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11 *Class Counsel*

12  
 13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA

15  
 16 IGNACIO PEREZ, on Behalf of Himself  
 and All Others Similarly Situated,

17 Plaintiff,

18 v.

19 RASH CURTIS & ASSOCIATES,

20 Defendant.

Case No. 4:16-cv-03396-YGR

21 **PLAINTIFF’S NOTICE OF MOTION  
 AND MOTION TO APPROVE THE  
 OCTOBER 11, 2019 ASSIGNMENT**

22 Date: January 14, 2020

23 Time: 2:00 p.m.

24 Courtroom: 1

25 Judge: Hon. Yvonne Gonzalez Rogers

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on January 14, 2020 at 2:00 p.m. or as soon thereafter  
3 as counsel may be heard by the above-captioned Court, located at 1301 Clay Street, Oakland, CA  
4 94612, Courtroom 1, 4th Floor in the Courtroom of Judge Yvonne Gonzalez Rogers, Plaintiff  
5 Ignacio Perez (“Plaintiff” or “Class Representative”), by and through his undersigned counsel of  
6 record, will move and hereby does move, pursuant to Fed. R. Civ. P. 23(d)(1)(C), for an order  
7 approving the October 11, 2019 Assignment Of Cause Of Action In Exchange For Covenant Not  
8 To Execute (the “Assignment”).

9 This motion is made on the grounds that the parties have executed the Assignment so that  
10 Plaintiff can seek to recover on the judgment (ECF No. 370) from Defendant’s insurers for the  
11 benefit of the certified Classes, and Fed. R. Civ. P. 23(d)(1)(C) permits the Court to issue orders  
12 that “impose conditions on the representative parties.” Plaintiff executed the Assignment as a  
13 Class Representative and a fiduciary to the certified Classes and requests that the Court approve the  
14 Assignment subject to two conditions: (1) That Plaintiff, through Class Counsel, shall promptly  
15 notify this Court of the recovery, if any, obtained on behalf of Class Members as a result of the  
16 Assignment; (2) That such recovery, if any, shall be held in trust until this Court approves a fair,  
17 reasonable and adequate method for distributing the proceeds of the recovery to Class Members.

18 This motion is based on: (1) this Notice of Motion and Motion, (2) the Memorandum of  
19 Points and Authorities in support thereof, (3) the Declaration of Scott A. Bursor, (4) the papers and  
20 pleadings on file, and (5) the arguments of counsel at the hearing on the Motion.

21 **CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED**

22 Whether the Court should approve the Assignment pursuant to Fed. R. Civ. P. 23(d)(1)(C),  
23 subject to two conditions: (1) That Plaintiff, through Class Counsel, shall promptly notify this  
24 Court of the recovery, if any, obtained on behalf of Class Members as a result of the Assignment;  
25 and (2) That such recovery, if any, shall be held in trust until this Court approves a fair, reasonable  
26 and adequate method for distributing the proceeds of the recovery to Class Members.

1 Dated: October 17, 2019

Respectfully submitted,

2  
3 **BURSOR & FISHER, P.A.**

4 By: /s/ Scott A. Bursor  
5 Scott A. Bursor

6 Scott A. Bursor (SBN 276006)  
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28 *Class Counsel*

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## I. INTRODUCTION

1  
2 On September 9, 2019, this Court entered a \$267,349,000 class action judgment against  
3 Defendant. (ECF No. 370). Fed. R. Civ. P. 62(a) automatically stayed execution of that judgment  
4 for 30 days, through October 9, 2019. Class Counsel was prepared to file a writ of execution to  
5 enforce the judgment promptly, and Defendant was prepared to file a bankruptcy petition to stay  
6 enforcement of the judgment. On October 7, 2019 Defendant filed an *ex parte* request to stay  
7 enforcement of the judgment (ECF No. 380), which included a declaration from Defendant's  
8 bankruptcy lawyer, Michael W. Malter, stating "if the stay of enforcement is not continued past  
9 October 9, 2019 ... my client will have no choice but to file for Chapter 11 bankruptcy protection."  
10 Malter Decl. ¶ 8, ECF No. 380-2.

11 At nearly the last minute, that bankruptcy filing was avoided when the parties reached  
12 agreement on the Assignment Of Cause Of Action In Exchange For Covenant Not To Execute (the  
13 "Assignment"). The parties signed the agreement late in the evening on October 8, 2019, just  
14 before Rule 62(a)'s automatic stay expired. The parties made some corrections to the agreement  
15 and re-executed it on October 11, 2019. A true and correct copy of the Assignment is attached as  
16 Exhibit 1 to the Declaration of Scott A. Bursor, submitted herewith. The purpose of the  
17 Assignment is to permit Plaintiff, as the Class Representative, to seek to recover on the judgment  
18 from Defendant's insurers, XL America, Inc., XL Catlin Inc., and Indian Harbor Insurance  
19 Company (hereafter, "XL").

20 Plaintiff requests that the Court approve the Assignment pursuant to Fed. R. Civ. P.  
21 23(d)(1)(C) subject to two conditions: (1) That Plaintiff, through Class Counsel, shall promptly  
22 notify this Court of the recovery, if any, obtained on behalf of Class Members as a result of the  
23 Assignment; and (2) That such recovery, if any, shall be held in trust until this Court approves a  
24 fair, reasonable and adequate method for distributing the proceeds of the recovery to Class  
25 Members.

## II. THE RATIONALE FOR THE ASSIGNMENT

1  
2 After winning the trial, Plaintiff and Class Counsel carefully considered our next steps, with  
3 the understanding that we have a fiduciary obligation to maximize the Class Members' recovery.  
4 Class Counsel investigated the finances of the Defendant and its principals and determined that  
5 they would be unable to satisfy the judgment. Class Counsel also carefully reviewed Defendant's  
6 insurance policy, and the prior settlement negotiations. Class Counsel determined that Defendant  
7 has a strong claim against its insurer, XL, for XL's bad faith failure to settle this action. We  
8 determined that the best way to maximize Class Members' recovery is to obtain assignment of  
9 Defendant's claim against XL and pursue full recovery of the judgment from XL.

10 California law requires insurance companies to act reasonably to settle claims. "In each  
11 policy of liability insurance, California law implies a covenant of good faith and fair dealing. This  
12 implied covenant obligates the insurance company, among other things, to make reasonable efforts  
13 to settle a third party's lawsuit against the insured. If the insurer breaches the implied covenant by  
14 unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover  
15 damages proximately caused by the insurer's breach." *PPG Industries, Inc. v. Transamerica Ins.*  
16 *Co.*, 20 Cal.4th 310, 312 (1999).

17 The facts recited in the Assignment establish XL's bad faith refusal to settle this action. XL  
18 controlled Defendant's counsel and explicitly retained full control of settlement negotiations. *See*  
19 *Assignment* ¶¶ 3-6. Prior to class certification, XL rejected at least four written offers to settle this  
20 action within the policy limits, and walked out of a mediation without even making a settlement  
21 offer. *See Assignment* ¶¶ 7-18. After class certification, XL refused to negotiate and rejected at  
22 least two invitations to resume mediation. *See Assignment* ¶¶ 20-27. Based on these facts, Class  
23 Counsel believe there is a high probability that a court would find that XL did not make reasonable  
24 efforts to settle this action, that XL's refusal to negotiate was unreasonable, and that XL thus  
25 breached the implied covenant of good faith and fair dealing. The measure of damages for that  
26 breach is the full amount of the judgment. *See, e.g., Hamilton v. Maryland Cas. Co.*, 27 Cal. 4th  
27 718, 725 (2002) ("Where the underlying action has proceeded to trial and a judgment in excess of  
28 the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured

1 for the entire amount of that judgment ....”); *Purdy v. Pacific Automobile Ins. Co.*, 157 Cal.  
2 App.3d 59, 74 (1984) (affirming trial court verdict against insurer for bad faith failure to settle  
3 within policy limits, and holding the insurer liable for the entire judgment despite the insured’s  
4 insolvency and bankruptcy).

5 The Assignment was necessary because “a judgment creditor cannot bring a direct action  
6 for breach of the duty to settle, but the insured can assign his cause of action for breach of the duty  
7 to settle to the judgment creditor.” *Ham v. Continental Ins. Co.*, 2009 WL 513474, at \*3 (N.D.  
8 Cal. Mar. 2, 2009). Class Counsel thus determined that we should negotiate to obtain such an  
9 assignment from the Defendant. The opportunity to pursue recovery against the Defendant through  
10 bankruptcy has relatively little value. But Defendant’s claim against XL is worth \$267,349,000  
11 plus interest.

12 The Assignment is based on California Practice Guide: Insurance Litigation Form 12:C  
13 (The Rutter Group 2019) (“Assignment of Cause of Action in Exchange for Covenant Not to  
14 Execute”). The Assignment transfers Defendant’s claim against XL to Plaintiff, and requires  
15 Defendant to assist Plaintiff and Class Counsel in prosecuting that claim. For example, the  
16 Assignment requires Defendant to provide Class Counsel with copies of all documents and  
17 correspondence between Rash Curtis and XL relating to the claim, and to waive the attorney-client  
18 privilege with respect to communications with defense counsel concerning the claim. *See*  
19 Assignment ¶ 35. The Assignment includes detailed factual recitals concerning XL’s conduct and  
20 settlement negotiations, *see* Assignment ¶¶ 3-33, and requires Defendant to testify to those facts in  
21 any lawsuit or proceeding to enforce the assigned rights, *see* Assignment ¶ 41 (“Rash Curtis agrees  
22 to testify in said action to the facts recited above ....”). Class Counsel did not accept Defendant’s  
23 representations or rely on their veracity. Class Counsel insisted that Defendant’s personal counsel  
24 visit with Defendant at their offices to search for documents concerning the facts recited in the  
25 Assignment. And every fact recited is supported by contemporaneous documents.  
26  
27  
28

### III. RULE 23(E) DOES NOT APPLY

The Assignment is not a class action settlement. Paragraph 43 of the Assignment recites the parties' understanding that the Assignment was effective upon execution and does not require court approval under Fed. R. Civ. P. 23(e):

43. The parties are not aware of any authorities describing procedures for seeking court approval for an assignment of cause of action in exchange for a covenant not to execute on a class action judgment. It is the parties' understanding that Fed. R. Civ. P. 23(e) does not apply, and neither notice to the class nor court approval is required, since this agreement does not settle, voluntarily dismiss, or compromise Class members' claims, and does not bind absent Class members. It is also the parties understanding that this agreement will be effective upon execution. Nevertheless, the parties have agreed, in an abundance of caution, to present this agreement to the Court for approval, or in the alternative for a ruling that court approval is not required. Should the Court disapprove of the instant agreement or should the agreement be deemed ineffective for any reason, then this entire agreement will be void and the parties will return to their status quo prior to executing this agreement.

### IV. THE COURT SHOULD APPROVE THE ASSIGNMENT WITH CONDITIONS PURSUANT TO FED. R. CIV. P. 23(D)(1)(C)

Although Rule 23(e) does not apply, this Court has jurisdiction to approve the Assignment under Fed. R. Civ. P. 23(d)(1)(C), which permits the Court to "issue orders that ... impose conditions on the representative parties." The Court has broad authority under Rule 23(d). *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) (recognizing that district courts have "both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties"); *Slovin v. Sunrun, Inc.*, 2017 WL 2902902, at \*5 (N.D. Cal. July 7, 2017) (invoking the Court's jurisdiction under Rule 23(d)(1)(C)).

Plaintiff therefore requests that the Court approve the Assignment pursuant to Fed. R. Civ. P. 23(d)(1)(C) subject to two conditions: (1) That Plaintiff, through Class Counsel, shall promptly notify this Court of the recovery, if any, obtained on behalf of Class Members as a result of the Assignment; and (2) That such recovery, if any, shall be held in trust until this Court approves a



1 fair, reasonable and adequate method for distributing the proceeds of the recovery to Class  
2 Members.

3 **V. CONCLUSION**

4 For the foregoing reasons, Plaintiff respectfully requests that the Court approve the  
5 Assignment pursuant to Fed. R. Civ. P. 23(d)(1)(C) subject to two conditions: (1) That Plaintiff,  
6 through Class Counsel, shall promptly notify this Court of the recovery, if any, obtained on behalf  
7 of Class Members as a result of the Assignment; and (2) That such recovery, if any, shall be held in  
8 trust until this Court approves a fair, reasonable and adequate method for distributing the proceeds  
9 of the recovery to Class Members.

10 Dated: October 17, 2019

Respectfully submitted,

11 **BURSOR & FISHER, P.A.**

12 By: /s/ Scott A. Bursor  
13 Scott A. Bursor

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