

1 KASOWITZ, BENSON, TORRES & FRIEDMAN LLP  
CHARLES N. FREIBERG (SBN 70890)  
2 BRIAN P. BROSNAHAN (SBN 112894)  
JACOB N. FOSTER (SBN 250785)  
3 101 California Street, Suite 2300  
San Francisco, California 94111  
4 Telephone: (415) 421-6140  
Facsimile: (415) 398-5030

5 LEVINE & MILLER  
6 HARVEY R. LEVINE (SBN 61879)  
CRAIG A. MILLER (SBN 116030)  
7 LEVINE & MILLER  
550 West C Street, Suite 1810  
8 San Diego, CA 92101-8596  
Telephone: (619) 231-9449  
9 Facsimile: (619) 231-8638

10 Attorneys for Plaintiffs  
JOYCE WALKER, KIM BRUCE HOWLETT,  
11 and MURIEL SPOONER, on behalf of themselves  
and all others similarly situated

12  
13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**

15  
16 JOYCE WALKER, KIM BRUCE  
HOWLETT, and MURIEL  
17 SPOONER, on behalf of themselves  
and all others similarly situated,  
18  
19 Plaintiffs,

19 v.

20 LIFE INSURANCE COMPANY OF  
THE SOUTHWEST, a Texas  
21 corporation,  
22  
23 Defendant.

**CLASS ACTION**

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

**PLAINTIFFS' STATEMENT OF  
POSITION REGARDING  
DEFENDANT LIFE INSURANCE  
COMPANY OF THE  
SOUTHWEST'S APPLICATION TO  
SEAL MATERIALS SUBMITTED  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION**

Judge James V. Selna

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP  
101 CALIFORNIA STREET, SUITE 2300  
SAN FRANCISCO, CALIFORNIA 94111

1 In response to the Court’s May 15, 2012 email from Ms. Tunis requesting “a  
2 further declaration from either party...from counsel as to...what the Plaintiffs’  
3 position is in regards to this application,” Plaintiffs Joyce Walker, Kim Bruce  
4 Howlett, and Muriel Spooner (collectively, “Plaintiffs”) submit this Statement of  
5 Position Regarding Defendant Life Insurance Company of the Southwest’s  
6 (“LSW”) Application to Seal Materials Submitted in Support of Plaintiffs’ Motion  
7 for Class Certification.

8 **I. FACTUAL BACKGROUND.**

9 LSW has produced a number of documents to Plaintiffs that have been  
10 designated “Confidential” pursuant to the protective order in this matter. The  
11 protective order provides that as to “any papers to be filed with the Court [that]  
12 contain information and/or documents that have been designated as  
13 ‘CONFIDENTIAL’ or ‘CONFIDENTIAL INFORMATION – PROTECTIVE  
14 ORDER,’ the proposed filing shall be accompanied by an application to file the  
15 papers or the portion thereof containing the designated information or documents  
16 (if such portion is segregable) under seal.” Dkt. 103 ¶10. In keeping with this  
17 provision, for Plaintiffs’ motion for class certification, as well as prior discovery  
18 motions, Plaintiffs have coordinated with LSW (for the sake of efficiency and to  
19 defer any separate dispute over the merits of LSW’s confidentiality designations)  
20 the filing under seal of documents designated by LSW as “Confidential” pursuant  
21 to the protective order.<sup>1</sup> This coordination was without prejudice to either party to  
22 challenge the confidentiality designation of any given document and whether that  
23 document should be filed under seal. *See* Dkt. 103 ¶11. Plaintiffs have made no  
24 representations as to whether any given document has properly been designated  
25 “Confidential” by LSW or should be filed under seal.

26 \_\_\_\_\_  
27 <sup>1</sup> Specifically with respect to Plaintiffs’ motion for class certification, Plaintiffs  
28 tried to be cautious in redacting information from their papers that could be  
perceived by LSW as referring to or having been obtained through discovery  
designated by LSW as “Confidential.”

1 **II. LEGAL STANDARDS.**

2 In the Ninth Circuit, courts begin with “a strong presumption in favor of  
3 access to court records.” *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331  
4 F.3d 1122, 1135 (9th Cir. 2003). Accordingly, a “compelling reasons” standard  
5 applies to most judicial records, which is derived from the common law right to  
6 “inspect and copy public records and documents, including judicial records and  
7 documents.” *See, e.g., Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 677-78 (9th  
8 Cir. 2010). To succeed on a motion to seal, a party must show that “compelling  
9 reasons supported by specific factual findings...outweigh the general history of  
10 access and the public policies favoring disclosure.” *Id.* (quoting *Kamakana v. City  
11 & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)).

12 The “compelling reasons” standard generally applies to materials filed in  
13 support of dispositive, as opposed to non-dispositive, motions. The Ninth Circuit  
14 has made this distinction based on the rationale that “the information that surfaces  
15 during pretrial discovery may be unrelated, or only tangentially related, to the  
16 underlying cause of action.” *Foltz*, 331 F.3d at 1135. Where, on the other hand,  
17 the particular motion “adjudicates substantive rights” or may be dispositive of the  
18 litigation, the “compelling reasons” standard is appropriate. *Id.* Although not a  
19 decision on the merits, a class certification motion raises similar policy issues as  
20 does a dispositive motion with respect to the public’s right to know, and may also  
21 be dispositive as a practical matter “by creating a ‘death knell’ for either plaintiff  
22 or defendant.” *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000)  
23 (setting forth guideposts to be utilized in determining whether to grant  
24 interlocutory appeal under Rule 23(f)). Indeed, in adopting Federal Rule of Civil  
25 Procedure 23(f), the Advisory Committee noted:

26 An order denying certification may confront the plaintiff with a  
27 situation in which the only sure path to appellate review is by  
28 proceeding to final judgment on the merits of an individual

1 claim that, standing alone, is far smaller than the costs of  
2 litigation. An order granting certification, on the other hand,  
3 may force a defendant to settle rather than incur the costs of  
4 defending a class action and run the risk of potentially ruinous  
5 liability.

6 Fed. R. Civ. Proc. 23(f), Advisory Committee’s Note to 1998 Amendments.

7 The Ninth Circuit has not ruled as to whether the “compelling reasons”  
8 standard applies to a motion for class certification. *Labrador v. Seattle Mortgage*  
9 *Co.*, 2010 U.S. Dist. LEXIS 95763, at \*5 (N.D. Cal. Sept. 1, 2010). District courts,  
10 however, have applied the “compelling reasons” standard in determining whether  
11 to seal materials submitted in support of a class certification motion. *Id.* (finding  
12 that “many of the concerns the Ninth Circuit identified in *Kamakana* for applying  
13 the ‘compelling reasons’ test to dispositive motions” applied to defendant’s  
14 application to seal its opposition to plaintiffs’ motion for class certification,  
15 including that “the grounds for the ruling would be kept secret from the public,”  
16 which would “hinder ‘the public’s understanding of the judicial process’” and  
17 “slow the development of the law on class certification”); *Dynamic Random*  
18 *Access Memory (DRAM) Antitrust Litig.*, 2007 U.S. Dist. LEXIS 20570, at \*31-32  
19 (N.D. Cal. Mar. 6, 2007) (noting that the court had applied the “compelling  
20 reasons” standard to the parties’ motions to seal in connection with the motion for  
21 class certification, “finding that motion akin to a dispositive motion”); *but see Rich*  
22 *v. Hewlett-Packard Co.*, 2009 U.S. Dist. LEXIS 64033, at \*3-4 (N.D. Cal. July 20,  
23 2009) (class certification motion not dispositive in the relevant sense because  
24 contested issues in plaintiffs’ motion involve procedural requirements of Rule 23  
25 and relate only tangentially to the underlying merits of plaintiffs’ claims). In light  
26 of the important issues presented on Plaintiffs’ motion for class certification and  
27 the supporting papers submitted therewith, Plaintiffs agree with the *Labrador* and  
28 *DRAM Antitrust Litigation* courts that the better policy on a motion for class

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP  
101 CALIFORNIA STREET, SUITE 2300  
SAN FRANCISCO, CALIFORNIA 94111

1 certification is to apply the presumptive “compelling needs” standard in  
2 determining whether judicial records should be sealed.<sup>2</sup>

3 **III. PLAINTIFFS’ POSITIONS WITH RESPECT TO DOCUMENTS**  
4 **FILED IN SUPPORT OF MOTION FOR CLASS CERTIFICATION.**

5 Plaintiffs understand that LSW has withdrawn its application to seal (1) the  
6 Declaration of Brian P. Brosnahan; (2) Exhibits D, G, H, L, Q, R, T, V, W, X, and  
7 Y to the Declaration of Brian P. Brosnahan; (3) Exhibits F, M, O, P, R, and T to  
8 the Declaration of Dr. Patrick Lee Brockett; and (4) Exhibit G to the Declaration of  
9 Lesa Dinglasan. *See* Declaration of Timothy Perla in Support of LSW’s  
10 Application to Seal, Dkt. 236. LSW asks the Court to seal (1) Plaintiffs’ Motion  
11 for Class Certification; (2) exhibits C, E, F, I, S, and U to the Declaration of Brian  
12 P. Brosnahan; (3) the Declaration of Dr. Patrick Lee Brockett and exhibits G, H, L,  
13 N, Q, and S thereto; and (4) the Declaration of Lesa Dinglasan and exhibits C, D,  
14 E, F, and H thereto. *Id.*

15 Plaintiffs do not object to the protection from public disclosure of any  
16 confidential or identifying information of non-party policyholders, such as that  
17 contained in Exhibit F to the Brosnahan Declaration and Exhibits C, D, E, and F to  
18 the Dinglasan Declaration. As a less restrictive alternative, however, Plaintiffs  
19 propose that instead of sealing these materials, Plaintiffs will publicly file redacted  
20 versions of these exhibits that remove any reference to policyholder identifying  
21 information (*e.g.*, names, addresses, social security numbers, medical information,  
22 etc.), which identifying policyholder information is not relevant to Plaintiffs’  
23 motion for class certification.<sup>3</sup>

24  
25 <sup>2</sup> If the Court instead elects to apply the lesser “good cause” standard here (*see*  
26 *Foltz*, 331 F.3d at 1135), Plaintiffs believe that, with respect to the documents  
27 addressed herein, LSW’s interest in confidentiality is outweighed by the fact that  
28 this case involves issues important to the public. *See, e.g., Rivera v. NIBCO, Inc.*,  
384 F.3d 822, 827 n.6 (9th Cir. 2004) (good cause standard is a “heavy burden”).

<sup>3</sup> Plaintiffs would be willing to discuss and coordinate these redactions with LSW  
prior to filing any such exhibits.

1 Of the other documents LSW seeks to have filed under seal, Exhibits G and  
2 H to the Brockett Declaration – LSW’s internal pricing memoranda – stand out as  
3 the most competitively significant documents, although the significance of the  
4 Paragon pricing memorandum is greatly diminished now that Paragon is no longer  
5 sold. Whether these documents meet the “compelling reasons” test and should be  
6 sealed, Plaintiffs leave to LSW to argue, but Plaintiffs do not see great competitive  
7 significance to the other documents submitted with the motion.

8 Plaintiffs do not believe that the remaining material, including the text of the  
9 briefing and declarations, is entitled to sealing protection. The public’s right to  
10 know the arguments made by Plaintiffs in support of their class certification  
11 motion and the rationale for the rulings the Court makes on Plaintiffs’ motion is  
12 very important regardless of whether Plaintiffs’ motion for class certification is a  
13 “dispositive motion.” The policy reasons for public access to the briefing and  
14 declarations in this case are strong and should prevail over LSW’s interest in  
15 secrecy.

16 Dated: May 21, 2012

KASOWITZ, BENSON, TORRES & FRIEDMAN  
LLP

17  
18  
19  
20 By: /s/ Brian P. Brosnahan  
21 Brian P. Brosnahan  
22  
23  
24  
25  
26  
27  
28