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20 and all others similarly situated

21 **UNITED STATES DISTRICT COURT**
22 **CENTRAL DISTRICT OF CALIFORNIA**

23 JOYCE WALKER, KIM BRUCE
24 HOWLETT, and MURIEL
25 SPOONER, on behalf of themselves
26 and all others similarly situated,
27
28 Plaintiffs,

v.

LIFE INSURANCE COMPANY OF
THE SOUTHWEST, a Texas
corporation,
Defendant.

CLASS ACTION

CASE NO.: CV 10-9198 JVS (RNBx)
Formerly Case No.: 3:10-cv -04852
JSW
from Northern District of California

**PLAINTIFFS' MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

District Judge James V. Selna

Date: April 16, 2012
Time: 1:30 p.m.
Courtroom: 10C

Discovery Cutoff: November 5, 2012
Pretrial Conference: January 14, 2013
Trial Date: January 22, 2013

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NOTICE OF MOTION AND MOTION

TO THE COURT AND ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 16, 2012, or as soon thereafter as the matter may be heard in the courtroom of the Honorable James V. Selna, Plaintiffs Joyce Walker, Kim Bruce Howlett, and Muriel Spooner (“Plaintiffs”), by and through their counsel of record, will and hereby do move this Court for leave to file a Second Amended Complaint in this action pursuant to Federal Rules of Civil Procedure 15(a)(2) and 16(b)(4).

This motion is based on this notice, the attached memorandum of points and authorities, the proposed order, the declaration of Brian P. Brosnahan, the pleadings, records and files in this case, and such other matters as may be considered by the Court. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on February 29, 2012.

DATED: March 12, 2012

KASOWITZ BENSON TORRES & FRIEDMAN
LLP

By: s/Brian P. Brosnahan
Brian P. Brosnahan

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court should grant Plaintiffs’ motion for leave to file a second amended
4 complaint because the amendment presents valid and important claims on behalf of
5 the proposed class, Plaintiffs were diligent in moving to amend their complaint
6 after uncovering the additional claims, and Defendant Life Insurance Company of
7 the Southwest (“LSW”) would not be prejudiced by amendment. The proposed
8 amendments would not require modification of the current pre-trial and trial
9 schedule.

10 The operative First Amended Complaint (“FAC”) involves a putative class
11 action lawsuit against LSW for acts of fraud and unfair competition in its
12 marketing and sale of equity-indexed universal life insurance policies (“IUL”).
13 Plaintiffs generally allege that LSW perpetrates a bait and switch scheme to foist
14 on consumers policies with little value by providing them with deceptive
15 illustrations that present projected investment gains that will purportedly provide
16 the policyholder with significant tax-free income through policy loans, while
17 concealing the true cost of the policy, the true guaranteed rate, the tax risks
18 associated with policy loans, and material risks that the policies will not perform as
19 illustrated.

20 Although this Court’s May 21, 2011 Order for Jury Trial (Dkt. 61) required
21 amendment within 60 days, or by July 11, 2011, LSW did not produce documents
22 in response to discovery until long after that date and it was thus impossible for
23 Plaintiffs to seek amendment based on newly discovered information contained in
24 those documents within the period originally contemplated by this Court. As this
25 Court previously held in determining that good cause existed to extend the dates in
26 the pretrial scheduling order, “Plaintiffs were diligent in serving their document
27 production requests, diligent in attempting to resolve the disputes between the
28 parties without resort to this Court’s intervention, and diligent in presenting their

1 Motions to Compel to the Magistrate Judge.” However, this Court recognized that
2 “[d]espite this diligence, engaging in that process took several months to
3 complete. . .” In fact, Plaintiffs did not receive discovery confirming the amended
4 claims until Thursday, February 23, 2012, and Plaintiffs received LSW’s response
5 to Plaintiffs’ correspondence seeking LSW’s justification for its practices on
6 Friday, February 24, 2012. Plaintiffs sent the proposed second amended complaint
7 (“SAC”) to LSW on Monday, February 27, 2012 and requested that LSW stipulate
8 to amendment. LSW refused. Plaintiffs filed this motion on the earliest possible
9 date thereafter. *See* Declaration of Brian P. Brosnahan in Support of Plaintiffs’
10 Motion for Leave to File Second Amended Complaint (“Brosnahan Decl.”), ¶¶17-
11 20.

12 Plaintiffs seek to amend their complaint to conform to the evidence that they
13 have gathered regarding two additional deceptive aspects of the policy illustrations
14 that are used by LSW in the marketing and sale of its equity-indexed policies. In
15 particular, LSW’s illustrations purport to project policy values based on the non-
16 guaranteed rates and charges “currently” applied by LSW to its existing
17 policyholder accounts. LSW includes in these calculations a reduced Monthly
18 Administrative Charge beginning in the eleventh policy year (for both the
19 SecurePlus Provider and Paragon policies) and an annual “Account Value
20 Enhancement” of 1.25% beginning in the tenth policy year (for SecurePlus
21 Provider policies), which are represented as “current” rates and charges even
22 though no policyholder currently receives (or has ever received) these benefits.
23 Inclusion of these items significantly inflates the policy values and makes the
24 policies appear far more attractive than they actually are. Since Plaintiffs were not
25 in possession of the data needed to reverse engineer LSW’s policy illustrations, it
26 was not until the discovery process was well underway that they were able to
27 confirm that the illustrated policy values were based on these so called “current”
28 rates and charges and that this was true of all illustrations classwide. Plaintiffs also

1 could not determine without discovery that the policy features were not in fact part
2 of LSW's "current" rates and charges and never have been provided to any
3 policyholder. Nor could Plaintiffs determine that LSW had no justification for
4 treating these features as part of its "current" rates and charges.

5 The Court should grant Plaintiffs leave to amend in order to allow the full
6 scope of LSW's deception in its policy illustrations to be litigated on the merits.
7 This is particularly true because this case is a putative class action, and rational
8 class members might choose to opt-out and/or file separate class actions pursuing
9 these claims if the claims are not going to be adjudicated in this case. Litigating
10 the claims also will not materially complicate or delay this action because the
11 claims are straightforward and plainly common to the class. Addition of these
12 classwide claims will not require postponement of the class certification hearing,
13 nor will it impede trial in this action as currently scheduled for January 22, 2013.

14 **II. THE PROPOSED AMENDMENTS**

15 Plaintiffs' proposed amendments read as follows:

16 9. The Illustrations also misrepresent LSW's current rates
17 and charges and the associated "Current Basis A" and "Current Basis
18 B" values (including the surrender values and the accumulated values)
19 depicted in the Illustrations. The Illustrations project non-guaranteed
20 values on two different bases. Both "Current Basis A" and "Current
21 Basis B" purport to project non-guaranteed values assuming
22 application of LSW's rates and charges that are "current" at the time
23 the Illustration is prepared. Current Basis A reflects projected values
24 under the assumption that the non-guaranteed assumed interest rate
25 equals LSW's then current variable loan rate. Current Basis B reflects
26 projected values under the assumption that the non-guaranteed
27 assumed interest rate equals the weighted average of LSW's then
28 current index rates (including application of caps and participation
rates) applicable to the various "equity-indexed strategies" that the
policyholder may select and assuming the historical performance of
the S&P 500. Since the performance of the policy will depend on
index earnings and not on the variable interest rate, Current Basis B
values are presented as being more relevant to the prospective

1 policyholder than Current Basis A values, which are included just “as
2 a point of comparison,” according to the Illustration.

3 10. For both the Provider and the Paragon policy, the policy
4 values projected in the Illustrations under Current Basis A and Current
5 Basis B include reductions in the Monthly Administrative Charge
6 beginning after the tenth policy year. In the case of the Provider
7 policy, policy values projected in the Illustrations under Current Basis
8 A and Current Basis B include a so-called “Account Value
9 Enhancement” of 1.25% per year beginning in the tenth year the
10 policy has been in force; LSW deems the reduced Monthly
11 Administrative Charge and the “Account Value Enhancement” to be
12 part of its “current” rates and charges for purposes of depicting
13 “Current Basis A” and “Current Basis B” policy values.

14 11. Even when not guaranteed, “current” rates and charges
15 are meaningful to prospective policyholders because they are actually
16 applied to the accounts of real policyholders. Charges that are actually
17 applied to policyholder accounts are the product of market forces and
18 are thus more likely to be applied to the prospective policyholder’s
19 account than other rates and charges that have no marketplace reality.
20 This higher level of confidence that prospective policyholders place in
21 truly “current” rates and charges, even if non-guaranteed, is why LSW
22 uses projections of Current Basis A and Current Basis B policy values
23 in its Illustrations.

24 12. The Current Basis A and Current Basis B policy values
25 depicted in LSW’s Illustrations are false and misleading because
26 certain of the rates and charges upon which they are based are not part
27 of LSW’s current rates and charges because they are not currently
28 applied to any policyholder’s account. They are entirely fictional. A
reasonable policyholder would understand the concept of “current”
rates and charges, and the terms “Current Basis A” and “Current Basis
B,” to include only those rates and charges that are currently applied
to policyholder accounts. But the Account Value Enhancement of
1.25% per year that is used to inflate the Current Basis A and Current
Basis B policy values in LSW’s Provider Illustrations is not currently
applied to any policyholder’s account because it begins in the tenth
year that the policy has been in force, but the Provider has been sold
only since 2005, so there is not a single Provider policyholder who
currently receives (or has ever received) an Account Value
Enhancement. Similarly, Provider Illustrations depict a substantial

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1 decrease in the Monthly Administrative Charge beginning after the
2 tenth policy year, but no Provider policyholder currently receives (or
3 has ever received) such a decrease in his or her Monthly
4 Administrative Charge because no Provider policy has been in effect
5 for ten years or more. Paragon illustrations depict a decrease in the
6 Monthly Administrative Charge to zero beginning after the tenth
7 policy year, but no Paragon policyholder currently receives (or has
8 ever received) such a decrease in his or her Monthly Administrative
9 Charge because the Paragon policy was first sold in 2007, so there is
10 not a single Paragon policyholder who currently receives (or has ever
11 received) a reduction in his or her Monthly Administrative Charge.

12 13. Not only do LSW's Account Value Enhancement and the
13 reduction in the Monthly Administrative charge lack marketplace
14 reality because no LSW policyholder has ever received those benefits,
15 but, on information and belief, it is unlikely that LSW will continue
16 selling the Provider or Paragon policies for a full ten years, so LSW
17 will not need to provide an Account Value Enhancement or a reduced
18 Monthly Administrative Charge in order to sell new policies. Thus,
19 the need to sell new policies will not impose market pressure on LSW
20 to provide the Account Value Enhancement or the reduced Monthly
21 Administrative Charge to new policyholders. These facts are known
22 to LSW but not to prospective policyholders. LSW has already
23 stopped selling the Paragon policy. Prospective policyholders are also
24 unaware that LSW's true "current" rates and charges do not include
25 either the Account Value Enhancement or the reduced Monthly
26 Administrative Charge and are unaware that the Current Basis A and
27 Current Basis B policy values depicted in the Illustrations are
28 significantly inflated, as discussed below.

1 The addition of the Account Value Enhancement and the
2 reduction in the Monthly Administrative Charge has a substantial
3 impact on the Current Basis A and Current Basis B policy values
4 depicted in the Illustration, and this is the reason that LSW includes
5 them in the current basis values. In Joyce Walker's case, her
6 October 3, 2007 Illustration (attached hereto as Exhibit A) depicts
7 Current Basis B values that will provide her with annual retirement
8 income until she reaches age 99 and with \$1,311,622 remaining in the
9 policy at that time as its cash surrender value. However, if the
10 Account Value Enhancement and the reduction in the Monthly
11 Administrative Charge were not included in the projections, the

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1 Illustration would show the policy running out of money (i.e., lapsing)
2 before Ms. Walker reaches the age of 71. Current Basis A values
3 shown in the Illustration are similarly inflated by the inclusion of the
4 Account Value Enhancement and the reduction in the Monthly
5 Administrative Charge. The Current Basis A and Current Basis B
6 policy values depicted in the Illustration are thus entirely fictional.

6 15. In Kim Howlett’s case, his July 27, 2007 Illustration
7 (attached hereto as Exhibit C) depicts Current Basis B values that will
8 provide him with annual retirement income until he reaches age 93
9 and with \$159,495 remaining in the policy at that time as its cash
10 surrender value. However, if the reduction in the Monthly
11 Administrative Charge were not included in the projections, the
12 Illustration would show the policy running out of money (i.e., lapsing)
13 before Mr. Howlett reaches the age of 80. Current Basis A values
14 shown in the Illustration are similarly inflated by the inclusion of the
15 reduced Monthly Administrative Charge. The Current Basis A and
16 Current Basis B policy values depicted in the Illustration are thus
17 entirely fictional.

18 16. In Muriel Spooner’s case, her July 27, 2007 Illustration
19 (attached hereto as Exhibit E) depicts Current Basis B values that will
20 provide her with annual retirement income until she reaches age 91
21 and with \$114,165 remaining in the policy at that time as its cash
22 surrender value. However, if the reduction in the Monthly
23 Administrative Charge were not included in the projections, the
24 Illustration would show the policy running out of money (i.e., lapsing)
25 before Ms. Spooner reaches the age of 80. Current Basis A values
26 shown in the Illustration are similarly inflated by the inclusion of the
27 reduced Monthly Administrative Charge. The Current Basis A and
28 Current Basis B policy values depicted in the Illustration are thus
entirely fictional.

17. LSW is aware that the inclusion of the Account Value Enhancement and the reduction in the Monthly Administrative Charge in the projected policy values causes the projected non-guaranteed values of the Provider and Paragon policies to appear far more attractive to prospective policyholders than the projected non-guaranteed values would appear if only LSW’s actual current rates and charges were applied, and further that the values are not realistic. Peter Weinbaum, an “Advanced Sales Consultant” for LSW who works with policy illustrations, commented in an email to his

1 colleagues, including Matthew DeSantos, Vice-President of
2 Marketing and Business Development for LSW,

3 “It seems to me that any illustration of non-guaranteed
4 elements of a life insurance contract is a hallucination.
5 That’s why VUL [variable life insurance] was so hot 7
6 years ago, and why IUL [indexed universal life] is so hot
7 today. People want to believe the illustrated values. It
8 seems to me that it’s just a matter of strong disclosures.
9 If we work too hard to protect customers from stumbling
10 and falling, our competitors will be only too happy to
11 give them the opportunity.”

12 *See* LSW-E00037050, attached hereto as Exhibit G.

13 18. It is apparent that LSW knows that its projections of non-
14 guaranteed values are deceptive since the projections include as
15 “current” items that have no marketplace reality and are included
16 simply to inflate policy values, because when LSW submitted
17 exemplar Provider Illustrations to the California Department of
18 Insurance (“CID”), LSW omitted all references to the Account Value
19 Enhancement and the reduction in the Monthly Administrative
20 Charge. Compare Exhibit H (2005 Provider Illustration submitted to
21 CID) at LSW-00000162 & LSW-00000169 and Exhibit I (2009
22 Provider Illustration submitted to CID) at LSW-00018084 & LSW-
23 00018097 with Exhibit A (Joyce Schmidtbauer’s October 3, 2007
24 Illustration) at LSW-00002336 & LSW-00002349. When LSW
25 submitted an exemplar Paragon Illustration to the CID, LSW omitted
26 all references to the reduction in the Monthly Administrative Charge.
27 Compare Exhibit J (2006 Paragon Illustration submitted to CID) at
28 LSW-00000480 with Exhibit C (Kim Howlett’s July 27, 2007
Illustration) at LSW-00001230. Although these items were omitted
from the exemplars of Illustrations provided to the California
Department of Insurance, Plaintiffs are informed and believe that they
are included in all Provider and Paragon illustrations, respectively,
that are presented to prospective LSW policyholders.

See Brosnahan Decl., Ex. A at ¶¶9-18. Similar and related allegations also have
been added to the complaint elsewhere, as reflected in the attached blackline
comparison filed concurrently with this motion.

1 **III. STATEMENT OF FACTS**

2 **A. Procedural Background**

3 Plaintiffs filed this putative class action in San Francisco Superior Court on
4 September 24, 2010, alleging that LSW engaged in fraud and unfair competition in
5 its marketing and sale of their indexed universal life insurance policies. LSW
6 removed, and the case was transferred to this Court. With respect to LSW's
7 Motion to Dismiss the Complaint, the Court issued an Order on May 5, 2011
8 (Dkt. 59) granting in part and denying in part the motion, while providing Plaintiffs
9 with leave to amend. The operative FAC, filed on June 6, 2011, corrected the
10 deficiencies identified by the Court. On October 17, 2011, this Court denied in
11 part and granted in part LSW's motion for judgment on the pleadings, sustaining
12 all but one of Plaintiffs' claims and theories with respect to LSW's fraudulent and
13 unfair scheme.¹ See Dkt. 112.

14 On May 11, 2011, the Court issued an Order for Jury Trial (Dkt. 61) that
15 required amendment within 60 days, or by July 11, 2011. Plaintiffs had served
16 their first set of document requests on April 7, 2011, practically as soon as they
17 were permitted under the Federal Rules. On May 16, 2011, LSW served its
18 responses, in which it objected to a substantial number of Plaintiffs' requests. Just
19 four days later, on May 20, 2011, Plaintiffs sent LSW the first of six meet and
20 confer letters containing detailed explanations of Plaintiffs' positions and the
21 relevance of the requested documents, and offering to narrow certain document
22 requests so that LSW would promptly begin producing documents. But LSW
23 refused to withdraw numerous objections, and those few documents it agreed to
24 produce were not forthcoming, forcing Plaintiffs to move to compel. At two
25 separate hearings on Plaintiffs' motion to compel – on August 30 and
26

27 ¹ In addition to adding the new claims discussed herein, the SAC also excises
28 references to the claim for which the Court granted judgment on the pleadings.

1 September 14, 2011 – Magistrate Judge Block resolved the parties’ substantive
2 disputes and also established a schedule for LSW’s production of documents.

3 Since LSW effectively delayed producing documents until after adjudication
4 of Plaintiffs’ motion to compel (as of September 7, LSW had produced only 4,697
5 pages), Plaintiffs moved for an extension of the pretrial scheduling deadlines,
6 which LSW opposed. On November 9, 2011, this Court granted Plaintiffs’ motion:

7 Plaintiffs were diligent in serving their document
8 production requests, diligent in attempting to resolve the
9 disputes between the parties without resort to this Court’s
10 intervention, and diligent in presenting their Motions to
11 Compel to the Magistrate Judge. (See generally Foster
12 Decl.) Despite this diligence, engaging in that process
13 took several months to complete, and now that
14 production has begun in earnest, both sides appear to
15 agree that several thousand documents have been and/or
16 will be produced by Defendant and must be reviewed by
17 Plaintiffs.”

18 *See* Amended Pretrial Scheduling Order and Order Granting Plaintiffs’ Motion to
19 Modify the Pretrial Scheduling Order (Dkt. 117) at 1-2.

20 **B. Discovery And The Meet and Confer Process**

21 Following the orders by Magistrate Judge Block requiring that LSW produce
22 numerous documents, LSW began producing documents in earnest in October
23 2011 and has since produced over 100,000 pages of documents. Brosnahan Decl.,
24 ¶10. Plaintiffs worked diligently to review these documents and, in doing so,
25 Plaintiffs noted that no documents explained how a reduced Monthly
26 Administrative Charge or an annual Account Value Enhancement could be
27 considered “current” or how their inclusion in the “Current Basis” values could be
28 justified.

As Plaintiffs were reviewing these documents, they were also working with
their experts to try to understand the basis for LSW’s Current Basis A and Current
Basis B value calculations. This process was slowed because LSW had not (and

1 still has not) produced the data input files that underlie the calculations in its policy
2 illustrations, including particularly its cost of insurance tables.

3 During the August 30, 2011 discovery hearing, LSW agreed to produce
4 documents explaining the derivation of accumulated and cash surrender values
5 with respect to the individual Plaintiffs' policies, as well as "all data input files
6 from which values used in the calculations of [illustrations] were drawn, e.g., cost
7 of insurance tables." Brosnahan Decl., Ex. C at 81:11-82:18. The Court ordered
8 LSW to provide this information within two weeks. *Id.* at 82:23. LSW, however,
9 failed to include the data input files that the Court ordered LSW to provide
10 Plaintiffs, including but not limited to cost of insurance tables, mortality tables, and
11 the formula for calculating the accumulated values and cash surrender values.
12 LSW's refusal to provide these files is the subject of a presently pending motion to
13 compel. *Id.* at ¶8. LSW's delays in producing this information required Plaintiffs'
14 experts to develop a work-around to permit modeling of LSW's illustrations,
15 including Current Basis A and Current Basis B policy values, to a reasonable
16 approximation, which they did in January, 2012. *Id.* ¶9.

17 Based on their review of the documents and their work with their experts,
18 Plaintiffs began to suspect that there was no basis for LSW to represent the
19 reduced Monthly Administrative Charge and annual Account Value Enhancement
20 as part of LSW's "current" rates and charges other than a desire to inflate the
21 illustrated policy values. In January, 2012, Plaintiffs' experts performed an
22 analysis of the effect of the reduced Monthly Administrative Charge and an annual
23 "Account Value Enhancement" on the Current Basis A and Current Basis B values,
24 which demonstrated that these practices have a very substantial impact on the
25 policy values portrayed in the illustrations. *Id.* at ¶11. Examples of these
26 calculations are set forth in paragraphs 14-16 of the SAC.

27 On January 24, 2012, Plaintiffs wrote to LSW requesting that LSW confirm
28 whether "the Current Basis A and Current Basis B values depicted in the

1 illustrations include, and are significantly inflated by, charge levels and account
2 crediting methodologies that are not “current” in any normal sense of that word.”
3 *Id.* at ¶12 & Ex. D. Plaintiffs also requested that, if true, “these practices be
4 discontinued immediately unless LSW provides a legitimate explanation and
5 justification for these practices within 20 days from the date of this letter.” *Id.*

6 LSW did not respond to Plaintiffs’ letter. On February 16, Plaintiffs wrote
7 to LSW again requesting a response. *Id.* at ¶14 & Ex. F. On February 24, counsel
8 for LSW responded to Plaintiffs’ letter by stating that “the ‘features’ you identified
9 in your letter concern non-guaranteed product events anticipated for policyholders
10 who have maintained their policies for ten years.” *Id.* at Ex. ¶H. LSW did not
11 agree to discontinue the practices in question, nor did it offer any justification.

12 On January 24, 2012, Plaintiffs served their Second Set of Requests for
13 Admission which, *inter alia*, requested that LSW admit that the Current Basis A
14 and Current Basis B values in illustrations provided to the named plaintiffs and all
15 class members were calculated based on a reduced Monthly Administrative Charge
16 beginning in the eleventh policy year (for both the SecurePlus Provider and
17 Paragon policies) and an annual “Account Value Enhancement” beginning in the
18 tenth policy year (for SecurePlus Provider policies). *Id.* at Ex. E. On February 23,
19 2012, LSW responded by admitting that, in regards to the named plaintiffs’
20 illustrations, the Current Basis A and Current Basis B values were calculated using
21 “the Monthly Administrative Charge and all applicable rates and charges deemed
22 current as of the date of, and as set forth in, the particular, individualized
23 illustration” and that (for the Provider policy) they were calculated “using all
24 applicable rates and charges (including, but not limited to, a 1.25% Account Value
25 Enhancement) as of the date of, and as set forth in, the particular, individualized
26 illustration.” *Id.* at Ex. G. (LSW’s Responses, *see e.g.*, RFA Nos. 88-89).

27 Moreover, LSW admitted that this practice applied to the entire class by
28 stating that the current values “set forth in illustrations generated by ICS Solutions

1 software for SecurePlus Paragon and SecurePlus Provider Indexed Universal Life
2 policies are calculated using the Monthly Administrative Charge and all applicable
3 rates and charges deemed current as of the date of, and set forth in, a particular,
4 individualized illustration.” *Id.* (RFA Nos. 80-81). LSW’s response refused to
5 admit or deny that all class member illustrations included the Account Value
6 Enhancement in the policy values, indicating that LSW could not identify any class
7 member illustrations that did not include the Account Value Enhancement. *Id.*
8 (RFA Nos. 91-92).

9 LSW responded to Plaintiffs’ requests for admission that “No PROVIDER
10 or PARAGON policyholder is currently paying a REDUCED MONTHLY
11 ADMINISTRATIVE CHARGE” and that “no PROVIDER or PARAGON
12 policyholder has ever paid a REDUCED MONTHLY ADMINISTRATIVE
13 CHARGE” by admitting that “because no SecurePlus Paragon or SecurePlus
14 Provider policy has yet reached its tenth policy anniversary, any events illustrated
15 to occur beginning on such a policy’s tenth policy anniversary have not yet
16 occurred.” *Id.* (RFA Nos. 78-79). LSW responded to Plaintiffs’ requests for
17 admission that it is “not currently crediting” Account Value Enhancements to any
18 policyholders in the class and that “no policyholder” has ever received an Account
19 Value Enhancement by admitting that because “no policy has yet reached its tenth
20 anniversary, LSW has not yet applied a 1.25% Account Value Enhancement to the
21 Accumulated Values of any in-force Provider policies.” *Id.* (RFA Nos. 82-83).

22 Upon receipt of LSW’s letter and discovery responses on February 23 and
23 24 confirming its practices, and the uniform applicability of its practices to the
24 class as a whole, Plaintiffs prepared and transmitted the proposed SAC to LSW on
25 the following Monday, February 27, and requested that LSW stipulate to its filing.
26 *Id.* at Ex. J. Pursuant to Central District of California Local Rules 7-3, the parties
27 had a telephonic conference on February 29. *Id.* at Ex. K. In the conference, LSW
28 refused to stipulate to the filing of the SAC and indicated that it would oppose

1 Plaintiffs' motion. *Id.* After waiting the ten days required by Local Rule 7-3,
2 Plaintiffs filed this motion at the earliest permissible date, although Plaintiffs
3 agreed to delay the hearing date one week to accommodate the schedule of defense
4 counsel, Mr. Shapiro. *Id.*, at ¶19.

5 **IV. ARGUMENT**

6 The Court should grant Plaintiffs' motion for leave to file the SAC because
7 the purpose of pleadings is to facilitate a proper decision on the merits rather than
8 erecting formal and burdensome impediments in the litigation process. *Howey v.*
9 *United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Unless undue prejudice to the
10 opposing party will result, trial courts should ordinarily permit a party to amend its
11 complaint. *Id.*

12 Where, as here, a plaintiff moves for leave to amend after the time for
13 amending has expired under the court's pretrial scheduling orders, amendment
14 should be granted where (1) there is "good cause" for seeking the amendment
15 under Federal Rule of Civil Procedure 16(b); and (2) the defendant does not make
16 a showing of prejudice, or strong showing of undue delay, bad faith, repeated
17 failure to cure deficiencies by amendments previously allowed, or futility under
18 Federal Rule of Civil Procedure 15(a). *Monday v. Saxon Mortg. Servs.*, 2011 U.S.
19 Dist. LEXIS 72785, at *1-2 (E.D. Cal. July 7, 2011).

20 **A. Good Cause Exists To Provide Leave To Amend Under 16(b)**
21 **Because Of Plaintiffs' Diligence And The Importance Of The**
22 **Amendments To The Class**

23 Good cause exists under Federal Rule of Civil Procedure 16(b) where the
24 movant has exercised diligence in its attempt to comply with the deadlines set forth
25 in the court's scheduling order. *Monday*, 2011 U.S. Dist. LEXIS 72785, at *2.
26 Diligence and, thus, good cause, exist where the amended complaint is based on
27 materials or information produced during the discovery process. *Id.* ("Because
28

1 plaintiff moves to amend her complaint based on facts uncovered during discovery,
2 the court finds that plaintiff has good cause to seek leave to amend.”).

3 As this Court already has found, Plaintiffs were diligent in serving
4 discovery, but “[d]espite this diligence,” did not obtain documents until after the
5 time for amending the complaint had passed. It took many months for Plaintiffs to
6 analyze the extremely complex policy illustrations, identify these additional
7 deceptive practices, and work with experts to identify and quantify their impact.
8 *See* Brosnahan Decl., ¶4. As soon as Plaintiffs believed that they had a basis for
9 amending its complaint, they served discovery and sent meet and confer
10 correspondence to LSW to confirm their suspicions.

11 In particular, Plaintiffs’ proposed SAC is based on information gleaned from
12 discovery over the last few months. First, LSW did not confirm until February 23
13 and 24, 2012 that its illustrations include in their calculation of Current Basis A
14 and Current Basis B policy values an annual “Account Value Enhancement” of
15 1.25% beginning in the tenth policy year as well as a reduced Monthly
16 Administrative Charge beginning in the eleventh policy year. Brosnahan Decl., at
17 ¶¶4, 10-16.

18 Second, Plaintiffs were unable to confirm that these claims were shared by
19 all class members until LSW responded to meet and confer correspondence and
20 discovery on February 23 and 24. *Id.* at ¶¶15, 17. Such correspondence and
21 discovery responses confirmed that these practices are applied uniformly to the
22 entire class and the claims are shared by the class.

23 Third, Plaintiffs and their experts were initially unable to assess the
24 importance and materiality of these practices because LSW did not (and still has
25 not) produced cost of insurance tables that would allow efficient reverse
26 engineering of the policy values in the illustrations. *Id.* at ¶¶4, 7-9. As a result,
27 Plaintiffs’ work with experts on this issue has been difficult and time consuming.
28 *Id.* In January, 2012, Plaintiffs’ experts effected a work-around that demonstrated

1 that inclusion of these items significantly inflates the Current Basis A and Current
2 Basis B policy values and makes the policy appear far more attractive on a current
3 basis than it actually is. *Id.* at ¶11. Examples of these calculations are reflected in
4 the proposed SAC, at paragraph nos. 14-16.

5 Fourth, it took Plaintiffs months to review over one hundred thousand pages
6 of documents produced by LSW beginning in late October 2012 following
7 Plaintiffs' motion to compel; that review revealed no documents showing how the
8 Account Value Enhancement and the reduced Monthly Administrative Charge
9 could be considered "current" and how these practices could be justified. It was
10 not until February 23 and 24, 2012, that LSW responded with its belief that the
11 features were current and their inclusion in the calculation was justified because
12 they are "anticipated," though not guaranteed by LSW, and that the only sense in
13 which they are "current" is that LSW "deems" them to be current. *Id.*, Exs. G &
14 H. This confirmed that in fact these features are not "current" in any commonly
15 understood meaning of that term, and that LSW has no justification for its practice
16 of substantially inflating its Current Basis A and Current Basis B policy values by
17 the inclusion of rates and charges that are not currently provided to anyone and
18 never have been provided to anyone.

19 After receiving LSW's confirmation on Friday, February 24, that the policy
20 values are inflated by the reduced Monthly Administrative Charge and Account
21 Value Enhancement, and that LSW could offer no justification for this practice,
22 Plaintiffs provided LSW with a proposed amendment on the following Monday,
23 February 27, and requested that LSW stipulate to the proposed filing. *See*
24 Brosnahan Decl. ¶¶17-19. A telephonic meet-and-confer call pursuant to L.R. 7.3
25 occurred on February 29; LSW refused to stipulate. After allowing the required
26 ten day period to run after the meet and confer session pursuant to L.R. 7.3,
27 Plaintiffs filed this motion in time to obtain the first available hearing date, April 9,
28

1 but agreed to request April 16 based on the unavailability of defense counsel on
2 April 9. Brosnahan Decl. at Ex. L.

3 Moreover, good cause exists to allow amendment here because these are
4 valid and important class claims, and it is more efficient for them to be adjudicated
5 in this proceeding. Plaintiffs represent a class of approximately 37,000
6 policyholders. All class members have an interest in having these claims
7 adjudicated, and a failure to adjudicate them in this proceeding risks additional
8 litigation by class members who might choose to opt-out and/or pursue the claims
9 in a separate class action litigation.

10 The interest of the class is particularly strong given the substantial impact
11 that these deceptive practices have on the Current Basis B values depicted in
12 LSW's illustrations (which are presented as the most likely and important set of
13 values). For example, named plaintiff Joyce Walker's Illustration depicts Current
14 Basis B values that will provide her with annual retirement income until she
15 reaches age 99 and with \$1,311,622 remaining in the policy at that time as its cash
16 surrender value. However, if the Account Value Enhancement and the reduction in
17 the Monthly Administrative Charge were not included in the projections, the
18 Illustration would show the policy running out of money (i.e., lapsing) before
19 Ms. Walker reaches the age of 71. The impact of these practices on the
20 Illustrations provided to other class members is similarly dramatic for other class
21 members. These same deceptive Illustrations are at the core of other claims being
22 asserted in this case.

23 In sum, Plaintiffs have been diligent in preparing and seeking leave to file
24 the proposed SAC, which contains meritorious claims that should be adjudicated
25 by the Court as part of this class action. On these facts the Court should find good
26 cause to provide leave to amend.

27
28

1 **B. Amendment Is Appropriate Because LSW Will Not Be Prejudiced**
2 **And There Is No Strong Showing Of Undue Delay, Bad Faith, Or**
3 **Repeated Amendments**

4 Federal Rule of Civil Procedure 15(a)(2) directs the Court to freely grant
5 leave to amend when justice so requires. The rule reflects a “policy of favoring
6 amendments”, *see Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160
7 (9th Cir. 1989), and is “to be applied with extreme liberality.” *Eminence Capital,*
8 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). This policy in favor of
9 amendment applies regardless of whether the amendment seeks to add claims or
10 parties. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

11 “In exercising its discretion regarding granting or denying leave to amend, a
12 court must be guided by the underlying purpose of Rule 15 – to facilitate decision
13 on the merits rather than on the pleadings or technicalities.” *Feezor v. Sears,*
14 *Roebuck & Co.*, U.S. Dist. LEXIS 66144, at *2-3 (E.D. Cal. June 9, 2011). Under
15 Rule 15’s liberal policy favoring amendment, the nonmoving party bears the
16 burden of demonstrating why leave to amend should not be granted. *Genentech,*
17 *Inc. v. Abbott Laboratories*, 127 F.R.D. 529, 530-531 (N.D. Cal. 1989).

18 The Supreme Court has held that leave to amend should be freely given in
19 the absence of undue delay, bad faith or dilatory motives of the movant, repeated
20 failure to cure deficiencies by amendments previously allowed, undue prejudice to
21 the opposing party by virtue of allowance of the amendment, or futility of
22 amendment. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227
23 (1962). The most important factor is prejudice. *Eminence Capital*, 316 F.3d at
24 1052. “Absent prejudice, or a strong showing of any of the remaining *Foman*
25 factors, there exists a presumption under Rule 15(a) in favor of granting leave to
26 amend.” *Id.*

27 There is no prejudice here. Plaintiffs do not seek to redepose LSW
28 witnesses who already have been deposed in this action for the purpose of

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1 inquiring about these additional claims. Nor do Plaintiffs seek to modify the
2 existing schedule of pre-trial or trial dates. Since the claims are common to all of
3 LSW’s illustrations, the amendments will not delay class certification proceedings.
4 Nor are the claims or LSW’s defenses complex because LSW has stated that it
5 believes its practices are legitimate simply because they are “anticipated.”
6 Although Plaintiffs notified LSW about these potential claims prior to
7 Ms. Walker’s deposition, counsel for LSW chose to ask no questions on the
8 subject. Brosnahan Decl., ¶20. LSW, of course, also would have the right to file a
9 motion to dismiss the additional claims.

10 Nor has there been undue delay, bad faith or dilatory motive by Plaintiffs.
11 Discovery in this case is still active, with a discovery cut-off that is still many
12 months away and a trial date that is almost a year away. Plaintiffs moved
13 diligently to investigate these claims, acted diligently in placing LSW on notice of
14 the claims, and acted diligently in moving to amend the complaint.

15 **V. CONCLUSION**

16 Plaintiffs’ proposed SAC is timely and is consistent with the policy of trying
17 cases on the merits. Good cause exists for the request herein, and Plaintiffs
18 respectfully request that the Court provide leave to allow Plaintiffs to file their
19 SAC.

20
21 DATED: March 12, 2012 KASOWITZ BENSON TORRES & FRIEDMAN
22 LLP

23
24 By: s/Brian P. Brosnahan
25 Brian P. Brosnahan
26
27
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