CONSUMER WATCHDOG
Harvey Rosenfield (SBN: 123082)
Harvey@ConsumerWatchdog.org
Benjamin Powell (SBN: 311624)
Ben@ConsumerWatchdog.org
6330 South San Vicente Blvd.
Suite 250
Los Angeles, CA 90048
Tel: (310) 392-0522

MEHRI & SKALET, PLLC
Jay Angoff *(Pro Hac Vice)*
Jay.Angoff@findjustice.com
Cyrus Mehri *(Pro Hac Vice)*
CMehri@findjustice.com
Michael Lieder *(Pro Hac Vice)*
MLieder@findjustice.com
2000 K Street NW, Suite 325
Washington, DC 20036
Tel: (202) 822-5100

MASON LLP
Gary Mason *(Pro Hac Vice)*
GMason@MasonLLP.com
Danielle Perry (SBN: 292120)
DPerry@MasonLLP.com
Theo Bell *(Pro Hac Vice)*
TBell@MasonLLP.com
5101 Wisconsin Avenue NW, Suite 305
Washington, DC 20016
Tel: (202) 429-2290

Attorneys for Plaintiffs and the Proposed Classes

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EILEEN-GAYLE COLEMAN and ROBERT CASTRO, on behalf of themselves and all others similarly situated, Plaintiffs, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION and USAA GENERAL INDEMNITY COMPANY, Defendants.	Case No. 3:21-cv-00217-RSH(KSC) **PLAINTIFFS' REPLY IN SUPPORT OF RENEWED MOTION FOR CLASS CERTIFICATION** **Hearing:** Date: Courtroom: 3B Judge: Hon. Robert S. Huie PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

Introduction

The crux of USAA's opposition to class certification is on *damages* issues. By contrast, on liability issues USAA says very little—because the liability issues are clearly amenable to class certification. The Court has already held (ECF 22) that Counts I and II state valid claims under Business & Professions Code § 17200 for violating § 1861.16(b) of the Insurance Code. By its express language, § 1861.16(b) requires USAA to sell all qualifying good drivers policies from its best-priced subsidiary. And that means a policy from United Services, not GIC—because for 100% of the members of the Good Driver class (and 97% of all good drivers insured through GIC), USAA's lowest priced policy is a United Services policy.[1] The resulting class-wide liability question under Counts I and II is simple: Has USAA violated 1861.16(b) by selling enlisted personnel and their families its higher-price GIC policies instead of its lower-priced United Services policies?[2]

Next, for Counts III and IV, which allege discrimination based on military status under the Unruh Act and the Military and Veterans Code, the class-wide issue is also clear: By placing enlisted personnel and their families in higher-priced GIC rather than United Services, the lower-priced company for officers, has USAA engaged in prohibited discrimination?

In short, for all four counts USAA has no plausible argument against numerosity, commonality, typicality, adequacy, or predominance on liability issues, which explains its singular focus on damages.

---

[1] *See* ECF 119-1 ¶ 9 ("about 97.0% of policyholders with collision coverage and good driver discount … paid more in GIC than they would have in USAA").

[2] Plaintiffs use a shorthand, describing GIC as selling coverage to "enlisted" personnel and their families, while United Services sells to "officers." United Services insures some high-ranking enlisted personnel, a point that USAA unnecessarily belabors. ECF 123 at 3.

On damages, USAA misconceives the governing standard. In its earlier ruling, the Court identified "predominance" as a key issue. In the Ninth Circuit, predominance is established for damages issues by a showing that damages can be "feasibly and efficiently calculated once the common liability questions are adjudicated." *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013). Plaintiffs have made that demonstration now—not just by having "created a *model* or methodology" for calculating damages for each class member, which this Court ruled was not enough (ECF 109 at 17), but by having calculated damages now for about 200,000 members of the good driver and discrimination classes. *See* ECF 119-1, 119-2, and 119-3. (These expert and rebuttal expert reports were unavailable for the previous round of briefing).

USAA's objections to these calculations are exaggerated and misleading. Contrary to USAA's statements in its opposition, "millions of individualized" inquiries or calculations will *not* be required to answer questions of injury or loss amounts. As this brief explains, those statements are mirages. The requirements of Rule 23 have been met. Without a class, tens of thousands of meritorious policyholder claims would go unaddressed. Given the high transaction costs that class members would have to incur to pursue their claims individually, USAA would evade essentially all class members' claims. And any non-class resolution, covering far fewer claims, would have much less deterrent effect.

Argument

I. A class action is "superior" to all "other available methods for fairly and efficiently adjudicating" this controversy.

The Court's earlier ruling on class certification identified Rule 23(b)(3) "predominance" as a sticky issue here. ECF 109. Yet USAA's opposition opens with a challenge to Rule 23(b)(3) "superiority" (ECF 123 at 8-12), speculating that insureds might be better served by seeking relief from the CDI than by proceeding

in this court. In making that argument, USAA gravely misconceives and misapplies the "superiority" standard.

First, USAA's "superiority" argument is a déjà vu. This Court has already rejected it, on USAA's motion to dismiss, by ruling that the CDI has neither primary nor exclusive jurisdiction over this case and that the filed-rate doctrine does not apply. ECF 22 at 8-9.[3] USAA should not be allowed to re-argue these points on class certification. *Second,* Rule 23(b)(3) delineates the factors pertinent to "superiority," *see, e.g.,* Fed. R. Civ. P. 23(b)(3)(A–D), and although the list is non-exhaustive, it does not include weighing the superiority of a class action against possible *administrative* relief. *See Amalgamated Workers Union v. Hess Oil V.I. Corp*., 478 F.2d 540, 543 (3d Cir. 1973) ("We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against … an administrative remedy"). And even more tellingly, if the possibility of agency enforcement could defeat certification, then classes would be denied all the time in securities, antitrust, employment discrimination, and environmental cases— given the SEC's, the FTC's, the EEOC's, and the EPA's enforcement powers. Rule 23 would be eviscerated. Congress and the Rules Committee intended private class actions to complement government enforcement.

Third, even *if* Rule 23(b)(3) superiority did contemplate comparing class actions to non-litigation alternatives, transferring proceedings would not be sensible at this stage of this case. Litigation is already well underway here. Belatedly re-routing this case to a government agency — for enforcement, if at all,

---

[3] This Court's ruling denying USAA's motion to dismiss does not conflict with a Washington district court's dismissal of a suit relying on Washington law. *See, e.g.*, ECF 123 at 10 (citing *Epstein v. USAA Gen. Indem. Co.*, Case No. 22-cv-684-MJP, 2022 U.S. Dist. LEXIS 191122, *at* *1 (W.D. Wash. Oct. 19, 2022)). As the Washington court took pains to point out, California's "version of the filed rate doctrine" and "anti- discrimination laws" differ from Washington's. *Id. at* *14.

at some undetermined time—is an inferior alternative. *Fourth*, administrative remedies would be inferior remedies here. The CDI lacks the power to award the relief sought here—refunds payable to policyholders. *State Farm Gen. Ins. Co. v. Lara*, 71 Cal. App. 5th 148, 159 (2021) (concluding that a retroactive refund was impermissible).[4] And the CDI has no jurisdiction over Unruh Act claims.

In sum, only a class action offers a mechanism for adjudicating the claims of all affected policyholders now–not later–and at low transaction costs. With "[t]hese considerations [being] at the heart of why the Federal Rules of Civil Procedure allow class actions," this case "vividly points to the need for class treatment." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017). The individual damages of each insured covered by the proposed classes "are too small to make litigation cost effective in a case against funded defenses and with a likely need for expert testimony." *Id.* A class action is superior to any other alternative for adjudicating this controversy.[5]

II. CDI has not approved USAA's charging higher rates for "good drivers" in GIC than in United Services.

Citing a 2014 CDI Market Conduct report (ECF 122-3 Exh. B), USAA also argues that it received CDI's "approval" to place enlisted "good drivers" in GIC and charge them higher rates. ECF 123 at 5. But in fact, that market conduct report

---

[4] USAA's two counterexamples are easily distinguishable. ECF 123 at 11. In one, the insurer issued $1.5 million in refunds because it had changed its pricing without CDI's knowledge or prior approval. *See* https://tinyurl.com/5bp42zk6. In the other, no insurer challenged the Commissioner's Covid-19 refund orders.

[5] USAA states that this lawsuit is "an attempt to second-guess … regulator-approved rates" or "have this Court set different ones for roughly 200,000 policyholders." ECF 123 at 1. Not so. "None" of the claims here challenge the reasonableness of regulator-approved rates, as the Court has already ruled. ECF 22 at 8-9. And none of the remedies Plaintiffs seek ask this Court to set rates: plaintiffs seek *restitution* for insureds for amounts they were overcharged. *Id.*

says *the opposite*: "All unacceptable or non-compliant activities *may not have been discovered.* Failure to identify, comment on, or criticize non-compliant activities in this state or other jurisdictions *does not constitute* acceptance of such practices." ECF 123-3 Exh. B at 27 (emphasis added). Further, as this Court has held, "Regardless of what Defendants' Placement Rules authorize or whether the Insurance Commissioner approved them, Defendants have not established that they are entitled to bypass the requirements of Section 1861.16(b)." ECF 22 at 13.

III. Plaintiffs' Experts' Model Sufficiently Establishes Predominance.

The Ninth Circuit explained in *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013)—a case that USAA never cites— that the test for predominance for damages is whether they can be "feasibly and efficiently calculated once the common liability questions are adjudicated." Through their expert reports, plaintiffs have now shown that. They have calculated loss amounts for all approximately 200,000 members of the classes.[6] Yet USAA, still trying to create "individualized inquiries" that would "engulf" common questions, perseverates about two things:

(1) USAA's first contrived issue is whether class members' losses, which they incurred by paying more for a GIC policy than they would have paid for a United Services policy, *might* be offset by *later* "mid-period" changes those insureds may have made to their policies, which might, in

---

[6] For every class member, the calculation follows the same five steps (ECF 119-3 ¶ 6), which replicate the methodology, base rates, and relativities that USAA set out in its filings with CDI. *Id.* ¶¶ 29–30. And all calculations use common evidence: USAA and GIC offer the same 11 insurance coverages for car insurance; each company assesses a base rate, charges the same base rate to all its policyholders, and then multiplies that base rate by "relativities," which are associated with "rating factors"; both USAA and GIC use the same rating factors and same categories for each rating factor; and for most factors, they use identical relativities. ECF 119-1 ¶¶ 14–22.

turn, affect plaintiffs' calculations of their premiums on eight sample dates. USAA calls this concern about who paid how much to GIC "variable A"— or "actual premiums." ECF 123 at 14.

(2) USAA's second contrivance is to argue that plaintiffs' damages theory supposedly depends on "impossible" assumptions, "untethered to their liability theory," about how much class members would have paid if, counterfactually, they had been offered United Services policies. ECF 123 at 21. USAA calls this its concern about "variable B" —or "but-for premiums." ECF 123 at 14.

Both these arguments are misleading and off-base. As shown below, USAA's speculations about "mid-period" changes that some insureds may have made to their policies turn out to be immaterial. And USAA's supposition that damages depend on calculating precisely how much each insured would have paid in premiums to United Services, if they'd been offered a United Services policy, misunderstands both the law and this case.

1. Whether insureds made "mid period" changes to their policies is immaterial.

"Mid-period" changes (what USAA calls "variable A") are immaterial here—for at least five reasons.

First, they are immaterial because USAA has not identified *any* class member who, because of a mid-period change, suffered *no* loss. Even for the two named plaintiffs, Coleman and Castro, who are the only two class members for whom USAA has attempted calculations, USAA does *not* argue that either was not injured because of "mid-period changes." Instead, USAA's expert (Ms. Watkins), acknowledges the fact of damage, while arguing that plaintiffs have overstated Coleman's loss for the class period by 5% (notwithstanding benchmark measurements) and *understated* Castro's by 2%. ECF 122-1 at 94. A 5% over-

estimate or 2% under-estimate are both small, going to weight not admissibility, and both acknowledge injury.[7] That result is underwhelming, to say the least. And in any event, an adversary's questions about *allegedly* omitted variables—on which, more in a minute—generally raise issues of weight not admissibility. *Bazemore v. Friday*, 478 U.S. 35, 400 (1986); *Hemings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002); *Apple iPod iTunes Antitrust Litig.*, No. 05-CV-0037 YGR, 2014 U.S. Dist. LEXIS 136437, at *21-22 (N.D. Cal. Sep. 26, 2014). This issue is a tempest in a teapot.

Second, not having made calculations for any other class members, USAA's conjecture that mid-period changes *might* be material for other class members cannot defeat class certification. *Third*, mid-period changes are also immaterial because plaintiffs' eight benchmark sample date measures (which USAA calls "snapshots") do not *fail* to pick up mid-period adjustments. A change in premium between one sample date and the next is *not* missed. It is just picked up by the next sample date measurement and therefore accounted for.

Fourth, mid-period changes in any class member's GIC premiums are also immaterial because the measure of any class members' loss is not a reduction in the GIC premium, which is the "variable A" number that USAA has looked at. Instead, loss is measured by *the spread* between a class member's GIC premium and the amount they would have paid for a lower-priced policy from *United Services*, which USAA has *not* looked at. A change in a GIC premium affects loss *only if* there would not be a corresponding change in a United Services premium

---

[7] Ms. Watkins also confirms the accuracy of Plaintiffs' expert's damages model for the whole class periods: the difference between the damages she calculated and the damages Mr. Schwartz calculated is approximately *two tenths of one percent* for both classes. ECF 122-1 at 115-116. (2/10 of 1% is the result of dividing the total in column 5 by the total in column 3, "Total Bias Dollars" divided by "Schwartz Primary damages").

for the same reason. And more *than 99% of the time* a change in a GIC premium will correlate with a corresponding change in the same direction for United Services premiums. ECF 119-2, ¶¶ 7 & 17; ECF 119-4, ¶ 14. As a result, mid-period changes "have minimal effect" on the size of an insured's loss. *Id.* ¶ 9. For this reason, too, USAA's remonstrations about mid-period changes and cancellations are much ado about nothing.

Fifth, whether and how plaintiffs account for mid-period changes is, in any event, not an issue bearing on *class certification*. It might be fodder for cross-examination *at trial*, but it is not grounds for excluding expert opinions at class certification and does not mean that individual issues predominate. *Maldonado v. Apple, Inc.*, No. 3:16-cv-04067-WHO, 2021 U.S. Dist. LEXIS 92483, at *16-17 (N.D. Cal. May 14, 2021) ("A jury might credit [defendant's]s interpretation of the data…. [b]ut that does not mean that individual issues predominate"). It means only that, if the jury agreed with USAA rather than with plaintiff's expert (Griglack), then plaintiffs would not succeed on the merits. *Id.*

2. Plaintiffs' Damages Do Not Depend on "Impossible Assumptions."

USAA's second objection to plaintiffs' damages theory (its "variable B" objection) is its claim that it is impossible to know what United Services' premiums would have been in a counterfactual world where GIC good drivers were charged "but for" United Services' premiums. According to USAA, those "but for" premiums would be "completely different from" United Services' historic premiums and would depend on "impossible assumptions." ECF 123 at 21-23. But that objection is misguided for at least two reasons.

First, there is no need to construct a United Services rate for a "but for" world. For the good driver class, the rate that every class member should have been charged, under § 1861.16(b), is the *actual* rate that United Services *was charging,* not an imagined "but for" rate. That follows from the plain language of the statute, which refers to the lowest rates *that are then being offered*: "insurer

shall sell, a good driver discount policy to a driver *from an insurer* within that common ownership, management or control group*, which offers* the lowest rates for that coverage." And for the discrimination class, the measure of damages is liquidated: since United Services' rates are in almost all cases higher than GIC rates, and the class excludes policyholders for whom GIC rates were lower, pegging the exact United Services rate is irrelevant. The Unruh Act provides for statutory damages in the amount of $4,000 regardless of the exact spread between GIC and United Services rates. Cal. Civ. Code § 52(a).

Second, the premise behind USAA's "variable B" objection—that any risk of uncertainty as to the amount of damage should be borne by and held against *plaintiffs*—is wrong. Recognizing the uncertainty inherent in imagining conditions in a "but for" world, the law does not allow the wrongdoer "to complain that they cannot be measured" with "exactness and precision." *Story Parchment Co. v. Paterson Parchment Paper Co*., 282 U.S. 555, 563 (1931). "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946). And "[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery …." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, concurring) (quoting *Story Parchment*, 282 U.S. at 565).

IV. There are no uninjured class members here (and no "risk of violating Article III").

USAA's last argument is that "Plaintiffs are unable to identify who overpaid," resulting in overbroad classes and inviting "Article III problems." ECF 123 at 24–25. That is a grandiloquent argument—but wrong. *First*, the fact of class-wide injury is plain here: on the day they bought or renewed their policies from USAA, *all* class members paid more for a GIC policy than they would have

paid for a United Services policy. Through common evidence and methods, plaintiffs' experts establish that. And the class definitions guarantee it, by *excluding* from class membership the few GIC insureds who would have paid more using United Services' rates.[8] USAA's professed concern about distinguishing "injured from uninjured policyholders" is illusory.

Second, even *if* "uninjured" class members were a possibility, this Circuit countenances that. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (affirming certification even though potentially 28 percent of the class may not have suffered antitrust impact).

CONCLUSION

For all the reasons stated above, and in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court grant their renewed motion for class certification.

Dated: July 28, 2023

---

[8]Buried in a footnote, USAA suggests that the class definitions are impermissibly "fail-safe" definitions. ECF 123 at 8 n.1. But the proposed class definitions don't fall in that category: they describe class members *factually*, as policyholders who paid more for GIC policies than they would have paid for United Services policies, *without* presupposing the illegality of that practice. Illegality is a *legal* conclusion that is not referenced in the class definition and that must be established *independently* of class membership." *See Melgar v. CSK Auto, Inc.*, 681 Fed. Appx. 605, 607 (9th Cir. 2017) ("[T]he class definition did not presuppose its success, because the liability standard applied by the district court required class members to prove more facts to establish liability than are referenced in the class definition."); *see also Vizcaino v. United States District Court*, 173 F.3d 713, 721-22 (9th Cir. 1999) (disapproving the premise that a fail-safe class would be impermissible).

/s/ Jay Angoff

CONSUMER WATCHDOG
Harvey Rosenfield (SBN: 123082)
Harvey@ConsumerWatchdog.org
Benjamin Powell (SBN: 311624)
Ben@ConsumerWatchdog.org
6330 South San Vincente Blvd.
Suite 250
Los Angeles, CA 90048
(310) 392-0522; Fax: 310-392-8874

MEHRI & SKALET, PLLC
Jay Angoff *(pro hac vice granted)*
Jay.Angoff@findjustice.com
Cyrus Mehri *(pro hac vice granted)*
CMehri@findjustice.com
Michael Lieder *(pro hac vice granted)*
MLieder@findjustice.com
2000 K Street NW, Suite 325
Washington, D.C. 20006
Tel: (202) 822-5100; Fax: (202) 822-4997

MASON LLP
Gary Mason *(pro hac vice granted)*
GMason@MasonLLP.com
Danielle Perry (SBN: 292120)
DPerry@MasonLLP.com
Theo Bell *(pro hac vice pending)*
TBell@MasonLLP.com
5101 Wisconsin Avenue NW, Suite 305
Washington, D.C. 20016
Tel: (202) 429-2290

Attorneys for Plaintiffs
and Proposed Classes

CERTIFICATE OF SERVICE

I, Jay Angoff, am the ECF user whose identification and password are being used to file this document. In compliance with the Southern District of California Electronic Case Filing Administrative Policies and Procedures Section 2(f)(4), I attest that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: July 28, 2023

Respectfully submitted,

/s/ Jay Angoff