IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

DAVID B. KARR, individually and on behalf of others similarly situated,	)	
	)	Case No. 1916-CV26645
Plaintiff,	)	
	)	Division 14
vs.	)	
KANSAS CITY LIFE INSURANCE COMPANY	)	
Defendant.	)	

REPLY IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD

In responding to Class Counsel's Motion for Attorneys' Fees, Expenses, and Service Award ("Motion"), Defendant Kansas City Life Insurance Company ("KCL") offers an "Opposition" that is both improper and irrelevant. Its arguments do nothing to call into doubt that Class Counsel's request is wholly appropriate and warranted in this case. Therefore, the Court should ignore KCL's arguments in their entirety and grant Class Counsel's Motion.

In the first instance, KCL's attempted challenge to Class Counsel's Motion is not permitted as a matter of law, because KCL has no standing to oppose Class Counsel's request for attorneys' fees and a service award from the common fund. KCL is not a member of the Class of Missouri policyholders. Quite to the contrary, it has zealously advocated against the interests of the Class at every stage of this litigation. Simply put, KCL has no cognizable interest in the allocation of the common fund or on any matter it sets forth in its Opposition. Its purported assertions on behalf of the interests of the Class are disingenuous at best and, at worst, ignore unambiguous law confirming that it has no basis to challenge Class Counsel's Motion.

In any event, KCL's willful ignorance of settled law to advocate a position against its policyholders, and against Class Counsel and Mr. Karr, who resolutely stood up for the rights of those policyholders, is not surprising. It is merely par for the course in this litigation where, despite well-reasoned and clear findings—*as a matter of law*—that KCL had *repeatedly* violated its contracts *in three different ways* for more than *three decades* and *without the knowledge* of more than 8,000 Class Members, KCL nonetheless argued at trial that each member of the Class should receive the sum total of *zero dollars* in recompense for the wrongfully taken monies from their cash values. Now, yet again, despite an extraordinary result where the efforts of Class Counsel and Mr. Karr resulted in a jury verdict for the *full amount* of alleged compensatory damages *for each and every* Class Member, KCL inserts itself like a fox guarding the hen house. Under the guise of looking out for absent Class Members whom it repeatedly argued were entitled to nothing throughout this litigation, KCL now takes the position that those who fought for the rights of that Class should likewise receive nothing for their significant efforts and the more than three years of litigating this case all the way to a successful jury verdict.

For the reasons set forth herein and in Class Counsel's Motion and Suggestions in Support of the same, Class Counsel's Motion should be granted.

I. KCL DOES NOT HAVE STANDING TO CHALLENGE THE MOTION.

KCL has no cognizable interest to challenge the proposed allocation of Class funds, including those amounts to be allocated to Class Counsel and Mr. Karr. *See Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2021 WL 247958, at *3 (W.D. Mo. Jan. 25, 2021) ("State Farm has no standing to oppose the requested award because the award is being paid from the Common Fund, in which State Farm has no interest."); *Bouaphakeo v. Tyson Foods, Inc.*, 593 Fed. Appx. 578, 586 (8th Cir. Nov. 19, 2014) (Benton J. concurring) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, n.7 (1980) ("Boeing had no cognizable interest in further litigation

between the class and its lawyers over the amount of fees ultimately awarded from money belonging to the class.")); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) ("Dow has no interest in the method of distributing the aggregate damages award among the class members."); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) ("[A] defendant has no interest in how the class members apportion and distribute a damage fund among themselves."); *Copeland v. Marshall,* 641 F.2d 880, 905, n.57 (D.C. Cir. 1980) ("In 'common fund' cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the bounty."); *Tennille v. W. Union Co.,* 809 F.3d 555, 559 (10th Cir. 2015) ("Generally, a settling defendant in a class action has no interest in the amount of attorney fees awarded when those fees are to be paid from the class recovery rather than the defendant's coffers."); *Lyngaas v. Curaden AG*, 436 F. Supp. 3d 1019, 1027 (E.D. Mich. 2020) ("[G]iven that any incentive award would be drawn from the class recovery, Curaden USA lacks standing to object to the amount of the incentive award, as it has no interest in the matter."); *see also Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 574 (Mo. App. W.D. 2017) ("The same [standing] requirement of justiciability exists under Missouri law.").

KCL has no cognizable interest in how the fund is distributed, and, therefore, it has no legally colorable basis upon which to challenge how much of the fund should be allocated for attorneys' fees, expenses, and a service award. For this reason alone, KCL's objections should not be heard.

II. KCL'S ARGUMENT AGAINST CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS WITHOUT MERIT.

Even if the Court were to entertain KCL's improper Opposition—and it should not—the arguments therein are meritless and encapsulate little more than rejected arguments previously

offered by KCL on class certification issues that it has now repackaged to disparage Class Counsel and Mr. Karr on the heels of the Class's victory at trial. Generally, KCL's arguments fall into two categories: (1) it asserts that this case is not "novel" because it was preceded by a case against a different defendant that was determined under Missouri law in *Vogt v. State Farm Life Insurance Co.* (W.D. Mo.), and (2) it claims the result of this case is not "extraordinary," even though the efforts of Class Counsel and Plaintiff resulted in a jury verdict in the amount of 100% of alleged compensatory damages, because, as KCL argues, Class Counsel and Mr. Karr voluntarily abandoned claims for conversion and punitive damages potentially available to the Class. *See* KCL's Suggestions in Opposition to Plaintiff's Motion ("Opp.") at 1.

KCL's feigned concern over a conflict between Class Counsel who achieved a verdict of $28.36 million for the Class, on the one hand, and the Class on the other, rings hollow. Indeed, KCL presents an incomplete analysis that disregards the bulk of the relevant factors[1] for determining whether the percentage requested by Class Counsel under a percentage-of-the-fund method is appropriate and further distorts the procedural history of this case to fit its warped narrative.

A. Class Counsel's Successful Argument and Reliance on Relevant Case Law Provided by *Vogt* Does Nothing to Cast Doubt on the Fee Request.

The thrust of KCL's first argument is both haphazard and, quite frankly, bizarre. In essence, it seeks to take Plaintiff's prior arguments that championed this Court's consideration of the most relevant case law on point and weaponize it against Class Counsel. It is true that Class Counsel relied on *Vogt* to argue that Missouri law favored Plaintiffs on the merits, including Plaintiffs'

[1] *See, e.g.*, Suggestions in Support of Motion at 2, 15, citing, *inter alia*, *Berry v. Volkswagen Grp. Of Am., Inc.*, 397 S.W.3d 425, 431 (Mo. 2013) (setting forth factors, including the "result achieved," "nature and character of the services rendered," "the degree of professional responsibility required," the nature and importance of the subject matter," and "the vigor of the opposition").

interpretation of the Class policies and application of the discovery rule to prevent the running of the statute of limitations, among other matters, and did so against KCL's repeated arguments that *Vogt* was inapplicable. But, Class Counsel's success in doing so merely demonstrates effective legal counsel rather than some conflict or deficiency in the quality of the legal work provided.

Likewise, KCL's attempt to discredit Class Counsel's contributions to achieving the result in this case on the basis of Class Counsel's work in litigating similar claims against other defendants merely serves to highlight the particular skill and experience that Class Counsel has in cases involving complex universal life insurance products issued to thousands of policyholders. In fact, KCL's arguments alleging other cost of insurance class cases as reflecting a mixed bag of outcomes, once again only highlights the skill of Class Counsel, the substantial risk involved, the time and labor required, and the excellent benefit achieved when a Class of thousands succeeds on taking three breach of contract claims all the way up to and through a jury trial, and then recovers 100% of alleged compensatory damages.

Perhaps most telling of the shortcoming in KCL's arguments is the fact that KCL speaks out of both sides of its mouth in its attempt to downplay Class Counsel's efforts in this case. On the one hand, it argues that Class Counsel's efforts were "essentially rote and mechanical" because of case similarities with *Vogt*, but then on the other hand, argues that "KCL and State Farm are different companies, they offered their insureds different policies with different contractual language and *made different arguments at different times and in different ways throughout the life of each case*." Opp. at 2 (emphasis added). KCL cannot have it both ways, claiming the case was zealously litigated (such that Class Counsel had to overcome numerous *different* arguments made by KCL throughout the life of the case) when it suits KCL's argument but then claiming the case

was mere mechanical application of prior case law when it sees an opportunity to diminish Class Counsel's efforts and results.

Finally, KCL's argument that Class Counsel's offer to provide expense reports *in camera* "robs KCL of the ability to challenge the propriety of the amount sought" (*id.* at 5) falls flat because, as stated previously herein, KCL has no cognizable interest to challenge the propriety of the amount of attorneys' fees, expenses, and service award sought in the first place, regardless of whether expense records are provided *in camera*, as an exhibit to a motion, or otherwise. At bottom, KCL's entire Opposition is nothing more than petty mudslinging at the efforts and credentials of Class Counsel because KCL lost the case.[2] This is no grounds for challenging the requested fees and service award.

B. The Strategic Decision to Keep the Conversion Claim from the Jury Does Not Render the Result Less than Excellent.

The jury found in favor of the Class for 100% of compensatory damages in this case. There were simply no additional compensatory damages to be gained by submitting the conversion claim to the jury. As with the conversion claim, the damages for KCL's breaches of contract were the overcharges to the cash value of each Class Member. The jury so found, over KCL's opposition at trial, that the Class was entitled to the full $28.36 million sought for those overcharges. There is not a single penny of compensatory damages lost to the Class as a result of not putting the conversion claim before the jury. Indeed, contemporaneously with its Motion for fees, Class

[2] In any event, once again, to the extent that the Court asks Class Counsel to provide time and expense records to support its Motion, they will gladly do so, even if it is unnecessary because the Court may award fees using the percentage-of-the-fund approach, and the "result achieved," "nature and character of the services rendered," "the degree of professional responsibility required," "the nature and importance of the subject matter," and "the vigor of the opposition" (*Berry*, 397 S.W.3d at 431) justify a one-third fee. *See, generally*, Suggestions in Support of Motion, including cases cited at 13-14 brief and demonstrating fee awards in state and federal court on par with Class Counsel's request.

Counsel now seeks to add to and further maximize that award by recovering pre- and post-judgment interest on the damages to the Class.

KCL nevertheless challenges the work of Class Counsel in achieving this excellent result by drawing from its previous class certification arguments about adequacy and repackaging them as a challenge to fees. But, KCL already had its opportunity to challenge the adequacy of Class Counsel and Mr. Karr, as well as to allege conflicts of interest, when it opposed class certification and again when it later filed a motion to decertify and a subsequent motion to reconsider. Those efforts failed. An improper Opposition on a motion for fee and service award allocation is not the mechanism for raising those arguments again.

Regardless, KCL's recycled efforts fare no better here, for obvious reasons. Ultimately, "[a] strategic decision to pursue those claims a plaintiff believes to be most viable does not render her inadequate as a class representative." *Todd v. Tempur-Sealy Int'l, Inc.*, No. 13-CV-04984-JST, 2016 WL 5746364, at *5 (N.D. Cal. Sept. 30, 2016). Hence, while true that Class Counsel "spent significant time amending the petition to seek punitive damages, attempting to secure discovery to support it, and avoiding a summary judgment to strike it" (Opp. at 4), Class Counsel and Mr. Karr's later strategic decision to forgo putting that issue before the jury does not undermine the requested fees and service award. Having informed Class Counsel and Mr. Karr that the "Plaintiffs appear to have a steep mountain to climb in order to convince the Court that the issue of punitive damages should be submitted to the jury" (Order Denying Motion to Dismiss Punitive Damages Claim (Nov. 23, 2022)), the Court also denied Plaintiffs' motion to enforce discovery on punitive damages (*See* Order Regarding Pending Motions (Nov. 23, 2022); Plaintiff's Motion to Enforce Discovery and Suggestions in Support of same (June 24, 2022); *see also* Plaintiff's Reply (July

12, 2022)). In light of these developments, among others, Class Counsel cannot be faulted when it strategically pursued a path that resulted in 100% of compensatory damages to the Class.

III. THE PROPOSED SERVICE AWARD OF $100,000 IS APPROPRIATE.

For its criticisms of the proposed service award to Mr. Karr, KCL suggests the Motion fails to address "(1) actions [Mr. Karr] took to protect the class's interest, (2) the degree to which the class has benefitted from those actions, and (3) the amount of time and effort [Mr. Karr] expended in pursuing litigation," (Opp. at 6), but this is precisely the standard applied in support of Class Counsel's Motion. *See* Suggestions in Support of Motion at 18-19. Like its other arguments, KCL's main "point" in contesting the service award appears to be to again raise failed adequacy and typicality arguments. *See* Opp. at 6. Plaintiff's subjective understanding of the complex internal and undisclosed workings of KCL's universal life insurance products neither renders him an inadequate representative nor does it serve as a basis for challenging the proposed service award, particularly where he personally hired Class Counsel with expertise with these issues and engaged a well-qualified expert to assist in making the Class's case.

Additionally, for many of the same reasons mentioned above, KCL's purported concern that the service award is "unfair" to the Class is insincere, particularly given the fact that KCL is of the opinion no one should receive anything in recompense for its breaches of its policies. In any case, the $100,000 requested is hardly excessive. By straightforward division, it represents merely a fraction of a single percent of the overall damages award (and even less if pre- and post-judgment interest are applied). Indeed, given compensatory damages per Class Member at an average of around $3,500 (once again, without pre- and post-judgment interest applied), the average Class Member would share little more than $12 apiece for allocating the requested award. This is hardly unfair to any Class Member given the significant contributions of Mr. Karr to pursue these worthy claims to remedy the wrongful conduct of which Class Members were unaware.

KCL's ability to cherry-pick a handful of cases where service awards were found in lesser amounts does nothing to detract from the substantial case law presented with Class Counsel's Motion demonstrating amounts at or in excess of $100,000 are routinely awarded to class representatives. *See* Suggestions in Support of Motion at 19-20, n.10. By way of brief example, none of the cases cited by KCL, outside of *Vogt*, involve a matter that proceeded to trial. *See*, *e.g.*, *Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017) (affirming service award on settlement); *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198 (W.D. Mo. 2017) (approving service award with approval of settlement settlement); *Fellows v. Am. Campus Communities Servs., Inc.*, No. 4:16-CV-01611-JAR, 2018 WL 3056046 (E.D. Mo. June 20, 2018) (approving service award with approval of settlement); *Rawa v. Monsanto Co.*, No. 4:17CV01252-AGF, 2018 WL 2389040 (E.D. Mo. May 25, 2018) (approving service awards with approval of settlement); *Martin v. Safe Haven Sec. Servs., Inc.*, No. 19-cv-00063-ODS, 2020 WL 4816418 (W.D. Mo. Aug. 19, 2020) (approving service award with approval of settlement); *Paulson v. Dynamic Pet Prods., LLC*, 560 S.W.3d 583 (Mo. Ct. App. 2018) (affirming settlement with incentive awards); *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260 (Mo. Ct. App. 2011) (approving class action settlement and service awards). And with regard to *Vogt*, the contributions of a plaintiff in a different case are not dispositive of the contributions made and substantial benefit conferred in this case as a result of Mr. Karr's involvement and willingness to pursue claims on behalf of fellow Missourians. The discretion to determine a service award lies with the Court, which is not bound by the determination of a service award in another case.

IV. CONCLUSION

For the reasons stated herein and in the Suggestions in Support of the Motion for Attorneys' Fees, Expenses, and Service Award, the Motion should be granted and KCL's Opposition disregarded.

Dated: February 6, 2023

Respectfully submitted,

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this February 6, 2023, the foregoing document was filed with the Clerk of the Court using the Missouri e-filing system, which sent notification of such filing to all counsel of record.

/s/ Patrick J. Stueve
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