 the common-fund method had numerous “recognized advantages” including “relative ease of calculation,
25 alignment of incentives between counsel and the class, a better approximation of the market conditions in a
26 contingency case, and the encouragement it provides counsel to seek an early settlement and avoid
27 unnecessarily prolonging the litigation.” *Id.* The Court further explained the common fund method was
28 preferable because it “rewards counsel for success and penalizes it for failure. *Id.* at 493 (citation omitted).

1 The common fund method also fairly “distributes the cost of hiring an attorney among all the parties
2 benefited.” *Id.* at 489.

3 Courts routinely approve class action attorney fee awards “average[ing] around one-third of the
4 recovery.” *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11. Indeed, the Supreme Court in
5 *Laffitte* notably affirmed an award of one-third of a \$19 million common fund. *Id.* at 488 (affirming
6 appellate court’s finding that “an award of one-third the common fund was in the range set by other class
7 action lawsuits.”). *See, also, e.g., Beaver v. Tarasada Hotels* (S.D. Cal. 2017) 2017 WL 4310705
8 (approving 33 and 1/3% of common fund); *Mathein v. Pier 1 Imports, Inc.* (C.D. Cal. 2018) 2018 WL
9 1993727 (approving 1/3 of \$3.5 million common fund for attorney fee award under California law);
10 *Emmons v. Quest Diagnostics Clinical Lab.* (E.D. Cal. 2017) 2017 WL 749018 (approving attorney fee
11 award of 1/3 of common fund settlement under California law); *Smith v. CRST Van Expedited, Inc.* (S.D.
12 Cal. Jan. 14, 2013) 2013 WL 163293, at *5 (recognizing 33% as California benchmark for fee awards in
13 class actions); *Singer v. Dickinson & Co.* (C.D. Cal. 2010) 2010 WL 2196104, at *22-23 (approving
14 33.33% of \$1 million settlement as “fall[ing] within the typical range of 20% to 50% awarded in similar
15 cases,” and citing awards of between one-third and 40% of the common fund).

16 Not only is Class Counsel’s requested fee award of 33 and 1/3% within the ordinary range
17 approved by the courts, but such a fee is amply justified based on the following factors, (1) the substantial
18 result achieved on behalf of the Class; (2) Class Counsel’s extensive experience and skill; (3) the
19 substantial time and effort that Class Counsel devoted to the case; and (4) the nature of contingent fee
20 award and the risks that Class Counsel undertook to prosecute this case. *See Laffitte, supra*, 1 Cal. 5th at
21 504-05 (held court may consider various factors in determining the reasonableness of the fees).

22 **a. Class Counsel achieved an outstanding result**

23 Class Counsel have achieved an excellent result. The \$12.5 million settlement represents between
24 43% and 50% of total potential damages in this lawsuit. Given the significant risk that Plaintiffs would not
25 prevail at all if this case goes to trial, or that the damage award would be significantly be reduced, this
26 represents an excellent result for Class Members. (Davis Dec., ¶ 43.)

27 **b. Class Counsel’s extensive experience and skill**

28 The requested fee award of one-third the total Gross Settlement Fund is further justified in light of

1 Class Counsel’s skill and specialized knowledge. Class Counsel has over thirty years of experience
2 litigating class action actions against insurance companies. (*Id.* at ¶¶ 4-5, 44.) Class Counsel’s requested
3 attorney fee of one-third of the settlement fund is well within the norm for attorneys with their skills and
4 depth of experience. *See, e.g., Ruiz v. XPO Last Mile, Inc.* (S.D. Cal. 2017), 2017 WL 6513962, at *7
5 (awarding class counsel’s request for 35% in attorney fees in part because of the experience and skill of
6 counsel); *Ogbuehi v. Comcast of Calif.* (E.D. Cal. 2015) 2015 WL 3622999, at *11 (“The experience of
7 class counsel also supports a 33.33 percent award.”); *Franco v. Ruiz Food Prods.* (E.D. Cal. 2012) 2012
8 WL 5941801, at *16 (awarding 33% in attorney fees in part because “Class Counsel [were] experienced
9 class litigators....”)

10 **c. Class Counsel have devoted substantial time and effort to this case**

11 As detailed above, in the preliminary approval motion, and in the concurrently filed declarations of
12 Class Counsel, Class Counsel have devoted substantial time and effort to this lawsuit. Class Counsel have
13 litigated it vigorously for six years up to trial. In all, Class Counsel have worked 4,054.8 hours on this
14 matter to date. (Davis Dec., ¶¶ 46-55.) This time investment was necessary to successfully resolve the
15 matter for the Class. Class Counsel expect to continue to perform work on this case after final approval.
16 Among other things, Class Counsel expect to spend time answering Class Members’ questions and
17 overseeing the continued administration of the Settlement. The considerable time and effort that Class
18 Counsel spent litigating this case favors the requested fee award of 33 and 1/3%. *See Laffitte, supra*, 1
19 Cal.5th at 505 (recognizing time spent by counsel as important factor for determining attorney fees under
20 percentage method).

21 **d. Class Counsel undertook considerable risk of non-payment in**
22 **prosecuting this case on a contingency basis**

23 Class Counsel undertook significant risks in prosecuting this case entirely on a contingency basis.
24 Class Counsel could only recover their fees and expenses if Plaintiffs prevailed. Such risks of non-payment
25 further support an award of one-third the Gross Settlement Amount. *See, e.g., Barbosa v. Cargill Meat*
26 *Solutions Corp.* (E.D. Cal. July 2, 2013) 297 F.R.D. 431, 449-50 (justifying fee award of 33% of total
27 settlement amount in part on fact that “the action was taken on a contingency fee basis and, as such, Class
28 Counsel invested time, effort, and money with no guarantee of recovery”); *In re Heritage Bond Litig.* (C.D.

1 Cal. June 10, 2005) 2005 WL 1594403, at *21 (justifying fee award of 33 and 1/3% of common fund based
2 in part on “the significant risk assumed in litigating this case on contingency fee without any guarantee of
3 compensation”).

4 **B. The lodestar cross-check confirms the reasonableness of the fee request**

5 While the California Supreme Court has endorsed the common fund method as the best method to
6 approximate the marketplace for attorney fees in a contingent case, the Court has indicated that trial courts
7 may still use the lodestar method to “cross-check” the reasonableness of the common fund method. *Laffitte*,
8 *supra*, 1 Cal.5th at 505. As the California Supreme Court made clear in *Laffitte*, however, the lodestar
9 calculation, when used as a cross-check, “does not override the trial court’s primary determination of the
10 fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on
11 the potential fee award.” *Id.* In conducting the cross-check, courts should not closely scrutinize each
12 claimed attorney-hour, but instead should use information on attorney time spent to “focus on the general
13 question of whether the fee award appropriately reflects the degree of time and effort expended by the
14 attorneys.” *Id.* The lodestar is calculated by multiplying hours reasonably expended by the prevailing
15 hourly rates for the attorneys. *Ketchum v. Moses* (2001) 24 Cal.4th 1124, 1131-32.

16 Here, the lodestar cross-check supports Class Counsel’s request for attorney fees. Class Counsel
17 spent 4,054.8 attorney hours investigating and prosecuting this case over a period of more than six years.
18 (Davis Dec., ¶¶ 48-55, 62; Stuart Dec., ¶ 13; Trepinski Dec., ¶ 13.) The extent of the discovery and motion
19 practice, coupled with Blue Shield’s aggressive defense, demonstrates the time expended was reasonable
20 and necessary to achieve the Settlement. This case was settled only after more than six years of contentious
21 litigation, just a few weeks before the scheduled trial. Blue Shield conceded nothing and fought Plaintiffs at
22 every turn.

23 The hourly rates of the attorneys from Gianelli & Morris are reasonable in view of the
24 attorneys’ skill and experience. The same rates have been approved numerous times for these attorneys in
25 other class action cases. (Davis Decl., ¶ 57). Indeed, these same rates were approved in January of 2016
26 following a contested fee application in *Gallimore v. Kaiser Foundation Health Plan, Inc.*, Case No.
27 RG12-616206 a class action where counsel prevailed at trial. (*Id.* at ¶ 58.) The hourly rates of Kathryn
28

1 Trepinski and Antony Stuart are also reasonable in view of their experience and qualifications as set forth
2 in their concurrently filed declarations.

3 The hours are documented in Class Counsel’s billing records and are demonstrated by the work
4 described herein and as reflected in the Court’s files. (Davis Dec., ¶ 55; Stuart Dec., ¶ 13-16 Trepinski
5 Dec., ¶¶ 21-22.) The following is a summary of the attorney hours, rates, and resulting lodestar, and is
6 verified in the declarations of Class Counsel. (Davis Dec., ¶ 62; Stuart Dec., ¶ 13; Trepinski Dec., ¶ 19.)

<u>Attorney</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Lodestar</u>
Gianelli & Morris			
Robert S. Gianelli	875.5	\$900/hr	\$787,950
Joshua S. Davis	1,914.1	\$700/hr	\$1,339,870
Adrian Barrio	561.4	\$675/hr	\$378,945
SUBTOTALS	3,351		\$2,506,765
Law Offices of Kathryn Trepinski			
Kathryn Trepinski	386.50	\$900/hr	\$347,850
Stuart Law Firm			
Antony Stuart	317.30	\$900/hr	\$285,570
TOTAL LOADSTAR	4,054.8		\$3,140,185

18 Class Counsel have invested \$3,140,185 worth of time in obtaining a fair and reasonable
19 settlement for the Class. Class Counsel now seek one-third of the Gross Settlement Amount in attorneys’
20 fees, or \$4,166,250. This amounts to a modest 1.33 multiplier, which is significantly less than multipliers in
21 many other cases.

22 Courts routinely approve multipliers ranging from 2 to 4 times the lodestar amount, or even higher
23 where appropriate. *See, e.g., Sutter Health Insured Pricing Cases* (2009) 171 Cal.App.4th 495, 512
24 (finding multiplier of 2.52 to be “fair and reasonable”); *Wershba v. Apple Computer, Inc.* (2001) 91
25 Cal.App.4th 224, 255 (“Multipliers can range from 2 to 4 or even higher.”); *Chavez, supra*, 162
26 Cal.App.4th at 66 (affirming attorney fees with lodestar multiplier of 2.5). Indeed, courts following *Lafitte*
27 have reaffirmed that a multiplier between 2 and 4 to be reasonable and not so “extraordinarily high” as to
28 require greater judicial scrutiny. *See Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F Supp.3d 1244,

1 1265 (finding that a 3.07 multiplier is “well within the range for reasonable multipliers” under *Laffitte*);
2 *Beaver v. Tarsadia Hotels* (S.D. Cal. 2017) 2017 WL 4310707, at *13 (“The one-third fee Class Counsel
3 seeks reflects a multiplier of 2.89 on the lodestar which is reasonable for a complex class action case.”).

4 The lodestar cross-check confirms that Plaintiffs’ fee request in this case is fair and reasonable and
5 should be approved.

6 **C. Class Counsel should also be reimbursed for their litigation expenses**

7 Pursuant to the Settlement and as detailed in the disseminated Class Notice, Class Counsel also
8 requests reimbursement from the common fund for out-of-pocket litigation expenses in the amount of
9 **\$653,433.46**. (Davis Dec., ¶¶ 66-69; Stuart Dec., ¶ 13; Trepinski Dec., ¶ 19.) *See Serrano v. Priest* (1977)
10 20 Cal.3d 25, 35 (common fund doctrine permits recovery of costs from the fund); *Rider v. County of San*
11 *Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “of necessity,
12 and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees”).

13 The costs included, among other things, the following significant expenses:

- 14 • Consultant expenses to analyze claims data produced by Blue Shield to determine whether it was
15 complete and accurate, and to assist with claims data depositions - \$48,590.58. (Davis Dec., ¶ 69(a).)
- 16 • Expert expenses to develop a computer program that could reprocess all Vital Shield member claims
17 since 2010 to determine each Class Member’s damages under Plaintiffs’ theory of the case, and then to
18 reprocess each Class Member’s claims - \$284,980.25. (*Id.*, ¶ 69(b).)
- 19 • Computer forensics discovery consultants to recover and extract emails from Blue Shield’s archived
20 systems and to advise on archival e-discovery deposition - \$44,080.19. (*Id.* at ¶ 69(c).)
- 21 • Class Certification Notice to Class Members - \$55,492.00. (*Id.* at 69(d).)

22 The amounts incurred above, and other amounts detailed in the Class Counsel declarations, were
23 reasonable because the costs were necessary to the tasks performed.

24 **VI. THE COURT SHOULD GRANT INCENTIVE AWARDS TO CLASS REPRESENTATIVES**

25 California’s courts approve incentives for class representatives as a matter of public policy
26 to ensure that meritorious class action litigation is pursued. *See, e.g., In re Cellphone Fee Termination*
27 *Cases* (2010) 186 Cal.App.4th 1380, 1393-95 (approving \$10,000 in incentives to four class
28 representatives, citing rationale that incentives should be awarded to compensate class representatives for

1 expense and risk incurred in conferring benefit to class), *and see citations infra*. As set forth in the
2 concurrently-filed declarations of the Class Representatives, Bodner and Felker have dutifully performed
3 their responsibilities as a class representatives for over six years. Numerous courts have approved service
4 awards well above the \$10,000.00 award requested here. *See In re Immunex Sec. Litig.* (W.D. Wash. 1994)
5 864 F.Supp. 142, 145 (approving \$25,000 service awards to each of 11 class representatives); *In re Dun &*
6 *Bradstreet Credit Serv. Cust. Litig.* (S.D. Ohio 1990) 130 F.R.D. 366, 374 (approving \$215,000 in service
7 awards ranging between \$35,000 and \$55,000 per representative). In light of the Class Representatives’
8 services, the requested incentive awards of **\$10,000.00** each is reasonable.

9 **VII. SETTLEMENT ADMINISTRATIVE EXPENSES ARE FAIR AND REASONABLE AND**
10 **SHOULD BE APPROVED.**

11 As set forth in the accompanying declaration of Matthew Neylon, the total costs that KCC
12 incurred and to be incurred by KCC for settlement administration is **\$98,508.00**. (Neylon Dec., ¶ 6.) The
13 costs included expenses for formatting, printing and mailing custom notice to all 24,743 Class Members
14 with their estimated settlement amount, performing skip-trace address searches to obtain updated mailing
15 addresses on undeliverable Notices, receiving, reviewing and processing requests for exclusion, handling
16 inquiries from Class Members, and transmitting the settlement payments. (*Id.*) Accordingly, the Court
17 should grant final approval of payment to KCC, in the amount of \$98,508.00.

18 **VIII. CONCLUSION**

19 For all the above reasons, Plaintiffs respectfully request that the Court grant final approval of
20 the Settlement, Attorney Fees and Costs, Incentive Awards, and Settlement Administrative Costs, in their
21 entirety, as sought herein.

22 DATED: March 30, 2020

23 GIANELLI & MORRIS
24 STUART LAW FIRM
25 LAW OFFICE OF KATHRYN TREPINSKI

26 By: Joshua S. Davis
27 ROBERT S. GIANELLI
28 JOSHUA S. DAVIS
Attorney for Plaintiffs ARTHUR BODNER
and MICHAEL FELKER, on behalf of
themselves and all others similarly situated

1
2
3 **PROOF OF SERVICE**

Bodner v. Blue Shield

Case No. BC516868

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**STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 550 South Hope Street, Suite 1645, Los Angeles, CA 90071.

On **March 30, 2020**, I served the foregoing document described as

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN ORDER GRANTING: (1) FINAL APPROVAL OF CLASS-ACTION SETTLEMENT; (2) ATTORNEY FEES, LITIGATION EXPENSES, CLASS REPRESENTATIVE INCENTIVE AWARDS, AND (3) SETTLEMENT ADMINISTRATIVE EXPENSES

on the interested parties in this action by placing a true copy of the original thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED

By Electronic Service, I caused a true and correct copy of the above-entitled documents to be electronically transferred onto **CASE ANYWHERE FILE AND SERVE** via the Internet, which constitutes service, pursuant to *Order Authorizing Electronic Service dated 11/15/2013*.

(State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 30, 2020** at Los Angeles, California.

Shayn Adamson

SHAYN ADAMSON

SERVICE LIST

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ARTHUR BODNER and
MICHAEL FELKER, on behalf of
themselves and all others similarly
situated

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COMPANY