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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

_____)	
)	
IN RE: INSURANCE BROKERAGE)	MDL No. 1663
ANTITRUST LITIGATION)	Civil No. 04-5184 (FSH)
)	
APPLIES TO ALL ACTIONS)	Hon. Faith S. Hochberg
)	
_____)	

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF
PROFESSIONAL INSURANCE AGENTS IN OPPOSITION TO
PROPOSED CLASS SETTLEMENT WITH ZURICH INSURERS**

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The National Association of Professional Insurance Agents (“PIA”) submits this *amicus* brief in opposition to certain aspects of the proposed class settlement. Specifically, approval of the class settlement would require the use of a disclosure form captioned “Zurich Agent/Broker Compensation Policy” (the “Mandatory Disclosure Statement”; attached as Exhibit 1) that will mislead class members – thousands of insurance consumers across the country – regarding the legal relationship of agents and brokers to insurance carriers like Zurich and to class members themselves. PIA’s members are small and midsize insurance brokers across the country. These members will suffer substantial harm from the compelled use of the Mandatory Disclosure Statement, including but not limited to the unnecessary interference with their relationships with their customers, which are already subject to comprehensive state regulation.

PIA thus expresses its strong opposition to the Motion for Preliminary Approval of Proposed Settlement Agreement (the “Zurich Settlement Motion”; Doc. No. 675).¹ Without the necessary changes to the Mandatory Disclosure Statement, the Zurich Class Settlement is not “fair, reasonable, and adequate” to

¹ The Zurich Settlement Motion extensively references the earlier Stipulation of Settlement (the “Zurich Class Settlement,” Doc. No. 648). Except as otherwise indicated, all capitalized terms used in this *amicus* brief have the meanings ascribed to them in Section I of the Zurich Settlement Agreement. (*Id.*)

the class as required by Federal Rule of Civil Procedure 23(e) because it will result in the class receiving inaccurate, misleading and illegal information that misstates the duties and obligations PIA members have towards them.

PIA tried to participate in the negotiations that culminated in the Mandatory Disclosure Statement, but was rebuffed. *See RIMS Holds Closed Meeting on Broker Placements*, Nat'l Underwriter Online News Service, Mar. 25, 2006; *RIMS Talks Disclosure Behind Closed Doors*, Nat'l Underwriter Online News Service, Apr. 19, 2005; *see also* Sam Friedman, Editorial, *Closed Doors: Take Two*, Nat'l Underwriter, Mar. 13, 2006; Sam Friedman, Editorial, *Behind Closed Doors*, Nat'l Underwriter, Apr. 25, 2005. PIA submits this *amicus* brief at this early stage of the settlement process so that necessary changes can be made to the Mandatory Disclosure Statement, without the increased delay and expense that will result if the changes are addressed only at a later date. To assist in this process, PIA hereby files with the Court a proposed alternative disclosure form (the "Revised Disclosure Form"; attached as Exhibit 2) designed to remedy the gross misstatements contained in the Mandatory Disclosure Statement.

INTEREST OF AMICUS CURIAE

Since its founding in 1931, PIA has worked to represent and advance the interests of over 11,000 independent agencies in all 50 states, Puerto Rico, the District of Columbia, and U.S. Territories and Possessions. PIA members are

Main Street insurance agents who serve their local communities across America. PIA members operate small and midsize retail insurance agencies that serve the insurance needs of individual consumers and small and midsize businesses. PIA member agencies place insurance with a variety of insurers.

PIA's agency members serve the full spectrum of their customers' insurance needs in their local and regional markets. PIA members own their insurance operations, and the insurance business and customer data, records and relationships that they develop. Through PIA, independent agencies are able to express their collective interests in regulations that are consistent with insurance-specific laws and obligations, the realities of the industry and the agencies' concern with providing their customers with professional, reasonable and responsive services.

Appointment of an independent agent means that the agent is responsible for more than just the original insurance placement or transaction with the customer. Independent agents serve as representatives between the customer and the insurance carrier, and have responsibility for a wide range of sales, support and other customer service functions for each of their appointing carriers. For example, the agent executes the carrier's directives with respect to the customer, answers customers' questions, solicits applications for coverage and renewals, submits claims and, in some cases, pays claims.

The law recognizes the unique professional relationship between the independent agents and their customers, which generally anticipates a higher level of disclosure than is the usual, customary and expected practice with other types of agents who do not have this special relationship or “special agent” status. *See* 7 Eric Holmes, *Appleman on Insurance Law and Practice* § 47.1 (2nd. ed. 2006); 3 Lee Ross & Thomas Segalia, *Couch on Insurance* §§ 46:27 to 46:40 (3d ed. 2005); *see also, e.g., Fenwick Machinery, Inc. v. A. Tomae & Sons, Inc.*, 79 N.J. 590, 401 A.2d 1087 (1979). The insurance laws in most United States jurisdictions expect independent agents to inform customers when coverage adjustments or additions are appropriate. *See* 3 *Couch on Insurance, supra*, §§ 46:27, 46:34, 46:37 to 46:38. The agent’s legal obligations exist for longest of: the term of the policy; the existence of the customer relationship; or the customer’s need for the policy. In general, independent agents must also advise customers of other coverages that may be relevant to the customer’s particular circumstances or that would provide better protection than or offer cost savings over the customer’s existing coverages.

Independent agents’ contractual and legal responsibilities necessitate an ongoing, two-way relationship with the customer for the duration of the policy. It is a relationship marked by frequent contact. While the customer becomes the policyholder of various insurers, it is the independent agent that directly interacts with and handles the customer’s insurance-related questions and support needs.

(Insurers likewise expect independent agents to be the primary customer contact.) In fact, the customer expects more contact from the agent than from the insurance company. Perhaps the most significant difference between exclusive agents and independent agents is that independent agents fulfill this role on behalf of a number of different insurers. This position allows the agent to identify an array of insurance products – across a variety of carriers – that appropriately responds to the customer’s particular needs on an ongoing basis. It also allows the consumer to receive, conveniently and in one office, with one contact person, the most appropriate coverage and information.

PIA assists independent agents by advocating on their behalf in industry, legislative, administrative and litigation matters. PIA also encourages uniform policy writing, increases cooperation between carriers and agents, works to protect the agency system, and provides guidance on agency practices for members’ effective operation of their businesses. PIA does so by working with state, federal and national insurance leaders and organizations, such as the National Association of Insurance Commissioners (the “NAIC”) and the National Conference Of Insurance Legislators (“NCOIL”). For over seventy-five years PIA has obtained a level of expertise in the insurance law and business practice areas that is respected by carriers, member agents and state and federal legislators and officials. Because

of its expertise and unique role, courts and administrative agencies have welcomed PIA's perspective and participation as *amicus curiae* or as an intervenor.

In sum, PIA's membership consists of local agents serving local communities, businesses and individuals. These independent agencies rely on PIA to voice their collective opinions and concerns on matters of law that affect their ability to conduct business in a fair and equitable fashion. In an industry dominated by Fortune 50 companies – many of which have been named as Defendants in these multidistrict proceedings – PIA provides a crucial voice for small and midsize insurance agents and brokers (hereinafter “Main Street Agents”) whose interests might otherwise be overlooked or disregarded, as has occurred in connection with the Zurich Class Settlement.

FACTUAL BACKGROUND

PIA expects that the parties have accurately described the basic structure and mechanics of the proposed Zurich Class Settlement, and therefore will not repeat those details here. PIA submits this brief solely to address a narrow set of issues: those created by the Mandatory Disclosure Form, and the harm it will cause to class and PIA members through the compelled dissemination of inaccurate and illegal information. PIA sets forth the background information below to assist this Court in its consideration of these issues.

PIA Members Are the Innocent Victims of the Misguided Crusade Certain State Attorneys General Have Launched Against Contingent Commissions, a Legal, Legitimate and Longstanding Practice That Benefits Class Members.

Starting in 2004, state law enforcement officials led by the New York State Attorney General have investigated alleged misconduct in the insurance brokerage industry involving charges of “bid-rigging” and steering, among other things. *See, e.g.*, “Investigation Reveals Widespread Corruption in Insurance Industry,” Press Release, Office of New York State Attorney General Eliot Spitzer, Oct. 14, 2004, http://www.oag.state.ny.us/press/2004/oct/oct14a_04.html. There are several key distinctions necessary to understand these charges: the difference between an independent agent and a broker; and differing carrier producer compensation practices in dealing with Main Street Agents as opposed to mega-brokers like the Broker Defendants. An independent agent is the carrier’s representative in the insurance marketplace, free to market and sell the insurer’s products within the bounds of the agent’s contractual appointment. An agent receives commissions from the carrier, but does not generally receive any direct compensation from the insured. On the other hand, brokers do not represent insurers, and have no binding or other legal authority on their behalf. With adequate disclosure, many insurance brokers may receive compensation from both policyholders and insurers depending upon the circumstances and services provided.

In addition, critical differences exist between the retail segment of the commercial insurance market, in which Main Street Agents operate, and the much more rarefied segment controlled by mega-brokers like the Broker Defendants. In the retail segment, carriers unilaterally dictate the terms, conditions, performance standards and compensation paid to Main Street Agents. While such terms and conditions can vary across insurance lines, the variations usually have a common pattern and standards that apply to all insurance agents and brokers operating within a given line. In the retail segment, insurers have all the market power. In the mega-market segment, by contrast, compensation arrangements are customized and routinely negotiated between the handful of mega-brokers like the Broker Defendants and the insurers with which they do business. In the mega-market segment, the mega-brokers have market power at least equal to that of the carriers. These distinctions are crucial to understanding the vastly different activities of the Broker Defendants, who had been receiving dual compensation from their customers and from carriers, and Main Street Agents who generally accept compensation only from carriers, as determined by these insurers and fully and publicly disclosed in the insurers' state rate filings and/or comprehensive annual reports filed with state insurance regulators.

Although the details of the particular insurance arrangements at issue can be very complex, the charges made in these regulatory actions and settlements can be summarized as follows.

- A handful of the nation's largest commercial insurance brokers, which collectively account for about 80% of the market, allegedly coerced their insurance company counterparts to make override payments (inaccurately characterized as "contingent commissions," or in the case of the largest broker, "placement service agreements" or "market service agreements") in return for steering their policyholder customers to favored insurers.²

² Academic studies have indicated that "a high concentration of power at the top of the brokerage industry" – not contingent commissions – was the underlying cause of the illegal bid-rigging, *see* Knowledge at Wharton, *Are Eliot Spitzer's Insurance Lawsuits Hitting the Wrong Targets?*, Oct. 19, 2005, <http://knowledge.wharton.upenn.edu/createpdf.cfm?articleid=1298#search=%22spitzer%20%22contingent%20commissions%22%20insurance%22> (referring to academic study showing that "contingent commissions are not the real problem with pricing in the insurance industry," but rather "there may simply be too few insurance brokers operating at the top of the industry"; noting further "[w]hen a small group of dominant brokers acts as gatekeepers – allocating a limited supply of insurance among companies seeking coverage – there is a greater potential for pricing abuse"). Needless to say, Main Street Agents, even collectively, do not have this sort of market power. Unlike the mega-brokers who are larger and have more negotiating leverage than most insurance carriers, Main Street Agents have no choice but to accept the compensation practices dictated to them by insurers.

- These mega-brokers did not disclose, or did not adequately disclose, contingent commissions to their customers, allegedly in breach of their fiduciary duties.³
- Contingent commissions, which the New York Attorney General (Eliot Spitzer) has characterized as “payoffs” and “kickbacks,” create inherent and irreconcilable conflicts of interest between the brokers and their customers, and thus should be legally abolished.

See, e.g., Oversight Hearing Insurance Brokerage Practices, Including Potential Conflicts of Interest and the Adequacy of the Current Regulatory Framework: Hearing Before the Subcomm. on Financial Management, the Budget, and International Security of the S. Comm. on Governmental Affairs, 108th Cong. 56-71 (2004) (prepared statement of Eliot Spitzer, Attorney General of New York

³ These challenged practices of these mega-brokers like the Broker Defendants differ vastly from those of Main Street Agents like PIA members. Brokers work directly for the insureds pursuant to written contracts and collect their fees directly from the insureds. In the vast majority of circumstances, Main Street Agents, by contrast, have contractual obligations only to insurers and collect compensation in the form of commissions only from insurers, as fully disclosed in state rate filings. As to those very few circumstances outside this rule, Main Street Agents must follow applicable state law regarding disclosures an insurance producer must make for each insurance placement to each customer or prospective customer.

State), available at <http://www.oag.state.ny.us/press/statements/insuranceinvestigationtestimony.pdf>.⁴

In November 2004, however, Mr. Spitzer gave contradictory testimony before Congress in which he admitted that contingent commissions were “not in and of themselves improper.”⁵ *Oversight Hearing Insurance Brokerage Practices, Including Potential Conflicts of Interest and the Adequacy of the Current Regulatory Framework: Hearing Before the Subcomm. on Financial Management, the Budget, and International Security of the S. Comm. on Governmental Affairs, 108th Cong. 6 (2004)* (testimony of Eliot Spitzer, Attorney General of New York State). For unknown reasons, the New York Attorney General apparently later concluded that contingent commissions are inherently harmful and thus should always be prohibited on an industry-wide basis.

⁴ In this prepared statement, Mr. Spitzer cited a 2002 market study that found that “Marsh and AON together comprised 54 percent of the global brokerage market, and Willis comprises an additional 7 percent.” *Id.* at 3. Mr. Spitzer further asserted that “[c]ontingent commissions are highly profitable: for example, in 2003, Marsh received \$845 million in such payments, and because little or no service is performed for steering business to insurance carriers, this \$845 million represents almost pure profit.” *Id.* at 7.

⁵ Indeed, this positive view of contingent commissions seems to be universally held within the insurance industry. For instance, a senior Zurich executive recently addressed an agents’ conference, and unequivocally stated: “Our belief is that contingent commissions are appropriate and lawful.” *Angst Surfaces Over Disclosure in Zurich Settlement, Texas Surplus Lines Rptr.*, July 2006, at 2.

Others, including disinterested academics, however, reject the view that contingent commissions are inherently harmful. See Knowledge at Wharton, *Are Eliot Spitzer's Insurance Lawsuits Hitting the Wrong Targets?*, Oct. 19, 2005, <http://knowledge.wharton.upenn.edu/createpdf.cfm?articleid=1298#search=%22spitzer%20%22contingent%20commissions%22%20insurance%22>; see also, e.g., Alan Reynolds, *Not Spitzer's Job*, Wall St. J., Oct. 22, 2004 (characterizing efforts to abolish contingent commissions as “an unlegislated ‘reform’ [that] would require larger fees from buyers; noting economic benefits, including “[c]ontingent fees are often based on the profitability of the business, so that brokers who keep bringing high-risk clients to insurers will not be rewarded for doing so” and “[c]ontingent fees for renewing policies also provide a clear incentive for brokers to keep clients satisfied”); Mark Gillette, *The Unintended Economic Consequences of Spitzer*, Bloomberg News, Dec. 3, 2004, available at <http://www.theroyalgazette.com/apps/pbcs.dll/article?AID=/20041203/BUSINESS/112030125> (“[E]conomic history may judge the New York attorney general as more of a bane than a boon.”). Among other things, two professors of insurance and risk management at the University of Pennsylvania’s Wharton School of Business have written a lengthy paper discussing the subject. See J. David Cummins & Neil A. Doherty, *The Economics of Insurance Intermediaries*, May 20, 2005, <http://www.huebnergeneva.org/documents/>

[cumminsdoherthybrokers%205-20-05d.pdf](#). Professors Cummins and Doherty concluded that “[c]ontingent commissions can help keep property-casualty and other markets efficient,” and that “[t]he practice may actually level the playing field by giving buyers and sellers equal access to vital market information.” Knowledge at Wharton, *supra*. To be sure, the Wharton professors decry markets abuses, such as bid-rigging, but point out that such practices can be investigated and prosecuted without any changes in existing law and without the need for extreme measures such as the abolition of contingent commissions. *See id.* In fact, the crusade to abolish contingent commission represents nothing less than “an assault on a system of compensation that is legal, honest and a mainstay of the American free enterprise system.” Matt Brady & Daniel Hays, *Agent Groups Rage Over Deals Halting Contingents*, Nat’l Underwriter, Aug. 14, 2006. In a real sense, Main Street Agents like the PIA members are being punished for the sins allegedly committed by mega-players such as the Broker Defendants. *See* Mark E. Ruquet, *Agents: Disgraced Brokers Don’t Deserve Contingency Fees*, Nat’l Underwrite Online, Sept. 12, 2006 (quoting industry leader as saying “it appears that those who have broken the rules and were punished for it are trying to see that all are punished with the elimination of contingents”).

In some respects, the efforts by the New York Attorney General’s Office to reform the business practices of the largest insurance brokers have yielded

impressive results in a statistical sense, including a number of criminal indictments and several guilty pleas; it has also collected over \$1 billion in restitution, fines and other penalties (including an \$850 million civil settlement from the nation's largest insurance broker in March 2005).⁶ *See, e.g.*, Knowledge at Wharton, *supra*. But these successes seem to demonstrate that the law existing in 2004 (and present law) provide ample means to remedy the serious misconduct alleged by the New York Attorney General without the need for a radical across-the board attack on contingent commissions themselves. *See id.*; *see also* Mark Gillette, *The Unintended Economic Consequences of Spitzer*, Bloomberg News, Dec. 3, 2004; Alan Reynolds, *Not Spitzer's Job*, Wall St. J., Oct. 22, 2004.

Furthermore, the New York Attorney General's Office has come under much deserved criticism for unilaterally attempting to restructure insurance markets in simplistic and inappropriate ways to address purported problems that go

⁶ What makes these settlements less impressive is the fact that they were coerced. That is, the targeted companies had no other viable option. If they refused to capitulate to unreasonable settlement demands, they faced indictment, which could well result in bankruptcy and dissolution, regardless of the merit (or lack thereof) of the legal claims against them. *See, e.g.*, *Angst Surfaces Over Disclosures in Zurich Settlement*, Texas Surplus Lines Rptr., July 2006, at 2. Indeed, Zurich's lead negotiator candidly admitted that it only settled the regulatory claims because "[r]ealistically, the alternative was indictment of the company." *Id.* To be sure, the specter of Arthur Andersen's collapse and failure following its indictment and conviction loomed large over all these so-called "voluntary" settlements.

well beyond bid-rigging and steering. *See* Knowledge at Wharton, *supra*. Many believe that a single state Attorney General should not dictate national policy on such a sensitive area as the proposed abolition of contingent commissions. *See, e.g.,* Alan Reynolds, *Not Spitzer's Job*, Wall St. J., Oct. 22, 2004 (observing that “Mr. Spitzer has no authority to dictate how insurance brokers are paid” and that “meddling with market-based incentive schemes is risky”); *see also The Unintended Economic Consequences of Spitzer*, Bloomberg News, Dec. 3, 2004, available at <http://www.theroyalgazette.com/apps/pbcs.dll/article?AID=/20041203/BUSINESS/112030125>.

On the most basic level, the radical, unjustified and unjustifiable attempts to abolish contingent commissions are unworkable. Indeed, the New York Attorney General's Office itself has come to realize this undeniable truth, as demonstrated by its consent to several recent amendments allowing the very same mega-brokers that engaged in the alleged “bid-rigging” and “steering” to accept contingent commissions, contrary to the stringent terms of their original settlement agreements. *See* Lavonne Kuykendall, *Commission Restrictions Loosened for Marsh*, Dow Jones Newswires, Aug. 24, 2006; *Commission Restrictions Loosened for Marsh & McLennan*, Aug. 24, 2006, http://www.marketwatch.com/News/Story/Story.aspx?siteid=google&dist=nwhfriend&rid=em_story_e_main&guid=%7b96E7155D-8874-4BD1-B183-1A09F0C56E2B%7d; *see also Aon Obtains*

Amendment to Regulatory Settlement Pact, Dow Jones Newswires, Sept. 7, 2006 (“Under the amendment, certain Aon business units are exempted from the agreement’s restrictions relating to compensation, contingent commissions and mandated disclosures”); Lavonne Kuykendall, *Willis Says Deal Lets It Take Pay from Insurers*, Wall St. J., Sept. 2, 2006, at B5 (“One week after industry-leading insurance broker Marsh & McLennan Cos. said the restrictions it faced on accepting contingent commissions had been loosened, Willis said it has received a similar deal from the New York Attorney General and the Insurance Department of New York.”). Cf. *Willis Joins Marsh in Getting OK for Contingency Pay for MGA Services*, Ins. J., Sept. 1, 2006 (“Willis said the amendment recognizes that in [managing general agent] operations the company is representing, acting on behalf of, and performing services for the insurer and therefore provides flexibility as to the insurer compensating Willis for these services.”). In fact, the justification offered for these modifications is highly instructive, and directly relevant to the matters now before the Court: permitting contingent commissions when brokers act solely as “managing general agent” for an insurer does **not** present even a potential conflict with any duties owed to policyholders; on the contrary, it provides desirable “flexibility” for insurers in deciding how to compensate brokers. See, e.g., *Willis Says Can Now Share Profits With Insurers*, Reuters, Sept. 1, 2006.

But this is exactly PIA's point! Two years after making national headlines, the New York Attorney General's Office has come to the belated realization – which was apparent from the beginning – that the largest mega-brokers should be permitted to receive contingent commissions when they act solely as an agent for insurers. This essential truth applies with even greater force to Main Street Agents like PIA members, who act solely as an agent for insurers in the vast majority of circumstances or in clearly defined and fully disclosed roles as retail brokers. *See supra* note 3.

The injustice and overreaching of this crusade against contingent commissions will have a direct and negative impact on members of the class, PIA members and the public interest. As to class members, they will suffer because of the loss of efficiency in property-casualty and other insurance markets and from restricted access to vital market information. *See* Knowledge at Wharton, *supra*. Even though PIA members have not been implicated in the alleged “bid-rigging” and “steering” schemes, and even though PIA members, collectively or otherwise, do not have market power in the sense that mega-players like the Broker Defendants do, they will suffer irreparable harm from a ban on contingent commissions. Onerous regulatory settlements, like the Multi-State Agreement and Three-State Agreement, punish “[h]onest agents who are following the law and producing profitable business for their companies . . . for the sins of the few.”

Matt Brady & Daniel Hays, *Agent Groups Rage Over Deals Halting Contingents*, Nat'l Underwriter, Aug. 14, 2006.

The parties have filed two regulatory agreements in connection with the proposed class settlement, the Multi-State Agreement (Exhibit A to the Zurich Class Settlement, Doc. No. 648-2) and the Three-State Agreement (Exhibit H to the Zurich Class Settlement, Doc. No. 648-9). In connection with these proceedings, the Three-Statement Agreement is of particular concern to PIA because it dictates that PIA members use the Mandatory Disclosure Statement and because it has been and will be used as a model for future settlements the Zurich Insurers may enter into with other state law enforcement and regulatory authorities, as reflected in the Regulatory Settlement Agreement (Exhibit K to the Zurich Class Settlement, Doc. No. 648-12). In fact, it appears that 15 state departments of insurance have now entered into the Regulatory Settlement Agreement. (Doc. No. 675-2 at 5.⁷)

A. The Multi-State Agreement

On or about March 20, 2006, the Zurich Insurers entered into the Multi-State Agreement, with the Office of the Attorney General of the States of California, Florida, Hawaii, Maryland, Oregon, Texas and West Virginia and the

⁷ Unless otherwise noted, all page citations refer to the page numbers electronically generated by the PACER ECF system.

Commonwealths of Massachusetts, Pennsylvania and Virginia, the Chief Financial Officer of the State of Florida and the Office of Insurance Regulation of the State of Florida. (Multi-State Agreement, Doc. No. 648-2 at 1.) The Multi-State Agreement specifically refers to these proceedings, and expressly provides that “[a]ll matters relating to enforcement and interpretation of this [Multi-State Agreement] shall be subject to the jurisdiction” of this Court. (*Id.* at 16.) The Multi-State Agreement further provides that each of the parties has the right to terminate should any class settlement in these multidistrict proceedings be terminated. (*Id.* at 17.) While disapproval of the Zurich Class Settlement would give parties the theoretical right to terminate the Multi-State Agreement, it would more likely lead to revision of the Mandatory Disclosure Statement to eliminate the misstatements that PIA members would otherwise have to make to their policyholder customers, including customers among the settlement class. Disapproval of the Zurich Class Settlement could also lead to adoption of PIA’s proposed Revised Disclosure Statement that satisfies the reasonable needs of all affected parties, comports with existing law, and addresses the problems inherent in the Mandatory Disclosure Statement.

The Multi-State Agreement required the Zurich Insurers to agree “to entry of an Order and Stipulated Injunction in the state courts of each of the signatory states in a form substantially and materially consistent with the document attached as

Exhibit B. . . .” (*Id.* at 4; *see also id.* at 57-80.) In turn, the form Order and Stipulated Injunction dictates that the Zurich Insurers require their agents and brokers, including PIA members, to provide the Mandatory Disclosure Statement to their policyholder customers.⁸ (*Id.* at 62-63.)

By motion filed on August 25, 2006, the state Attorneys General who are parties to the Multi-State Agreement sought leave to intervene in these proceedings “for the limited purpose of effectuating their settlement [i.e., the Multi-State Agreement] and Plaintiffs’ settlement” with the Zurich Insurers. (Doc. No. 672-1 at 2.) These state Attorneys General further asserted in support of the motion that “[i]f permitted to intervene in this action, [they] will file the agreed Order and Stipulated Injunction with this Court and ask that it be entered, vesting the Court with enforcement authority over the business reforms component of the Multi-State Agreement,” which includes required use of the Mandatory Disclosure Statement. (Doc. No. 672-2 at 3.) These state Attorneys General further state that “neither Class Counsel nor counsel for Zurich oppose” their intervention. (*Id.* at 1-

⁸ The form Order and Stipulated Injunction included with Multi-State Agreement refers to the Mandatory Disclosure Statement as Exhibit A, but the parties omitted that exhibit when filing the Zurich Class Settlement through apparent inadvertence. The parallel Regulatory Settlement Agreement contains a substantively identical definition of “Disclosure Statement” to that in the form Order and Stipulated Injunction and attaches a copy of the Mandatory Disclosure Statement as Exhibit A. (*Compare* Doc. No. 648-2 at 62-63 *with* Doc. No. 648-12 at 21-22, 32-33.)

2.) Assuming that this Court grants the intervention motion (which PIA does not oppose), then its jurisdiction over the enforcement of the Multi-State Agreement (and over all parties to the Multi-State Agreement for enforcement purposes) will be even more clearly established.

B. The Three-State Agreement

On or about March 24, 2006, certain of the Zurich Insurers entered into the Three-State Agreement, with the Office of the Attorney General of the States of New York, Connecticut and Illinois and the New York Superintendent of Insurance. (Doc. No. 648-9, at 1-2.) Unlike the Multi-State Agreement, the Three-State Agreement contains a direct attack on the payment of contingent commissions. Paragraph 18 provides that the Zurich Insurers' U.S. offices shall not pay any broker or agent, including PIA members, contingent commissions "relating to the placement of any excess casualty insurance policy" from 2006 to 2008. (*Id.* at 18.) Paragraph 24 further extends the prohibition such that the Zurich Insurers must cease paying contingent commissions on additional insurance lines when and if other carriers enter into similar settlements such that those carriers, combined with the Zurich Insurers, "represent more than 65% of the national gross written premiums in the given insurance line (or product/segment) in the [most recent] calendar year. . . ." (*Id.* at 19-21.)

The Three-State Settlement also contains a unique lobbying provision requiring the Zurich Insurers to “support legislation and regulations in the United States to abolish Contingent Compensation for insurance products or lines.” Unlike the Multi-State Agreement, the Three-State Agreement imposes no disclosure requirements on Zurich’s brokers and agents.

ARGUMENT

A. As Currently Proposed, this Court Should Reject the Zurich Class Settlement Because it Is Not “Fair, Reasonable and Adequate.”

Federal Rule of Civil Procedure 23(e)(1)(c) provides:

The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

Here the Zurich Class Settlement fails to satisfy these requirements because it will result in class members receiving the inaccurate information set forth in the Mandatory Disclosure Statement.⁹ *See In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 83 (D.N.J. 2001) (“the District Court acts as a fiduciary guarding the rights of absent class members, and must determine that the proffered settlement is ‘fair, reasonable and adequate’”; quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001)); *see also Girsh v. Jepson*, 521 F.2d 153, 160 (3d

Cir. 1975) (vacating settlement order; when District Court weighs fairness of settlement under applicable test it must evaluate all contentions of the parties and provide objectors with an opportunity for meaningful exposition of their positions); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1797 (2005) (“The purpose of subdivision (e) is to protect the nonparty class members from unjust or unfair settlements. . . .”).

PIA tried to participate in the drafting of the Mandatory Disclosure Statement, but was unfairly locked out of those negotiations. PIA likewise submitted comments and proposed revisions to the Zurich Insurers regarding the Mandatory Disclosure Statement to no avail.¹⁰ All of PIA’s comments were rebuffed. This secrecy and refusal even to consider the legitimate concerns expressed by all affected parties has been a hallmark of the regulatory onslaught

⁹ As noted, the Multi-State Agreement expressly provides for this Court to have jurisdiction over “[a]ll matters relating to [its] enforcement and interpretation.” (Doc. No. 648-2 at 16.)

¹⁰ PIA does not blame the Zurich Insurers or any other insurance company for this state of affairs. In a recent public statement, the Zurich Insurers made clear that they disagree with the misguided crusade against contingent commissions and recognize the serious problems the Mandatory Disclosure Statement creates for small and midsize insurance agents and brokers like PIA members. *Angst Surfaces Over Disclosures in Zurich Settlement*, Texas Surplus Lines Rptr., July 2006, at 2 (quoting Zurich executive as saying: “We tried to negotiate to have an exemption for small businesses. We were unsuccessful. We tried to have a system that uses the internet. We didn’t prevail there either.”).

against contingent commissions. *See, e.g., RIMS Closes 'Open' Forum to the Press: Media Barred from Bull Session with Top Brokers, Insurers in Wake of Spitzer Probes*, Nat'l Underwriter, Apr. 24, 2006. PIA is objecting to the Zurich Class Settlement, not out of any desire to hold up the return of substantial sums to policyholders who may have been damaged by Zurich's allegedly unlawful practices, but only to prevent the harm that the Mandatory Disclosure Statement, as currently drafted, will cause to the class and PIA members. PIA stands ready to assist in the legitimate ends of the settlement process, and has done so by preparing the proposed Revised Disclosure Statement, which is discussed below.

The current version of the Mandatory Disclosure Statement contains numerous material misstatements, including the following.

- *Your agent or broker is an independent businessperson or team of people not employed by Zurich or any other insurance company.*

Analysis: This statement is misleading and simply wrong. An insurance producer can only be “an agent” if that insurance producer is appointed by an insurer as the agent representative for that insurer. This is the common and statutory law (tied to the licensing definition of the term “agent”) in all 55 insurance jurisdictions in the United States, and has consistently been so for almost 200 years. These fundamentals do not greatly differ between and among all U.S. jurisdictions in terms of state insurance regulations or insurance common law. PIA members and other independent agents contracted to a particular insurer or insurers are bound by the written terms and conditions of their agency contracts. Those contracts address the method by which the agent receives compensation, as well as many of the duties and responsibilities the insurer and the agent have to each other. The use of the term “businessperson” violates state corporate and insurance law because it includes both corporate entities and individuals. The term “team of people” is also vague; it has no defined state or common law meaning.

While this statement explains that agents and brokers are not Zurich employees, it fails to explain what actual relationship they have to Zurich.

- *Most agents and brokers choose to be compensated for their services through the insurance companies with whom they place the insurance that they sell to their customers.*

Analysis: This statement is misleading and inaccurate. Almost without exception, agents and brokers (and particularly, Main Street Agents) do not “choose” the manner in which they are compensated by carriers. In a number of jurisdictions, an insurance producer acting as an agent can only receive compensation from insurers in the form disclosed in the insurers’ regulatory filings. *See, e.g.,* N.J. Admin. Code § 11:17B-3.1(a) (2005). In reality, independent agents receive compensation consistent with the carrier’s agency contract and at a compensation rate determined in advance by the carrier and/or applicable state laws and regulations. Furthermore, carriers and state law often prohibit agents from accepting other compensation, from policyholders or third-parties, in order to prevent conflicts of interest that might otherwise arise. As to the vast majority of independent agents (excluding industry giants, like the Broker Defendants) – and certainly including Main Street Agents like PIA members – Zurich and other insurers dictate all compensation terms.

- *Zurich will pay your agent or broker a commission. Zurich establishes its base commission on several factors including the type of insurance policy, the size of the insurance policy, and individual policy underwriting considerations. Each insurance policy has a standard commission which is the most that Zurich will pay. The standard commission for the types of policies Zurich is quoting is*

Analysis: This statement is confusing and inaccurate. No definition is provided for “standard commission,” and no explanation is provided as to how this amorphous term might apply to various unidentified “types of policies.” The average policyholder receiving the Mandatory Disclosure Statement would not understand the real meaning of this language, and thus could not provide informed consent. The same might also be true of the Main Street Agents who would be compelled under the Zurich Class Settlement to provide the Mandatory Disclosure Statement to all their customers. In addition, PIA questions the accuracy of the statement that “[e]ach insurance policy has a standard commission which is the most that

Zurich will pay.” Zurich agents and brokers know the compensation rates that each of them receive, but do not know and would not have ready access to what Zurich internally establishes as its “standard” commission rate for specific classes of insurance placements.

- *If you have chosen to compensate your agent or broker directly or you have not consented to your agent or broker taking a commission, you should speak directly to your agent or broker.*

Analysis: This language is perhaps the most objectionable part of the Mandatory Disclosure Statement. Class members reading this provision will likely believe that they have a choice as to: (a) whether the agent or broker receives a commission at all; and (b) the manner in which the agent or broker receives the commission. Based on this language, class members will likely conclude that they have the power to negotiate the agent’s compensation, when they do not. New Jersey and many other states have “mandatory place” laws, often in connection with automobile insurance policies. These laws require an agent to place consumers with a carrier. If one consumer refuses to consent to the agent’s receipt of commission based on this language, the agent must follow the same procedure for all consumers under anti-rebating laws. As a result, an agent could be forced to provide for coverage without receiving any compensation, or else risk violating either the anti-rebating or mandatory placement laws. In addition, class members might think they had the option of choosing to compensate their agent directly, which would violate existing law in several states. *See, e.g., N.J. Admin. Code § 11:17B-3.1(a) (2005).*

- *Zurich may also pay contingent compensation to your agent or broker. Zurich does not pay contingent compensation to all of its agents and brokers, and some agents and brokers choose not to accept contingent compensation from insurance companies. Contingent compensation is paid in addition to the base commission. Contingent compensation is not calculated until the end of the year. The amount will be a percentage of premiums based on several factors that determine how profitable your agent’s or broker’s insurance is for Zurich including [to be modified if factors changed]:*

Analysis: This statement is inaccurate as a matter of carrier practice, and as a matter of the compensation system designed and chosen by Zurich. It also runs afoul of the law in many states. The language regarding profitability

(“how profitable your agent’s or broker’s insurance is for Zurich”) is inaccurate. As a matter of law, the “insurance” belongs to Zurich and its policyholders, not to the agent or broker; by contrast, the book of business and related records do belong to the independent agency. The use of the term “insurance,” rather than book of business, fails to convey an accurate description of the base on which the contingent commission is calculated. For the retail appointed Zurich independent agencies, Zurich bases its producer contingency earning program on the entire book of business of all the insurance policies placed with Zurich by the producer for their customers (new and renewal).

1. *The total premium written for all eligible business in a year*
 - *Zurich pays a percentage of the eligible premiums in addition to the “Base Commission.”*
2. *Achievement of targeted premium levels*
 - *Zurich sets reasonable targets of premiums that will be placed with Zurich by your agent or broker each year. If that target is reached, then your agent or broker is paid an additional amount on the eligible premiums.*
3. *The profitability of the business*
 - *For each agent and broker, Zurich calculates the ratio of the total value of the claims over the premiums. The resulting ratio generates a payment. Lower ratios generate higher payments because lower ratios mean that the result is more profitable to Zurich. We do not disclose the actual ratio and payment percentages.*
4. *Preferred business considerations*
 - *We have unique agreements with some agents and brokers to place particular types of business with us. These agreements may result in the payment of additional commission for such policies.*

Analysis: This statement implies that the agent or broker receives specific direct compensation as a result of each and every one of these factors, which is incorrect. Contingent commissions depend on a formula that combines all

the factors and applies them to a collective and finite pool of contingency dollars. As to Factor #2, the adjective “reasonable” is undefined and would seem to invite unmeritorious challenges. Factor #3 overly simplifies the calculation and application of the formula used to generate the final payment. Factor #4 may have relevance to Zurich’s dealings with mega-players like the Broker Defendants, but has virtually no application to the Main Street Agents that comprise PIA’s membership. Inclusion of this factor will only confuse class members who deal with Main Street Agents.

The Mandatory Disclosure Statement proceeds from fundamentally flawed premises. Among other things, it obliterates the long-standing common law and statutory distinctions between independent agents and brokers, and the established common law and statutory duties of full and fair disclosure that have long been imposed upon agents/brokers when dealing with their insurance company principals. *See* 3 Lee Ross & Thomas Segalia, *Couch on Insurance* §§ 45 & 46 (3d ed. 2005). Insurance agents are licensed producers contractually appointed by carriers to offer insurance products for sale to policyholders. *See id.*, §45:1. An insurance agent is generally recognized as one who **acts on behalf of or represents** one or more insurers under contract in anticipation of an ongoing and continuous relationship. *See id.*, §54:2. Agents are deemed to have a fixed and permanent relationship with the insurance companies with which they have a contractual relationship, and thus have well documented duties and obligations to the carriers as defined by statute, common law and, most importantly, the agency contracts. *See id.*, §54. When the agent acts for the insurance company within the

scope and terms of the agency contract, the agent's actions become legally attributable to the carrier. *See id.*, §48 .

The agency contract sets forth the specific terms, conditions, duties and obligations of the parties and creates the principal/agent relationship. In this relationship, the agent has certain responsibilities, including: the placement of policies within underwriting guidelines set by the carrier; the collection of premiums for remittance to the carrier; the disclosure of risks and material information to the carrier; and the timely satisfaction of any requests for information from the carrier's underwriters. *See id.*, §54. Under existing law, an insurance agent has a well-documented obligation to provide full and fair disclosure of material information not only to the carrier, but also to the policyholder. *See id.*, §§54 & 55. But those disclosure obligations do **not** ordinarily make an insurer's appointed agent an agent of the policyholder. *See id.*, §55 .

The agent is the principal's representative in the insurance marketplace, free to market and sell the insurer's product within the bounds of the agent's contractual appointment. *See id.*, §54. A broker, by contrast, does not represent the insurer and has no binding or other legal authority on its behalf. *See id.*

Apart from common law considerations, each state has in place its own statutory and regulatory schemes defining the respective roles and duties of an

insurance agent and insurance broker. *See id.*, §47. Probably the most fundamental distinction between an agent and a broker is that in any dispute between the policyholder and the insurer, an agent is deemed to have been acting on behalf of the insurer when engaged in the sale, solicitation, or negotiation of the carrier's insurance policy. *See id.* Even as to brokers, insurance law does not presume that an insurance producer is in fact "the broker" of the policyholder. There is no legal basis to impose a universal agency relationship between brokers and agents and their customers and prospective customers, as the Mandatory Disclosure Statement purports to do.

Beyond its affirmative misstatements, the Mandatory Disclosure Statement is objectionable on other grounds. Independent insurance agents and brokers have their own legal obligations with regard to issues of compensation disclosure based on specific circumstances between them and their customers, as well as specific state law obligations that operate independent of Zurich or any other carrier. Agents and brokers must still comply with these independent legal obligations irrespective of the new requirements imposed on them by Zurich under the Multi-State Settlement, including but not limited to use of the Mandatory Disclosure Statement. That form cannot and should not relieve agents and broker from those other legal obligations. All the form does is interfere and conflict with agents' and

brokers' independent customer relationships with policyholders, including class members.

In sum, the Mandatory Disclosure Statement upsets and reverses venerable principles – it is inaccurate and violates existing state and common law in purporting to place the full burden of disclosure compensation on agents and brokers. In turn, the Mandatory Disclosure Statement minimizes the carrier's responsibility for disclosure, at expense of its authorized agents. Furthermore, the Mandatory Disclosure Statement requires independent agents, like PIA members, to make inaccurate and misleading statements that will only confuse policyholders regarding the compensation system and the compensation relationship between carriers and agents. The Mandatory Disclosure Statement may well leave policyholders with the mistaken belief that they have certain rights against their agents, with the potential to spawn a rash of unsuccessful and unmeritorious litigation that could clog the courts and cause policyholders and agents to incur unnecessary inconvenience and expense.

The logistics for use of the Mandatory Disclosure Statement will also harm class and PIA members. On a transaction-by-transaction basis, the agents and brokers representing Zurich will have to contact each customer to obtain consent in virtually any matter affecting an insurance placement. Although Zurich has indicated to PIA that the Mandatory Disclosure Statement form must be used for

every insurance “transaction,” that term has no clear legal meaning. Broadly defined, a “transaction” could mean every action taken involving an insurance policy, including but not limited to every telephone conversation between policyholder and agent, every e-mail, every billing inquiry, every policy renewal, every endorsement change, etc. Confusion to class members and inefficiency will result if agents like PIA members must give the Mandatory Disclosure Statement to customers and prospective customers in all these circumstances. It would be extremely cumbersome and inefficient, for example, if a policyholder could not add an additional automobile to a business policy without first having received the Mandatory Disclosure Statement and then providing written consent. The process anticipated by the Multi-State Agreement and required by the Mandatory Disclosure Statement is both unwieldy and unnecessary. It will provide no marginal benefit to the customer. Compliance efforts will be a nightmare.

Approval of the Zurich Class Settlement, as currently structured, will result in harm to PIA and class members that could easily be avoided with changes to the Mandatory Disclosure Statement, as described below. Absent these necessary changes, this Court should reject the proposed class settlement.

B. The Revised Disclosure Statement Proposed by PIA Satisfies the Concerns of All Interested Parties and Cures the Problems Caused by the Mandatory Disclosure Statement.

PIA has no intent to obstruct consummation of the Zurich Class Settlement, which promises to bestow significant financial benefits on class members allegedly damaged as a result of improper or legal practices. Nevertheless, any perceived need for expediting the settlement process cannot justify the serious and fatal flaws in the Mandatory Disclosure Statement, as identified above. As *amicus*, PIA wants to assist the process by ensuring that any fundamental change to longstanding industry practices, including disclosures independent agents and brokers may be compelled to make to their customers, is accurate and fair to all affected parties. While the state Attorneys General may have acted with the best of intent, they have imposed a “one size fits all” solution to a mammoth and diverse industry. Purported “reforms” that may make sense in the context of business dealings between the customers of the Zurich Insurers and mega-players like the Broker Defendants have no legitimate application to the relationship between the Zurich Insurers and the customers of Main Street Agents like PIA members. Here one size most assuredly does not fit all.

In the spirit of cooperation, however, PIA submits a suggested Revised Disclosure Statement. In PIA’s view, this form cures the flaws inherent in the Mandatory Disclosure Statement, and will protect and serve the legitimate interests of all affected parties. PIA has no pride of authorship, and has not prepared the Revised Disclosure Statement as a “take it or leave it” gesture. PIA well

appreciates the unfairness of excluding factions and parties from “reform” efforts that will have a direct and substantial impact on them. If all parties work together in good faith, then a new and improved disclosure statement is sure to result. From its own direct dealings, PIA is confident that the Zurich Insurers would be amenable to a cooperative approach to the problems created by compelled compensation disclosure. So far, the state Attorneys General, including the state Attorneys General who are parties to the Multi-State Agreement and who are presently seeking to intervene in these proceedings, have been less so. With this Court’s intercession, and the need to act expeditiously to get the Zurich Class Settlement approved, PIA believes the situation will likely change. Faced with the termination of the Multi-State Agreement as an alternative, the state Attorneys General will have every incentive to come to the bargaining table and negotiate in good faith to arrive at a resolution of a complex problem that is fair to all. So far, it appears that the state Attorneys General have lacked such an incentive, and that has caused the unjustified crusade for the abolition of contingent commissions and the host of flaws identified in the Mandatory Disclosure Statement.

CONCLUSION

For all these reasons, PIA requests that this Court decline to grant preliminary or permanent approval of the Zurich Class Settlement until and unless the flaws identified in the Mandatory Disclosure Statement are corrected.

Respectfully submitted this 15th day of September, 2006.

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Exhibit 1

Zurich Agent/Broker Compensation Policy

Most insurance companies providing commercial coverage in the United States distribute their insurance products through the independent agency and brokerage system. Your agent or broker is an independent businessperson or team of people not employed by Zurich or any other insurance company.

Most agents and brokers choose to be compensated for their services through the insurance companies with whom they place the insurance that they sell to their customers.

Base Commission

Zurich will pay your agent or broker a commission. Zurich establishes its base commission on several factors including the type of insurance policy, the size of the insurance policy, and individual policy underwriting considerations. Each insurance policy has a standard commission which is the most that Zurich will pay. The standard commission for the types of policies Zurich is quoting is:

Policy 1 _____%	Policy 3 _____%
Policy 2 _____%	Policy 4 _____%

If you have chosen to compensate your agent or broker directly or you have not consented to your agent or broker taking a commission, you should speak directly to your agent or broker.

Contingent Compensation

[May be deleted if no agreement with broker to pay contingent commissions]

Zurich may also pay contingent compensation to your agent or broker. Zurich does not pay contingent compensation to all of its agents and brokers, and some agents and brokers choose not to accept contingent compensation from insurance companies. Contingent compensation is paid in addition to the base commission. Contingent compensation is not calculated until the end of the year. The amount will be a percentage of premiums based on several factors that determine how

profitable your agent's or broker's insurance is for Zurich including [to be modified if factors changed]:

1. The total premium written for all eligible business in a year
 - Zurich pays a percentage of the eligible premiums in addition to the "Base Commission."
2. Achievement of targeted premium levels
 - Zurich sets reasonable targets of premiums that will be placed with Zurich by your agent or broker each year. If that target is reached, then your agent or broker is paid an additional amount on the eligible premiums.
4. The profitability of the business
 - For each agent and broker, Zurich calculates the ratio of the total value of the claims over the premiums. The resulting ratio generates a payment. Lower ratios generate higher payments because lower ratios mean that the result is more profitable to Zurich. We do not disclose the actual ratio and payment percentages.
4. Preferred business considerations
 - We have unique agreements with some agents and brokers to place particular types of business with us. These agreements may result in the payment of additional commission for such policies.

The maximum percentage for contingent compensation is 6.75%. The average paid in 2005 was ___%.

Visit Zurich's Web Site

For a more complete explanation of the nature of compensation Zurich pays to agents/brokers— including specific information on the maximum, average and actual ranges of commission paid by Zurich on the specific types of policies we are currently quoting for your company, please go to www.zurichna.com/yourcompany This web site includes a full explanation of the formula for developing contingent compensation if your agent or broker is eligible for contingent compensation from Zurich. Alternatively, you may call 1-800-xxx-xxxx to obtain the information.

Exhibit 2

ZURICH INSURERS COMPENSATION POLICY

- 1) Zurich Conducts its commercial insurance sales, marketing and policy placements activities using the services of insurance producers. We conduct most of this business through our appointed insurance agents, but conduct some of our commercial insurance business through insurance brokers with whom we contract.
- 2) Zurich pays our insurance agents and contract insurance brokers compensation based on the level of insurance premiums that they place with us and for the performance of services that we require them to perform.
- 3) As applied to the majority of our commercial lines insurance policy placements and transactions, the compensation we pay is divided into two parts. The first is an upfront compensation paid in the form of a commission, calculated as a percentage of the total insurance premium. Commission rates vary by line of insurance, class of business, and business arrangements with each insurance producer.
- 4) The second portion of this compensation is earned as a year-end performance bonus, calculated based on methods and formulas established by Zurich, and paid when the insurance producer has met our required performance standards for profitability, growth and overall net profit.
- 5) Zurich has special compensation arrangements that may differ from the procedures outlined above with certain insurance producers and/or for certain lines of insurance and/or classes of business. In those circumstances, we may issue additional disclosure form(s) that detail those special arrangements.
- 6) All compensation paid to all of Zurich's insurance producers is included in the insurance premium charged for your insurance policy. Any further pricing adjustments (up or down) made to your already issued insurance policy because of policy changes you request will also include these costs.
- 7) Zurich requires our insurance producers to provide a copy of this notice (or an amended notice as we may direct) to all new Zurich customers and active prospects.

If you have any questions or comments on Zurich producer compensation practices and procedures, please contact us at XXXXX. Here is the link to our website where we will post any updates or changes to this information, XXXXXX.

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2006, a true and correct copy of the foregoing document was filed electronically via CM/ECF in the United States District Court for the District of New Jersey, with notice of the same being electronically served by the Court on all counsel of record.

/s William F. Megna

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