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' OPPOSITION TO MOTION TO EXCLUDE THE REPORTS AND TESTIMONY OF JONATHAN GRIGLACK AND ALLAN SCHWARTZ** **Hearing:** August 25, 2023 Date: August 11, 2023 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

Rules

Statutes and Regulations

Other Authority

I. INTRODUCTION

USAA's *Daubert* motion makes three grievously flawed sets of arguments challenging the reports and testimony of plaintiffs' actuarial experts, Jonathan Griglack and Allan Schwartz, as unreliable.

First, USAA urges that Griglack supposedly errs in calculating *GIC premiums.* According to USAA, Griglack uses an "inadequate" "snapshot" approach that calculates pricing "only" on eight dates and then "derives" the amounts each policyholder paid to GIC rather than looking at amounts "actually paid." ECF 122 at 2, 17; ECF 122-1 at 92.

Second, USAA urges that Griglack also errs in calculating *United Services premiums*—by using "notional" numbers. ECF 122 at 11, 13-14. USAA would have Griglack engage in speculative gymnastics to calculate how much class members would have paid for United Services policies, by: (a) "combin[ing] all California GIC policyholders and United Services policyholders into a new" hypothetical company; (b) hypothesizing new base rates and relativities for that new hypothesized "combined insured pool"; and then (c) applying those hypothesized rates and relativities to estimate a new "but for" United Services premium for each policyholder. ECF 122 at 21.

Third, USAA argues that because Schwartz's computations of how much more class members paid GIC than they would have paid United Services rely on Griglack's calculations, Schwartz's calculations also are not accurate. *Id.* at 12-13, 23.

As shown in this brief, USAA's three arguments ignore much of what Griglack and Schwartz did and fundamentally misconceive the claims in this case, the statutes on which the claims are based, and damages and remedies law. Three points substantially dispose of USAA's arguments.

First, using sample dates is entirely justifiable here. The variable of interest is neither GIC premiums nor United Services premiums, as USAA wrongly argues,

but the *spread* between them. And because Griglack and Schwartz show that *spread* is stable across time, it scarcely matters which day one measures the spread or how many times. Day-by-day calculations would not make a material difference other than to explode the costs and duration of litigation.

Second, contrary to USAA's assertions, plaintiffs' "but for" United Services premiums are neither "notional," "impossible," nor "unlawful." ECF 122 at, *e.g.*, 13, 19. Griglack made very few assumptions about United Services premiums. He applied the rates United Services *was in fact charging* on each of eight dates. USAA's disparaging adjectives better describe *its own* counterfactual proposed methodology, which wrongly posits that the "only" way to calculate "but for" United Services premiums is to build a model requiring countless assumptions—about what a "combined" risk pool of GIC and United Services policyholders would look like, what new trend and loss development factors and rates and relativities USAA would estimate for that risk pool, what profit rate USAA would seek for that risk pool, and whether the CDI would approve those proposed rates. Then, stunningly, USAA admits that these assumptions would require speculation about things that *"no one can know."* ECF 122 at 3 (emphasis added). Not surprisingly, USAA's experts do not even try to calculate "but for" United Services premiums using that methodology. USAA thus is arguing that this case cannot be prosecuted, by a class or by an individual plaintiff, because calculating damages—the difference between what an insured paid to GIC and would have paid United Services —requires a variable, the "but for" United Services premium, that is unknowable. ECF 122 at 3. *And that is most decidedly not the law.* A defendant who has caused injury may not elude judgment merely because damages are difficult to calculate. "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). "Any other rule would enable the wrongdoer to profit by his wrongdoing at

the expense of his victim," *Murphy Co. v. Crowley*, 658 F.2d 1256, 1260 (9th Cir. 1981) (quoting *Bigelow*, 327 U.S. at 264), which is why "[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931)).

Third, as substantially confirmed by USAA's own experts, Griglack's calculations are reliable and accurate. Therefore, Schwartz's reliance on them is reliable as well, as are Schwartz's methods for calculating damages, as discussed below.

II. LEGAL STANDARD: FED. R. EVID. 702

Federal Rule of Evidence 702 identifies five criteria for evaluating proposed expert testimony: (1) expertise and qualifications, (2) likelihood of "helping" the jury, (3) grounding in "sufficient facts or data," (4) "reliable principles and methods," and (5) "reliably appl[ying]" those principles and methods to "the facts of the case." Fed. R. Evid. 702.

Griglack's and Schwartz's expertise and qualifications are set out in earlier filings in this case. *See, e.g.*, ECF 63-1 ¶¶ 1-2 (Griglack); ECF 119-3 at 21-33 (Schwartz). They are both Fellows of the Casualty Actuarial Society and members of the American Academy of Actuaries. USAA has not challenged their qualifications; hence, we do not discuss them further here.

The other four Rule 702 criteria address in different ways whether the expert testimony is both sufficiently reliable and beyond the ken of a jury. Only if an expert's opinion is so unreliable that it can offer "no assistance" to the jury must such testimony be excluded. *Zucchella v. Olympusat, Inc.*, No. CV 19-7335 DSF (PLAx), 2023 U.S. Dist. LEXIS 53333, at *6 (C.D. Cal. Jan. 10, 2023); *United States v. 17.69 Acres of Land*, No. 99cv1248 DMS (JMA), 2004 U.S. Dist. LEXIS 31030, at *4-5 (S.D. Cal. Dec. 20, 2004). Disputed expert testimony is generally to

be addressed by "'cross examination, contrary evidence, and attention to the burden of proof, not exclusion.'" *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2014) (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)).

III. OVERVIEW OF PLAINTIFFS' EXPERT REPORTS

A. Griglack's Report

In his work, Griglack calculated premiums by applying the rates and data that *GIC and United Services use*. USAA, like other California insurers, files "class plans" with the California Department of Insurance (CDI), which identify the "factors and discounts, and their order and manner of analysis" that an insurer uses to calculate individual premiums for automobile insurance. 10 CCR § 2632.3. These factors include a "base rate" for each type of coverage; a set of "rating factors" that affect rates; two or more categories for each rating factor (each insured is assigned to a single category for each rating factor); and "relativities" for each category. *See Coleman v. United Serv. Auto Ass'n*, 2023 U.S. Dist. LEXIS 97393, at *3 (S.D. Cal. March 21, 2023).

United Services and GIC offer the same 11 insurance coverages for primary automobile insurance. ECF 119-1, ¶ 14.[1] Each company associates a single base rate with each type of coverage and charges all policyholders the same base rate for each such coverage. But during the class period, without exception, GIC base rates have been higher than United Services base rates. *Id.*

To arrive at a premium, both companies multiply base rates times relativities to adjust for the specific risk characteristics of different policyholders and their vehicles and then add the results to arrive at the total premium. *Id.* ¶ 16. United Services and GIC use the *same* rating factors and categories. *Id.* ¶ 18. And for most

[1] Griglack's and Schwartz's declarations and reports refer to United Services as "USAA." In this brief, citations to and quotations from their reports refer to "United Services"; "USAA" refers to the two companies collectively.

ratings factors, they use *identical* relativities. *Id.* ¶ 19. The process "leaves no room for subjectivity when calculating premiums. It is the same process, for each insured, for each policy …." *Id.* ¶ 25. This is the process that Griglack replicated. ECF 119-1 ¶ 29.

Griglack obtained the information necessary to determine which of these publicly available base rates and relativities applied to each GIC insured from eight large spreadsheets produced by USAA in discovery. The spreadsheets show, for March 31 and September 30, from 2018 through 2021, the coverages for every GIC insured and contain sufficient data, with very rare exceptions, to identify each applicable relativity. *Id.* ¶¶ 29-42.

Griglack used this data, and Microsoft Excel, to generate eight huge spreadsheets, one for March 31 and one for September 30 of each year in the class period (2018, 2019, 2020, and 2021). In generating the spreadsheets, he replicated "the methodology, base rates, and relativities" that USAA has set out in its filings with the CDI. ECF 119-1 ¶ 29. He did this for each GIC insured. *Id.* His calculations are "the same as prescribed in" USAA's filings. *Id.* By that method he calculated both each class member's GIC premium on eight dates and their "but for" United Services premiums on the same eight dates. *Id.* ¶¶ 29-31.

To ensure accuracy and reliability, Griglack checked his work by comparing his calculated GIC premiums against data produced by USAA purporting to show the GIC premium for each policyholder. ECF 119-1, ¶¶ 39-40. His calculations of GIC premiums differed from those that USAA calculated by less than 1%—by about 0.3%. *Id.*, ¶ 43. Much, likely most, of that minimal difference is attributable to rare data anomalies, possibly errors. *Id.*, ¶¶ 33-38, 41-42. Because those anomalies will equally affect calculations of United Services premiums, he used the GIC premiums he had calculated rather than the premiums USAA had produced. *Id.*, ¶ 43.

Griglack also performed two different types of cross-checks to determine the stability of the spread between GIC and United Services' premiums over time. *Id.*, ¶¶ 44-48; ECF 119-2, ¶¶ 15-17. Schwartz also performed a different analysis of the correlation of the GIC and United Services' premiums. ECF 119-4, ¶ 14. These analyses are discussed in the Argument section below.

B. Schwartz's Reports

Schwartz had two tasks: identify the members of the Good Driver and Discrimination Classes, and reasonably estimate the losses or damages suffered by the members of each class. He used Griglack's spreadsheets to perform both tasks. ECF 119-3, ¶ 16.i.

For the Good Driver Class, Schwartz sorted the data to identify class members: GIC "good driver" policyholders with collision insurance who would have paid less in United Services than in GIC on any of the eight valuation dates. *Id.*, ¶ 6. Next, to determine the restitution for each class member, Schwartz totaled the spreads between the GIC premiums and United Services premiums for each date on which the GIC premium was higher. *Id.*, ¶ 16.ix. In the rare cases in which a GIC policyholder's premium was less than the premium the policyholder would have paid United Services, Schwartz did not include that difference in the loss calculations because the policyholder received what Cal. Ins. Code § 1861.16(b) mandated: a good driver discount policy from the affiliated insurer "which offers the lowest rates."

For the Discrimination Class, as for the Good Driver Class, Schwartz began by identifying class members: policyholders whose total GIC premiums on the eight dates exceeded the total premiums payable on those dates under the contemporaneous United Services rates, without the "good driver" limitation. *Id.*, ¶¶ 7-9. Next, Schwartz calculated damages for this class in several ways. The simplest model is to apply the statutory damages provision of the Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code § 51 *et seq.*, awarding each class

member $4,000. *Id.*, ¶¶ 12-13. But to address possible contingencies, Schwartz also calculated damages for this class in several other ways, as described in the Argument Section of this brief.

IV. ARGUMENT

A. Mr. Griglack's Reports and Testimony Satisfy Rule 702.

Griglack's testimony meets all the requirements of Rule 702. His testimony will assist the jury. He has relied on sufficient facts and data to form his opinions. He has applied reliable principles and methods to those facts and data. And his methods "fit" the facts and data in this case.

1. Mr. Griglack's opinions will help the trier of fact understand the evidence and determine facts in issue.

Much of the evidence, the terms, and the concepts in this case are outside the "expected knowledge of the average juror." *United States v. Cazares*, 788 F.3d 956, 977 (9th Cir. 2015). Jurors, for example, are unlikely to have background in insurance "rating factors" and "relativities"; how and why a change in GIC premiums almost perfectly correlates to a corresponding change in premium for a comparable policy from United Services; how changes in the spread between GIC and United Services premiums are much smaller, when they occur, than changes in the premiums; or how because of these facts, and others, it largely doesn't matter which day one measures the spread between GIC and United Services premiums or how many times. Griglack's testimony will explain these points.

2. Mr. Griglack's opinions are based on sufficient facts and data.

As the Ninth Circuit explained last year, the "'sufficient facts or data' element requires foundation, not corroboration." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025 (9th Cir. 2022). If the data provides a foundation for the opinions, the element is satisfied. Griglack easily meets this requirement.

Griglack used the same data described in Part III above from USAA's public filings and from spreadsheets generated by USAA for each of the four steps in his

analysis: (1) he measured every policyholder's GIC premium on eight dates (twice every year, for four years); (2) he calculated what policyholders would have been paying for the same coverage under United Services' contemporaneous rates; (3) he calculated the spread between policyholders' premiums in GIC and under United Services' rates on those eight dates; and (4) he ran cross-checks to ensure that measuring premiums on eight dates, rather than every day, was reliable.

USAA contends that he should have used day-by-day data, which it never provided. USAA briefly questions the accuracy of its own data but otherwise does not seriously contend that Griglack used insufficient data given his model, which measures premiums on eight days. Rather, it argues that he should not have adopted an eight-day model. Neither of these arguments undermines the evidentiary foundation of Griglack's testimony and cannot serve as a basis for exclusion.

a. The data was sufficiently accurate and complete.

Griglack recognized that the spreadsheets produced by USAA contained a small number of apparent errors and omissions and yet concluded that the spreadsheets were sufficient for his analyses. ECF 119-1, ¶¶ 7, 32. He reached this conclusion in conformity with Actuarial Standard of Practice 23 (if "accurate and complete" data are unavailable, "[t]he actuary should use available data that, in the actuary's professional judgment, allow the actuary to perform the desired analysis" and should disclose known data limitations and their implications).

USAA blatantly distorts how Griglack dealt with these rare data anomalies to suggest that his analysis was unreliable. ECF 122, at 9. For example, it claims that his estimated GIC premiums were too low because he was unable to rate about 0.5% of vehicles but omits that he also excluded those vehicles from the estimated United Services premiums. ECF 119-1, ¶ 34.a. As a result, the omissions would have little effect on the *spread*, the important number for which he was solving. Moreover, because 97% of GIC insureds with collision coverage were charged

more than they would have been in United Services, this omission almost certainly understated losses for 0.5% of policyholders, a point that USAA never mentions. As another example, USAA falsely states that Griglack arbitrarily lowered the number of conviction points or at-fault accidents. ECF 122, at 9. In fact, he lowered points/accidents only to test the possibility that the data was incorrect but used the values for points/accidents in the spreadsheets when performing the analyses. ECF 119-1, ¶¶ 34-37. But more importantly, a small number of minor data anomalies, which is all there were here, do not affect the sufficiency of the data overall or the validity of calculations and tests made using them.

Still, to be sure, Griglack performed a check to verify that the minor data anomalies were not unreasonably distorting his results. He compared his calculated GIC premiums against a field in each of the eight spreadsheets produced by USAA showing its calculation of the GIC premium for each policyholder. ECF 119-1, ¶¶ 39-40. The differences were miniscule, about 0.3%. *Id*., ¶ 43. Providing further corroboration, USAA's own expert Nancy Watkins also performed a test. She proposed a different way of taking possible data errors into account in calculating losses. Her alternative methodology reduced the estimated losses of both the Good Driver Class and the Discrimination Class by about 0.2%, *i.e.*, about $2 in a $1,000. ECF 122-1, at 114-15 (Ex. C to Watkins Rebuttal Rep.). In short, USAA's critiques of Griglack's means of addressing USAA's own data anomalies is much ado about nothing.

b. Having data for eight sample dates was sufficient.

USAA argues that because policy changes (such as adding or selling a vehicle, adding or subtracting a driver, or relocating) may alter the premiums payable by an insured during the course of a six-month policy, Griglack and Schwartz cannot, by measuring premiums only twice a year, reliably identify which policyholders paid more in GIC than they would have under United Services rates or estimate the amount of those policyholders' losses. USAA never suggests

that a more frequent sample would be sufficient. Rather, it argues as if only analyzing the data day by day would be sufficient. ECF 122 at 10.

When plaintiffs originally requested similar data, USAA objected that producing data for about 1500 days (365 days for four years) was overly burdensome. ECF 58-6, ¶¶ 26-29. As it is, USAA took more than eight months to produce spreadsheets with data for just eight dates. ECF 119-1, ¶ 32. For data covering 1500 dates, plaintiffs might still be awaiting production.

Putting aside these discovery realities, analyses by both parties' experts confirm that using sample data is reliable. USAA's other expert, Bruce Strombom, compared Griglack's estimates of GIC premiums, based on eight days of data, to a 400-policyholder sample that, Strombom says, accounts for changes in premiums between the eight dates, modeling what policyholders paid across the entire period. This analysis has little if any value for the question at the heart of this case—the spread between GIC and United Services premiums—because Strombom never evaluated United Services premiums let alone the spreads. Still, for what it's worth, Strombom opines that Griglack's estimates of the total premiums paid across the sample period, using his eight-day model, were off *by only 2.5%*, compared to Strombom's estimates of what a day-by-day model would show. ECF 122-1, at 205 (Strombom Supp. Rep.).[2] Similarly, Watkins opines that Griglack's calculations of GIC premium based on the sample dates were 4.6% greater than the actual earned premium for plaintiff Elaine-Gayle Coleman and 2.1% less than the actual earned premium she calculated for plaintiff Robert Castro. *Id.* at 93-94, 108 (Watkins Rebuttal Rep.). In short, Griglack's model for calculating GIC premiums produced results extremely close to Strombom's and Watkins's, pointing both to the sufficiency of the data he relied on and the reliability of his model.

---

[2] Strombom's analysis is beset with analytical errors. Plaintiffs intend to show at summary judgment or trial that, if he had performed the analysis properly, he would have found that the difference was less than 1%.

But far more important than Strombom's and Watkins' analyses are analyses performed by plaintiffs' experts which focus on factors affecting the *spreads* between GIC and United Services premiums. *First*, Griglack checked whether increases or reductions in GIC premiums, if they occurred between the eight dates he measured premiums, would "switch" an insured from a position of losing money by insuring with GIC to a position of saving money by insuring with GIC. The answer was almost never—only seven tenths of one percent of the time (.7%). ECF 119-1 ¶ 47. Because policy changes almost never caused premiums to "switch" from being higher in GIC to higher in United Services, or vice versa, Griglack concluded, "*it is very unlikely* that any policy changes that occurred between the eight sample dates [and] that were not accounted for in the next spreadsheet [for the next measurement date] would significantly impact the results of comparing" GIC premiums to United Services premiums. ECF 119-1, ¶ 48 (emphasis added).

Second, Griglack also performed a correlation analysis to look at whether an increase (or a decrease) in GIC premiums would produce a corresponding premium increase (or decrease) if the policyholder were insured by United Services. The answer is almost always—993 out of every 1,000 times. Because of this almost perfect correlation, policy changes that cause changes in GIC premiums "*will have minimal effect* on the [spread] between what GIC has charged its insured and what they would have been charged under the USAA rates and relativities." ECF 119-2 ¶ 7 (emphasis added).

Third, independently of Griglack, Schwartz performed a different correlation analysis, comparing the amount of calculated GIC premium against the amount of calculated United Services premium. He found an over 98% correlation. This means that a policyholder with a GIC premium at any given percentile among GIC premiums on any particular sample date almost invariably will have a calculated United Services premium very near the same percentile among United Services

premiums. ECF 119-4, ¶ 14.

Together, these three analyses powerfully demonstrate that GIC premiums and United Services premiums move in virtual lockstep. When a policy change causes the GIC premium to increase (or decrease), almost invariably the United Services premium will increase (or decrease). As a result, the *spread* remains remarkably stable.

This result should not be surprising. It is built into USAA's pricing structures, where GIC and United Services use the identical rating factors and categories and overwhelmingly use the same relativities. USAA uses 35 rating factors. For 27 of those 35 rating factors, USAA applies identical relativities to GIC and United Services policies. And for a 28th factor, 62 of the 63 associated relativities are *identical*. ECF 119-1 ¶ 19 & n.7 (identifying ratings factors and relativities).

These shared rating factors and closely shared relativities explain why—*and in fact, all but guarantee*— that an increase (or decrease) in the premium for a GIC policy will produce a corresponding increase (or decrease) in the premium for a United Services policy and that the spread between GIC and United Services premiums is so stable. And because that spread is stable across time, it scarcely matters which day one measures the spread or how many times.

Three additional facts further confirm the reliability of using "snapshot" data. *First*, even a spike in GIC premiums will always have a considerably smaller effect on the *spread* between GIC and United Services premiums, which is the

variable of interest, than on the premiums themselves.[3] *Second,* by relying on eight dates for measuring spreads, Griglack did not *ignore* mid-period changes. A change in premium between one sample date and the next is *not* missed. It is picked up by the next sample date measurement (within months, always and sometimes within weeks or days) and is therefore accounted for.[4] *Third*, sampling is an established and conventional step in cases, like this one, involving very large amounts of data. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) ("In many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability.") (quoting Manual of Complex Litigation §11.493, p. 102 (4th ed. 2004)[5]; *Elosu*, 26 F.4th at 1026 (explaining that experts should be "permitted wide latitude to offer opinions"

---

[3] For example, if a GIC premium is $1000 and the corresponding premium for comparable coverage under United Services is $800, a twenty percent increase to each would mean a $200 increase in GIC (from $1,000 to $1,200) and a $160 dollar in United Services (from $800 to $960). But this $200 increase in GIC premiums changes the *spread* between GIC and United Services by only $40. That is, if the original spread is $200 ($1,00 - $800 = $200), the new spread will be $240 ($1,200 - $960 = $240). Any increase (or decrease) in premiums will result in a considerably *smaller* increase (or decrease) in the spread, which is what matters.

[4] Applying basic statistics and odds, with six months between "snapshot" dates, on average policyholders will make a change, if they do, halfway between sample days (three months after the last snapshot date and three months before the next, on the "mean" date). And because (a) the change, if any, will be picked up within 90 days and (b) class member injury and losses are measured *by the spread* between GIC and United Services premiums, which will increase (or decrease) by only a fraction of the amount of a premium increase (or decrease), *see, e.g.*, note 3 above, the effect is small.

[5] *See Ridgeway v. Walmart Inc*., 946 F.3d 1066, 1088-89 (9th Cir. 2020) ("Despite variations, which are common in class action damage calculations, introduction of the representative sample and representative testimony was proper because plaintiffs had no other way to prove how much Wal-Mart owed them."); *see also Story Parchment*, 282 U.S. at 563 (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.")

because they "regularly 'extrapolate from existing data' and generate novel hypotheses about complex issues"). And here, Griglack did not "sample" class members; he looked at each class member's spread individually. All he "sampled" was dates—looking at spreads on 8 days (over 4 years) instead of 1,460 dates (4 times 365).

One further point bears mention. USAA misleadingly describes several decisions, supposedly supporting the proposition that expert testimony relying on "derivations" in lieu of "actual data" should be excluded. ECFF 122 at 16-18. But in those cases, experts were excluded for reasons having no bearing here. *See Paz v. Brush Engineered Materials Inc.*, 555 F.3d 383, 389 (5th Cir. 2009) (upholding exclusion of expert testimony as "unreliable because it was based on erroneous information"); *Montgomery Cty. v. Microvote Corp.,* 320 F.3d 440, 448-49 (3d Cir. 2003) (upholding exclusion of expert testimony that ignored data concerning how long a machine was down and instead relied on a document of unknown provenance provided by counsel); *Guidroz-Brault v. Missouri Pacific RR Co*., 254 F.3d 825, 831 (9th Cir. 2001) (upholding exclusion of expert testimony that did not identify any underlying facts on which it was based); *Nelson v. Tennessee Gas Pipeline Co*., 243 F.3d 244, 254 (6th Cir. 2001) (upholding exclusion of testimony of expert who "admitted no knowledge concerning the actual exposure of the seven plaintiffs" to the chemical they claimed had harmed them "or the temporal relationship between their exposure and symptoms"); *Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039, 1056-57 (8th Cir. 2000) (holding that expert's testimony should have been excluded because it was based on his "hypothetical" market instead of available market data); *Finjan, Inc. v. ESET, LLC*, No.: 17-CV-183-CAB-BGS, 2019 U.S. Dist. LEXIS 179296, at *11 (S.D. Cal. Oct. 16, 2019) (excluding expert's testimony based on "unverifiable estimates from disputed inputs to come to a facially unreasonable hypothetical number").

For all these reasons, Griglack considered "sufficient information" when measuring GIC premiums, United Services premiums, and the spreads between them on eight dates for roughly 212,000 policyholders. The mid-period changes on which USAA dwells are neither unaccounted for nor material.

3. Mr. Griglack used reliable principles and methods.

At each step of his analyses, Griglack used reliable principles and methods. Fed. R. Evid. 702(c). He adhered to USAA's own rules manual in placing each policyholder into the appropriate category for each rating factor based on the data in the spreadsheets. ECF 119-1, ¶¶ 13, 32.[6] He used Excel to perform millions of addition, subtraction, and multiplication operations by which he calculated the premiums that policyholders paid to GIC on the sample dates, the premiums that they would have paid under United Services' base rates and relativities, and the differences between those two sets of premiums.

USAA does not challenge Griglack's use of Excel to perform the calculations. *See United States v. Morgan*, 45 F.4th 192, 203 (D.C. Cir. 2022) (characterizing Excel as a widely accepted tool in affirming denial of motion to exclude expert testimony). USAA also does not point to any instance in which Griglack failed to follow the instructions in USAA's rules manual when programming Excel to perform those operations. In short, while challenging

---

[6] USAA tries to cast doubt about Griglack's methodology by stating that for the nine months before a new rate manual went into effect on December 28, 2017, Griglack "was 'unable to state *any opinions* to a reasonable degree of actuarial certainty' due to his inability to accurately calculate nearly a third of the GIC premiums in that period." ECF 122 at 8 (quoting Dkt. 85-1 at 3–4) (emphasis added by USAA). As a result, plaintiffs removed those nine months from the class period. What USAA fails to mention is that it produced spreadsheets for that period after the discovery period had ended, precluding a 30(b)(6) deposition or other discovery to try to understand all the data. If plaintiffs had been able to investigate the period prior to December 28, 2017, as they did the period afterward, Griglack undoubtedly would have been able to accurately calculate the premiums for that period as well.

Griglack's calculations of premiums based on data from eight days, USAA has not otherwise challenged Griglack's principles and methods in calculating the premiums.

Griglack also applied reliable methods to perform his switching and correlation cross checks, as did Schwartz with the correlation analysis that he performed. The switching analysis used standard sorting and filtering functions on Excel. Both correlation analyses involved use of regression analysis, which is a well-accepted statistical technique. *See, e.g., REX - Real Estate Exchange Inc. v. Zillow, Inc*., No. C21-0312 TSZ, 2023 U.S. Dist. LEXIS 126191, at *7-8 (W.D. Wash. July 21, 2023).

4. Mr. Griglack reliably applied the principles and methods to the data in this case.

While USAA disagrees – erroneously – with Griglack's drawing of conclusions from eight sample dates, it otherwise does not have any disputes with how he applied his methods to the data for those dates. USAA does not contend that Griglack erred in applying USAA's rules manual to the data it produced for those eight dates. It does not contend that he erred in entering any base rates or relativities in his formulas. It does not identify any mathematical errors made by the Excel program. And the consistency of the results across each of the eight periods indicates that Griglack performed his work reliably and accurately.

For all these reasons, Griglack satisfies all the elements to provide expert testimony in this case. USAA's motion to exclude his reports and testimony should be denied.

B. Mr. Schwartz's Reports and Testimony Are Reliable and Hence Admissible.

1. Mr. Schwartz's opinions will help the trier of fact understand the evidence and determine facts in issue.

Much of the evidence and concepts addressed by Schwartz in this case are outside the common knowledge of the average juror. Schwartz's reports explain, and his testimony will likewise explain, how to identify membership in each of the proposed classes from USAA's data and Griglack's spreadsheets, how to verify that members of both classes have suffered losses because of the spreads between GIC and United Services "but for" premiums, and how to separately calculate the damages for each class. His testimony will assist jurors.

2. Mr. Schwartz's testimony is based on sufficient facts and data.

Schwartz used the eight spreadsheets prepared by Griglack, one for each of the eight sample dates, to identify which GIC policyholders qualified as members of each class and the amount of their damages. ECF 119-3, ¶ 16.i. As explained above, Griglack's spreadsheets constitute reliable data from which to identify class members and calculate damages, a fact that Schwartz's correlation analysis helped to confirm. ECF 119-4, ¶ 14. Reliance on Griglack's spreadsheets is consistent with actuarial standards of practice, ECF 119-3, ¶ 16.i n.10, and expert witnesses can and frequently do rely on the analyses of other experts. *See, e.g., McMorrow v. Mondelēz Int'l, Inc.*, No. 17-cv-2327-BAS-JLB, 2021 U.S. Dist. LEXIS 42885, (S.D. Cal. Mar. 8, 2021) (declining to exclude expert testimony in connection with class certification even though expert supposedly "would do nothing more than take the price premium estimate from another expert," whose testimony the Court found reliable, "and perform simple arithmetic to calculate the damages"). USAA's criticism that "Mr. Schwartz piggybacks on Mr. Griglack's analysis" is misplaced. ECF 122 at 12. Schwartz relied on sufficient data.

USAA argues, however, that Schwartz looked at the "wrong" data. It urges that instead of using Griglack's spreadsheets based on the base rates and relativities *actually* used by United Services, Schwartz needed to (a) construct an imaginary counterfactual hypothetical risk pool, combining GIC and United Services policyholders, (b) guesstimate what base rates and relativities USAA would have proposed for that new risk pool, and (c) and guess whether the CDI would approve those base rates and relativities or some other set of base rates and relativities. USAA contends that this would be the only proper way to calculate United Services "but for" rates. But USAA simultaneously recognizes that this "method" is illusory because it requires knowing values and eventualities that, as USAA itself asserts, "no one could know." ECF 122 at 23. The impossibility of USAA's proposed procedure was essentially conceded by its expert Watkins who has never attempted to accomplish what USAA contends must be done, did not know what the result would be, and admitted that such a procedure would involve "the complexity of thousands of calculations and assumptions." ECF 64-1, ¶ 38.

USAA's argument is extraordinary and radical. It would preclude not only a class action but also any claim by any individual policyholder, who equally would be stymied by the unknowable nature of the "but for" world. And it is wrong. It has been established for more than a century that it does not "come with very good grace from the defendant to insist upon the most specific and certain proof" of the injury which it has itself inflicted. *Hetzel v. Baltimore & O.R. Co.*, 169 U.S. 26, 39 (1898); *In re TFT-LCD Antitrust Litig.*, No. M 07-1827 SI, 2012 U.S. Dist. LEXIS 9449, at *36 (N.D. Cal. Jan. 26, 2012) (same). Difficulty in calculating damages is not a valid defense—or a "get out of jail free" card. "The most elementary conceptions of justice and public policy require that te wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 264-65; *see Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 989 (9th Cir. 1995) ("the burden of any uncertainty in the amount of damages should be borne by the

wrongdoer"). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Murphy Co. v. Crowley*, 658 F.2d 1256, 1260 (9th Cir. 1981) (quoting *Bigelow*, 327 U.S. at 264).

USAA's argument also fails because of the specific provisions of § 1861.16(b) and the Unruh Act. Those provisions are discussed in subsection B.4 below.

3. Mr. Schwartz used reliable principles and methods.

In this case, Schwartz used capabilities of and algorithms in Excel to perform calculations, including pivot tables, lookup functions, and Excel Solver. ECF 119-3 nn. 13, 14, 23. As discussed above, Excel algorithms not only are considered reliable by actuaries, *id.*, but also by courts. *See United States v. Morgan*, 45 F.4th at 203. Schwartz also checked the results generated by the Excel algorithms against the underlying spreadsheets. USAA has not questioned the reliability of any of Schwartz's methods, and the requirement that his testimony be the product of reliable methodology is met.

4. Mr. Schwartz has reliably applied the principles and methods to the facts in this case.

Schwartz used the data in Griglack's spreadsheets and the Excel algorithms to identify the members of the Good Driver and Discrimination Classes and to calculate monetary relief for each of them in straightforward, feasible manners. After performing those calculations, he prepared a huge exhibit identifying the damages for each class member, thus demonstrating that class member identification and damages could be determined "feasibly and efficiently." *See Levya v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013) (listing of exposure on each individual claim "demonstrates that damages could feasibly and efficiently be calculated once the common liability questions are adjudicated").

USAA does not contend that Schwartz made any errors in those calculations. Instead, USAA contends that he used the wrong methodology. According to

USAA, the only proper methodology would involve "combin[ing] all California GIC policyholders and United Services policyholders into a new company," recalculating base rates and relativities "for that [new] combined insured pool," making assumptions about the rates and relativities that CDI would approve, and "then appl[ying] those rates and relativities to" estimate a new premium for each policyholder. ECF 122 at 21. But USAA admits that *"no one can know" what these hypothetical rates would be. Id.* at 3. Surely if Schwartz had attempted all that, USAA would move to bar his reports and testimony on grounds of wild speculation. USAA's criticism, if correct, thus would make identification of members of the two classes and calculation of their damages impossible.

But USAA is wrong as to each class. Calculation of damages in this case do not depend on or require a trip to Neverland.

a. Mr. Schwartz has reliably identified members of the Good Driver Class and calculated restitution for each member.

Section 1861.16(b) requires a family of insurance companies to "sell … a good driver discount policy to a good driver from an insurer within that [family] which offers the lowest rates for that coverage."[7] The statute uses the present tense. It refers to the lowest rates *that are then being offered*, not some rates that never existed.

Schwartz followed the statutory language precisely. If on any sample date the GIC premium of any good driver with collision insurance exceeded the

---

[7] USAA's fearmongering that "GIC would have violated the Insurance Code and actuarial principles by applying United Services' rates to GIC policyholders" misses what the statute requires. ECF 122, at 19. Section 1861.16(b) does not require *GIC* to sell its good drivers policies at United Services rates. Rather, it requires *United Services* to sell enlisted good drivers a policy when United Services is the low-cost provider. This argument also is at odds with the Court's prior ruling that neither Cal. Ins. Code § 11628(f)(1) nor the CDI's knowledge of USAA's placement rules excuses USAA from compliance with § 1861.16(b). ECF 22, at 12-13.

premium payable under United Services' rates, that policyholder had a claim for that six-month period; if a policyholder's GIC premium was less than the premium payable under United Services' rates, the policyholder did not have a claim for that six-month period. ECF 119-3, ¶ 6. Any good driver with collision coverage whose premium exceeded the premium payable under United Services' rates in any of the eight periods is identified as a Good Driver Class member. ECF 119, at 3. Each member is entitled to restitution in the total amount for the periods in which their GIC premiums exceeded the premiums payable under United Services' rates. For the eight sample dates, he identified 197,180 members of the Good Driver Class entitled to restitution in the amount of $150,401,083. ECF 119-3, ¶¶ 5, 14.

USAA responds that, if it had only known that § 1861.16(b) meant what it plainly says, and that this court has held that it says, USAA would have included all GIC policyholders, or at least all GIC good drivers, in the United Services pool and sought new rates for the combined pool that would have been higher than the contemporaneous United Services rates, thereby reducing damages. ECF 122, at 20-21. But USAA cannot reduce or eliminate its exposure by creating a world in which § 1861.16(b) would not apply at all. The statute addresses situations in which an insurance family has at least two companies selling insurance to good drivers. USAA now asks the Court to determine its exposure in a counterfactual world in which it would have no liability under § 1861.16(b) because it would have only a single company selling good driver policies. That makes no sense at all.

b. Mr. Schwartz has reliably identified members of the Discrimination Class and calculated damages for each member.

The Discrimination Class brings claims under the Unruh Civil Rights Act and section 394(a) of the Military and Veterans Code, both of which bar discrimination based on military status, including in the provision of insurance. ECF 22, at 17-19. The Unruh Act, to which insurers are expressly subject, *id.* at 18

n.8 (citing Cal. Ins. Code § 1861.03(a)), specifies the greater of statutory damages of $4,000 per class member or up to treble damages. Cal. Civ. Code § 52(a).

Schwartz has identified members of the Discrimination Class in a manner that deviates from membership in the Good Driver Class in two ways. First, he includes policyholders who do not qualify as "good drivers," as long as they have collision insurance. Second, if on any sample date a policyholder's GIC premium was less than the premium payable under United Services' rates, he offsets that amount against the amounts by which the GIC premium exceeded the premium payable under United Services' rates on other sample dates; only policyholders whose net premiums over the entire period were higher in GIC than in USAA are included in the Discrimination Class. Ex. 119-3, ¶¶ 7-9.

Schwartz determined that there were 207,224 class members. *Id.*, ¶ 14. Multiplying that number by $4,000 apiece yields minimum statutory damages for the Unruh Act violations of $828,896,000. Trebling the damages of the relatively few class members with actual damages in excess of $1,333 brings the total to $900,728,251. *Id.*, ¶ 13.

USAA seeks to compare Schwartz's methodology to those of experts whose methodologies were excluded for use of "impossible counterfactual[s]." ECF 122, at 21. For example, in *Oracle America, Inc. v. Google Inc*., No. C 10-03561 WHA, 2012 U.S. Dist. LEXIS 33619 (N.D. Cal. Mar. 13, 2012), the excluded portion of the expert's econometric model was based on an assumption that he previously determined was false. *Id.* at * 37. And in *Helft v. Allmerica Financial Life Ins. & Annuity Co*., 1:03-CV-35, 2009 U.S. Dist. LEXIS 24862 (N.D.N.Y. Mar. 26, 2009), the excluded opinion assumed, incredibly, that "plaintiffs would have continued to enjoy the same returns" on their investment "for as long as 46 years thereafter," which the court treated as conclusive proof that the expert was not qualified. *Id.* at *28-29. Here, Schwartz applied lots of simple math to USAA's actual data, and based his damages calculations, as is generally the case in

discrimination cases, on the difference between the terms offered to members of the favored group and the terms offered to members of the disfavored, protected group. *See Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947) ("If the prices are illegally discriminatory [in violation of the Robinson-Patman Act in that case], petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination."). It is USAA that argues that the experts must engage in impossible counterfactual speculation that, even if it were not overly speculative, would be designed to reduce damages to something less than the amount of the discrimination.

But in case the Court adopted USAA's contention that damages for the Discrimination Class members required creation of a counterfactual world, Schwartz performed an alternative damages calculation. His methodology, unlike the methodology USAA proposes, is not wildly speculative and is feasible to perform. He calculates damages by offsetting the reductions in premiums charged to GIC insureds with increases in the premiums that would have been charged to United Services insureds sufficient to generate the same total revenue to USAA. ECF 119-3, ¶¶ 19-23. While USAA disparages this as a "fudge factor," ECF 122, at 23, it has the virtues of being calculable and not speculative. Here, it yields a total of 193,799 Discrimination Class members. At $4,000 per class member, the statutory damages for the Unruh Act claims would be $775,196,000. ECF 119-3, ¶ 14. Including treble damages for class members with damages greater than $1,333 increases the amount to $797,138,451. *Id.*, ¶ 13.[8]

Schwartz has satisfied all requirements for providing expert opinions. USAA's motion to exclude his testimony should be denied.

---

[8] In the unlikely event that plaintiffs prevail on their section 394(a) claim but not their Unruh Act claim, Schwartz calculates that the 207,224 members of the Discrimination Class suffered damages of $170,145,027, or using the alternative methodology, that the 193,799 class members suffered damages of $109,576,928. ECF 119-3, ¶¶ 5, 14.

CONCLUSION

For all the reasons stated above, plaintiffs ask the Court to deny USAA's motion to exclude the reports and testimony of Jonathan Griglack and Allan Schwartz in their entirety.

Dated: August 11, 2023

s/ Michael D. Lieder

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, Michael D. Lieder, 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/ Michael D. Lieder