

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LINDA L. MOONEY and
LIESELOTTE W. THORPE,
on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

ALLIANZ LIFE INSURANCE
COMPANY OF NORTH
AMERICA,

Defendant.

Case No. 06-cv-00545 (ADM/FLN)

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR A
PERMANENT INJUNCTION
AND FOR AN AWARD OF
ATTORNEY FEES AND
EXPENSES**

I. INTRODUCTION AND STATEMENT OF FACTS

On October 12, 2009, the jury returned a verdict that factually established that Defendant Allianz Life Insurance Company of North America ("Allianz") used misrepresentations or deceptive practices in the course of selling its two-tiered annuities and made misrepresentations or engaged in deceptive practices with intent that others would rely on its statements or conduct. [Docket No. 526.] Judgment was entered on October 16, 2009. [Docket No. 529.] Although the jury did not award any

monetary damages, its two liability determinations constitute conclusive findings that Allianz violated the Minnesota Prevention of Consumer Fraud Act (“MPCFA”), Minn. Stat. § 325F.69, subd. 1 (2008), and under the private attorney general statute, Minn. Stat. § 8.31, subd. 3a (2008), and Fed. R. Civ. P. 65(d), the Court should amend the judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6) to include a permanent injunction.¹ The Court should also award attorney fees and expenses to Plaintiffs’ counsel pursuant to Minn. Stat. § 8.31, subd. 3a and Fed. R. Civ. P. 54(d)(2).

The Court has sufficient factual and legal support to grant the requested injunctive relief, particularly in light of the preclusive effect of

¹ Plaintiffs’ request for a permanent injunction should not come as a surprise to Allianz. Allianz acknowledged in its Statement of the Case and Trial Brief that Plaintiffs in their Amended Complaint requested “equitable and injunctive relief.” [Docket No. 395 at 2.] It also recognizes that equitable and injunctive relief must be “determined by the court.” [*Id.* at 59.] Additionally, for those policyholders who had already annuitized or who were still in deferral, Allianz’s proposed verdict form suggested that the Court would determine the relief upon the finding of liability by the jury. Specifically, it stated: “The Judge will determine the appropriate remedy for any harm the class members **who did not surrender** their annuities suffered as a direct result of the false or deceptive representation you have decided was contained in every class member’s consumer brochure.” (Emphasis added.)

the jury's findings. *See Garza v. City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987). An amendment of the Judgment under Rule 59(e) or 60(b)(6) is the appropriate basis for the Court to address injunctive relief at this stage of the proceedings.²

The efforts of Plaintiffs' counsel, as the Court has already commented, have led to a public benefit in that Allianz—and perhaps other insurers—will be reluctant to engage in deception and other conduct in violation of the consumer protection statutes, *infra*. As a consequence, injunctive relief is warranted.

² Should the Court determine it needs additional proceedings beyond this motion before entering equitable relief, this motion should be considered a motion under Fed. R. Civ. P. 59(a) to preserve the right for a trial of the remaining equitable issues. Prior to the merging of law and equity, situations such as this one would require two trials in order to preserve Seventh Amendment rights. The current regime involving the liberal joinder of claims, both legal and equitable, mandates a judicial determination of the equitable issues post-verdict. "Since these issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479-80 (1962). As the equitable claims are not addressed in the current Judgment, Plaintiffs seek either an amendment to the existing judgment (Rule 59(e)), or a new trial to produce a judgment on the remaining equitable issues (Rule 59(a)).

This case is unique for a variety of reasons. It is the first significant class action to be tried in the District of Minnesota in many years, and to our knowledge the only class case ever tried against a life insurance company anywhere in the United States. Allianz was ably represented by the Jordan Burt LLP law firm from Washington, D.C. Twenty-one of its lawyers were admitted pro hac vice in this matter and presumably many others aided without being formally admitted to practice before this Court. Furthermore, Jordan Burt was professionally assisted in its efforts by lawyers from Leonard, Street & Deinard in Minneapolis. Like most class cases, this matter involved significant motion practice. Not only was certification of a class vigorously opposed (and appealed), two attempts to decertify the class occupied both the Court and counsels' time. A total of 46 depositions were taken. Each side secured the assistance of expert witnesses. Ultimately, Allianz sought and was denied summary judgment and a three week jury trial ensued. In sum, the Court is well aware that this case was vigorously prosecuted and defended from the outset.

The effort was significant in terms of costs. Although it is unknown how much money Allianz spent on its attorneys and other professionals it

retained, the amount certainly is significant. Plaintiffs have calculated and have provided specific information concerning lodestar (hours x hourly rates) and expenses incurred. Through October 15, 2009, attorney lodestar for Plaintiffs is \$14,919,903 and they have incurred \$1,115,308.20 in expenses.³ (See Declarations of counsel submitted with this Motion.)

The result of this monumental effort is the determination that Allianz violated the Minnesota Consumer Fraud Act and this result now supports entry of a permanent injunction. Attorney fees and reimbursement of expenses is also warranted.

II. ARGUMENT

Based on the jury's determination of liability, Plaintiffs request that under Fed. R. Civ. P. 59(e) (motion to amend the judgment) and 60(b)(6) (other reasons to justify relief from a judgment), that the Court amend the judgment entered October 16, 2009 to include a Permanent Injunction under Minn. Stat. §§ 325F.69, subd. 1 and 8.31, subd. 3a, and Fed. R. Civ. P. 65(d).

³ As explained in Sections II.C.3 and II.D, *infra*, Plaintiffs suggest that the attorney fee award reduce lodestar by 10% (\$13,427,912) to reflect a reasonable estimate of time devoted to proving damages, and Plaintiffs' counsel expenses of \$1,115,308.20 exclude costs related to their damages expert.

A. A Permanent Injunction Should Issue Prohibiting Allianz from Further Violating the MPCFA.

Injunctive relief is authorized by both the MPCFA and the private attorney general statute, and because Plaintiffs prevailed in establishing that Allianz substantively violated the MPCFA, the Court should enter an order granting Plaintiffs' motion for injunctive relief.

A district court has discretion to enter a permanent injunction.

Kennedy Building Assocs. v. CBS Corp., 576 F.3d 872, 876 (8th Cir. 2009). The standard for issuing a permanent injunction is the same as the one used for issuing a preliminary injunction, with one key difference. *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). "A permanent injunction requires the moving party to show actual success on the merits, rather than the fair chance of prevailing on the merits required for a standard preliminary injunction." *Id.* If the court finds actual success on the merits, it then considers (1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest. *Id.* (citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 729 n.3 (8th Cir. 2008); *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)); see

also *Spectralytics, Inc. v. Cordis Corp.*, __ F. Supp. 2d __, __, No. 05-CV-1464 (PJS/RLE), 2009 WL 2837358, at *19 (D. Minn. Sept. 4, 2009) (citing the four-factor test for granting injunctions).

If violated, the MPCFA provides for injunctive relief. It states in relevant part:

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided in section 325F.70.

Minn. Stat. § 325F.69, subd. 1 (2008) (emphasis added). The private attorney general statute provides that, “. . .any person injured by violation of any of the laws referred to in subdivision 1 [which specifically references the MPCFA] may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees, **and receive other equitable relief as determined by the court. . . .**” Minn. Stat. § 8.31, subd. 3a (2008) (emphasis added). A prevailing plaintiff asserting an MPCFA claim can obtain

statutory injunctive relief. *Wexler v. Bros. Enter. Group, Inc.*, 457 N.W.2d 2d 218, 222 (Minn. Ct. App. 1990).

Because the jury determined that Allianz violated the MPCFA and as the Court has previously noted, the action will confer a public benefit, the Court should enter the permanent injunction Plaintiffs request.

1. **Plaintiffs Demonstrated Actual Success on the Merits by Proving to the Jury Allianz Violated the MPCFA.**

The jury determined on October 12, 2009 that Allianz violated Minn. Stat. § 325F.69, subd. 1. The jury found that Allianz used misrepresentations or deceptive practices in the course of selling its two-tiered annuities (Question 1) and Allianz also intended others would rely on the misrepresentation or deceptive practice (Question 2). The Court incorporated these determinations into its judgment. [Docket No. 529.]

Consequently, the jury found Allianz's misrepresentations and deceptive practices substantively violated the MPCFA. Although the jury found no harm associated with the conduct of Allianz, such a finding is unnecessary for purposes of injunctive relief. (*Id.*) These conclusive findings of the jury entitle Plaintiffs to injunctive relief, and thereby constitute injury under Minn. Stat. §8.31, subd. 3a, even though the jury

found no damages. *Love v. Amsler*, 441 N.W.2d 555, 560 (Minn. Ct. App. 1989) (determining that the fact of deceptive practices and having to defend them satisfied the MPCFA and private attorney general statute); *see also O'Neil v. Simplicity, Inc.*, 553 F. Supp. 2d 1110, 1118-19 (D. Minn. 2008) (granting motion to dismiss MPCFA claim after determining no “injury” was pleaded because the complaint failed to allege an actual injury or request injunctive relief).

Plaintiffs fully expect Allianz to argue that the jury’s decision not to award damages precludes a determination that Plaintiffs were successful on the merits. But Allianz would be wrong. Under Minnesota law, mere loss of bargaining opportunity—known as the “lost opportunity” theory-- has been determined to be an “injury” under the MPCFA and private attorney general statutes. *See Peterson v. BASF Corp.*, 675 N.W.2d 57, 73 (Minn. 2004); *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60, 65 (Minn. Ct. App. 2000) (finding injury with omission by auto dealer that it was retaining part of the proceeds for finance and insurance products, which resulted in loss of bargaining opportunity) (*Sutton I*).⁴ Based on the

⁴ The Minnesota Supreme Court vacated the decision in *Sutton I* and remanded in light of *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621

trial testimony of Plaintiffs and class members (and trial-designated deposition testimony of absent class members), injury was established under the “lost opportunity” theory because they testified they would not have purchased Allianz’s two-tiered annuities had the bonus feature not been misrepresented.

In *Sutton I*, the plaintiff had purchased a new vehicle and claimed that the dealership misrepresented in the installment contract that amounts charged for the extended service contract and credit insurance policies would be paid to others on the purchaser’s behalf and the dealer actually retained a profit on the contract and retained a commission from

N.W.2d 2 (Minn. 2001). *Sutton v. Viking Oldsmobile Nissan, Inc.*, 623 N.W.2d 247, 247 (Minn. 2001) (*Sutton II*). On remand, the court of appeals again acknowledged that the plaintiff testified that “had he known [the dealership] was keeping a large percentage, he would have negotiated a price or declined to purchase them.” *Sutton v. Viking Oldsmobile Nissan, Inc.*, No. C2-99-1843, 2001 WL 856250, at *2 (Minn. Ct. App. July 31, 2001) (*Sutton III*). The court held that because of this testimony, a material issue of fact existed as to the purchaser’s MPCFA claim and damages. Ultimately, following trial, the purchaser’s MPCFA claim failed because a jury determined—unlike the jury here—that the dealership “did not use false information or a deceptive practice in the course of selling services.” *Sutton v. Viking Oldsmobile Nissan, Inc.*, No. A03-533, 2004 WL 26595, at *2 (Minn. Ct. App. Jan. 6, 2004) (*Sutton IV*) (noting that the dealership had not made a representation that it would not profit from selling service contracts and that the purchaser knew the dealership would keep a portion of the vehicle’s purchase price as a commission). *Sutton IV* did not further comment on the lost opportunity theory.

the insurer. *Sutton I*, 611 N.W.2d at 63. The district court concluded the MPCFA claim failed because the plaintiff had not been damaged. The court of appeals reversed. It held:

[the plaintiff] testified that if he had known the extent of [the dealership's] profit on the service contract, he would have negotiated a lower price or refused to buy it. [The plaintiff] therefore either overpaid for the service contract or **lost the opportunity to refuse to buy it** because of the large profit [the dealership] would make on it. That financial detriment is an "injury[.]"

Id. (emphasis added); see also *Higgins v. Harold Chevrolet-Geo, Inc.*, No. A04-596, 2004 WL 2660923, at * *4-5 (Minn. Ct. App. Nov. 23, 2004) (noting that while "lost opportunity to negotiate" is a legally cognizable injury under the MPCFA, the purchaser's claim failed because he testified he "would have probably tried" to negotiated a lower price but was "not sure," distinguishing it from *Sutton I* where the purchaser unequivocally testified he "would have" negotiated a lower price or refused to purchase the vehicle); *Reinke v. Harold Chevrolet-Geo, Inc.*, No. A03-1148, 2004 WL 1152700, at *4 (Minn. Ct. App. May 20, 2004) (same).

The Minnesota Supreme Court also applied the "lost opportunity" theory in *Peterson v. BASF Corp.*, 675 N.W.2d 57, 72-73 (Minn. 2004)

(*Peterson III*).⁵ In *Peterson III*, the defendant argued that the plaintiffs' consumer fraud claim under New Jersey law failed because they failed to show an "ascertainable loss." *Id.* at 72. The supreme court noted that a causal link between the defendant's conduct and an ascertainable loss could be established "based either on (1) the farmers' lost opportunity to choose whether to buy [the herbicide] or the lower priced [herbicide], or (2) the lost opportunity to refuse to buy [the herbicide] if they had known the [the lower priced herbicide] was EPA registered for the same uses . . ."

⁵ This decision was preceded by *Peterson v. BASF Corp.*, 618 N.W.2d 821, 824-25 (Minn. Ct. App. 2001) (*Peterson I*), which specifically cited *Sutton I* and concluded that farmers "lost the opportunity to refuse to buy [a herbicide] because of BASF's marketing scheme and exploitation of federal regulations concealed that [a different herbicide] was registered for the same uses as [the first]." The court also noted that the farmers' reaction upon learning the truth constituted "circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF." *Id.* In the appeal following trial, the court of appeals in *Peterson v. BASF Corp.*, 657 N.W.2d 853, 868 (Minn. Ct. App. 2003) (*Peterson II*), upheld a jury's determination that the defendant violated the consumer protection statute, noting that "sufficient evidence had been presented . . . to find an ascertainable loss based on the farmers' lost opportunity to refuse to purchase [the herbicide] due to [the defendant's] conduct or actions."

*Id.*⁶ The supreme court therefore endorsed application of the lost opportunity theory in concluding that the farmers had suffered a loss.⁷

Here, trial (and designated deposition) testimony established that Plaintiffs and other class members suffered an “injury” by having purchased a product that Allianz misrepresented because they lost the opportunity not to buy the two-tiered annuity. Plaintiffs Linda Mooney, Lieselotte Thorpe, and class member Robert Wiley all testified or their conduct showed that they would not have purchased the annuities had Allianz not misrepresented the bonus or engaged in deceptive practices. (Cambronne Decl. ¶ 13.)

⁶ The United States Supreme Court in an order dated May 2, 2005 vacated *Peterson III* and remanded in light of *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (addressing preemption under the Federal Insecticide, Fungicide, and Rodenticide Act, which was an issue in *Peterson III*). On remand, the Minnesota Supreme Court held that the federal statute did not preempt the farmers’ MPCFA and other claims, admitting label information was proper, and no new trial was warranted for failing to give a jury instruction on the labeling requirements. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 484 (Minn. 2006).

⁷ The Court should reject any argument that the injury or loss to Plaintiffs and the class is speculative. Plaintiffs are not arguing that the lost opportunity theory should have awarded them monetary damages. The lost opportunity to refuse to buy the two-tiered annuities had the bonus features not been misrepresented by Allianz establishes the necessary “injury” to enter a permanent injunction.

The conclusion that Plaintiffs and members of the class were “injured” by Allianz’s violation of the MPCFA by losing their opportunity not to purchase the two-tiered annuities advances the public policies of the MPCFA and supports entry of an injunction. Private enforcement of consumer protection laws have the effect of rectifying the imbalance of power between consumers and the sellers who generally control the terms of marketplace transactions. *See Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 1002 (D. Minn. 2003); *Weigand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004). Plaintiffs, therefore, have established success on the merits.

2. Irreparable Harm Exists if Allianz is not Prohibited from Future Conduct that Violates the MPCFA.

An unpalatable message would be sent if an insurance company is found by a jury to have violated consumer protection statutes and not have its misrepresentations and deceptive conduct prohibited in the future. If that were the case, insurers would engage in practices that encourage minimum disclosure rather than maximum disclosure and thereby thwart the policies embodied in consumer protection statutes such as the MPCFA.

The Minnesota appellate courts have consistently held that statutory fraud laws are to be broadly construed in favor of protecting consumers. This “reflect[s] a clear legislative policy encouraging **aggressive prosecution of statutory violations.**” *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 495 (Minn. 1996) (emphasis added). The appellate courts in Minnesota have also held that the MPCFA “is designed to **encourage persons to take action to stop the fraudulent activity covered by the act**, even though the amount actually lost may be small.” *Yost v. Millhouse*, 373 N.W.2d 826, 832 (Minn. Ct. App. 1985) (emphasis added).

Here, Allianz still uses marketing materials (including consumer brochures and advertising on its website) that do not fully explain the bonus and the application of the Expense Recovery Adjustment. This means consumers are still misled by Allianz’s conduct and its violations of the MPCFA will continue to cause harm, even if that harm does not result in class-wide monetary damages.

3. **The Balance of Harms Favors Entry of a Permanent Injunction.**

The risk of consumer confusion caused from Allianz’s misrepresentations and deceptive practices balanced against the “harm” to

Allianz in complying with the MPCFA favors a permanent injunction. A corporation cannot say harm results from complying with the law, particularly laws that govern its interactions with the public. Thus, Allianz certainly cannot be harmed by being enjoined from further violations of the MPCFA and being ordered to make certain disclosures requested in the proposed Permanent Injunction. This factor, therefore, favors entry of a permanent injunction.

4. **The Court has Already Determined that this Action Benefitted the Public Interest.**

Although discussed more thoroughly below in the context of the requested award of attorney fees, the Court has already stated Plaintiffs' lawsuit conferred a public benefit if liability were established. That determination provides the final element necessary for issuance of a permanent injunction.

During the post-trial Fed. R. Civ. P. 50 hearing, the Court addressed the matter of public benefit, and the Court stated:

I do think that the status of the law is clearly that the issue of public benefit is a matter of law that the Court should determine. I don't think it is an appropriate issue of fact for the jury to decide. **And I do find, just so that the record is clear, that there is a public benefit should the jury return a**

verdict here. The legal services that have been provided would benefit a class of consumers, a large class, not a particular litigant. It's possible that the result of this case may affect the candor level by which insurance companies market and sell products to the public, and I think for those reasons it is subject to the sort of classic consumer protection analysis that the Court feels could well serve a public benefit, so I'm going to find that as a matter of law and not submit that issue to the jury.

(Cambronne Decl. Ex. E; Trial Tr. at 2442 (emphasis added).) Although the jury did not award damages, its findings of liability should “affect the candor level” of insurance companies toward the public. Putting a permanent injunction in place will ensure this candor, not only from Allianz toward its purchasers of insurance products, but from other insurance companies toward their customers as the injunction here will likely have a therapeutic and corrective effect on other insurers as well.

Because Plaintiffs were successful in establishing liability under the MPCFA, the threat of irreparable harm exists, the balance of harms favors Plaintiffs and the class, and the public's interest would be advanced, a permanent injunction should be entered.

B. The Terms of the Permanent Injunction.

In view of the foregoing statements of law and the facts as found by the jury, an injunction, effective January 1, 2010, should be entered as follows:

1. Allianz shall disclose in all forms of advertising, including but not limited to consumer brochures, print advertising, Allianz's website, statements of understanding, and product scripts, related to the annuity policies at issue in this litigation or any iterations or extensions or variations thereof⁸ in type face at least as large as the text related to the product description and not in a footnote(s) that:

a. The bonus provided by this annuity provides no immediate benefit but rather can only be realized after maintaining the annuity in deferral for a period of five (5) years and then annuitized thereafter for a period of at least ten (10) years.

⁸ Since the initiation of this lawsuit, Allianz ended sales of some of the products at issue and evolved others. For instance, what was known during the trial as the MasterDex 10, is now known as the MasterDex 10 Plus. This annuity is merely a variation of the MasterDex 10 focused on at the time of trial and the brochure continues to have the substantially similar offending language and nondisclosures as does the MasterDex 10 brochure. *Compare* MasterDex 10 Plus brochure *with* Plaintiffs' Trial Ex. 106 (Cambronne Decl. ¶ 12.)

Consumers are warned that the bonus referenced in this annuity is not available immediately to overcome surrender charges, pay capital gains taxes, or otherwise provide an immediate benefit. The bonus can be used only in determining the monthly payment available upon annuitization and is never available as a lump sum. This annuity is not a good investment for you unless you plan to maintain the annuity for at least fifteen (15) years.

b. For annuitizations earlier than the tenth policy anniversary, any monthly payout you may receive above the guaranteed minimum may be reduced by an expense recovery adjustment. This will reduce the effect of the bonus on the monthly payout you would otherwise receive.

2. Allianz shall make the same disclosures in ¶¶ 1(a) and 1(b), either orally or in writing, to consumers who contact it, whether by telephone to Allianz's consumer assistance representatives, through its website, or by other means of correspondence, related to the annuity policies at issue in this litigation or any iterations or extensions or variations thereof.

3. This Permanent Injunction is binding upon Allianz and the other persons bound by Fed. R. Civ. P. 65(d)(2). Allianz shall provide written notice of this injunction to its officers, independent agents, field marketing organizations, and employees.

C. **Plaintiffs' Counsel are Entitled to an Award of Attorney Fees.**

Although the federal court has held that the decision whether to award attorney fees resulting from a successful lawsuit for violating the MPCFA is within the district court's discretion, *Scott Fetzer Co. v. Williamson*, 101 F.3d 549, 556 (8th Cir. 1996); *Hutchinson Utils. Comm'n v. Curtiss-Wright Corp.*, 775 F.2d 231, 243 (8th Cir. 1985), Minnesota appellate court cases expressly hold that a prevailing attorney is entitled to an attorney fee award. *Wexler v. Bros. Entm't Group, Inc.*, 457 N.W.2d 218, 222-23 (Minn. Ct. App. 1990) (holding that successful plaintiffs are entitled to attorney fees). The statute recognizes that the award of attorney fees should (1) eliminate financial barriers to the vindication of consumer rights; (2) provide incentive for counsel to act as private attorneys general and (3) take into account the degree to which the public interest is advanced by the suit. *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct.

App. 1984). An award of attorney fees and reimbursement of expenses is appropriate in this matter under Fed. R. Civ. P. 54(d)(2)⁹ and Minn. Stat. §§ 325F.69, subd. 1 and 8.31, subd. 3a.

Under the MPCFA, the award of attorney fees is determined under the case law standards for other matters in which attorney fees are authorized. *Minn. v. Paulsen*, 188 N.W.2d 424, 426 (Minn. 1971). The general rule provides as follows:

. . . [A]llowances should be made with due regard for all relevant circumstances including the time and labor involved; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.

Id. In cases granting awards of attorney fees to prevailing plaintiffs in statutory fraud cases, the courts have an additional principle in applying

⁹ Rule 54(d) indicates that proceedings are subject to Fed. R. Civ. P. 23(h) in class actions. Rule 23(h) provides that a claim for an award of attorney fees must be made under Fed. R. Civ. P. 54(d)(2). Fed. R. Civ. P. 23(h)(1). Rule 23(h) also provides that “[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.” *Id.* Because the award of attorney fees in this matter does not involve an award from a common fund—Allianz would be paying them directly—notice in a “reasonable manner” should not involve providing mailed individual notice as would be typical in a settled class action.

the *Paulsen* test. The amount of the attorney fees award is *not* limited by the amount of damages recovered by the plaintiff. *Wexler v. Bros. Entm't Group, Inc.*, 457 N.W.2d 218, 220, 223 (Minn. Ct. App. 1990) (awarding fees despite damage award of less than \$12).

Minnesota courts also use “public benefit” as a factor in determining the amount of the fees, but the case law does not expressly discuss the relationship between the public-benefit limitation on lawsuits and the use of public benefit to determine the amount of fees. In the seminal case regarding interpretation of the remedies available for a violation of the MPCFA, the Minnesota Supreme Court held in *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) that, “the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public.” *See also Collins v. Minn. Sch. of Business, Inc.*, 636 N.W.2d 816, 820 (Minn. Ct. App. 2001) (awarding attorney fees and noting case conferred a public benefit because other potential consumers may have been injured by misrepresentations in the same manner had the plaintiffs not brought the action), *aff'd* 655 N.W.2d 320 (Minn. 2003). *Collins* observed, in the context of Minnesota’s false advertising statute that “federal courts have

consistently held that the prevention of false or misleading advertising is a public benefit.” *Id.* at 820-21 (citing *Hot Wax Inc. v. Tuttle Wax, Inc.*, 191 F.3d 813, 826 (8th Cir. 1999)).

The supreme court affirmed the court of appeals’ decision. In *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320, 330 (Minn. 2003), the court held that twenty-one plaintiffs, who accepted the defendant’s offer of judgment on an MPCFA claim, were entitled to costs under Minn. Stat. § 8.31, subd. 3a, including reasonable attorney fees, because their lawsuit served a public benefit. The court reasoned that the defendant had “launched” a “misrepresentation to the public at large by airing a television advertisement.” The court also determined public benefit existed because the defendant made numerous sales and information presentations to the student body of 1,200. “All of these factors indicate that [the defendant] presented its program to the public at large.” *Id.* Therefore, as the Court has already concluded, the same rationale applies to the consumer fraud statute and Plaintiffs demonstrated a public benefit as already discussed. (*See* Section II.A.4.)

Plaintiffs proved, and the jury determined, that Allianz violated the MPCFA by using a misrepresentation or a deceptive practice in selling its two-tiered annuity products and made the misrepresentation or engaged in a deceptive practice with intent that others rely.

After Plaintiffs rested their case and during the Court's consideration of Allianz's Fed. R. Civ. P. 50 motion, a discussion was had concerning the notion of a "public benefit":

MR. CAMBRONNE: . . . But, it is self-evident, Your Honor, that if – this is a big group people, that's true, but by addressing this problem, it obviously has a public benefit associated with it. We think you can rule that as a matter of law. You've implied as much in some pretrial motions here.

If we lose on the matter of liability, there's obviously no public benefit, but then the matter is moot in any event.

The fact of the matter is, if Allianz is found to have violated the consumer fraud statute in this case, that infers [confers], in and of itself, a public benefit.

(Cambronne Decl. Ex. E; Trial Tr. at 1557-58.)

The Court determined that the litigation would confer a public benefit if liability were established:

[T]here is a public benefit should the jury return a verdict here. The legal services that have been provided would benefit a class of consumers, a large class, not a particular

litigant. It's possible that the result of this case may affect the candor level by which insurance companies market and sell products to the public. . .

(Cambronne Decl. Ex. E; Trial Tr. at 2442.)

Earlier, in the context of denying Allianz's motion for summary judgment, the Court held that the suit conferred a public benefit. (Order, Feb. 26, 2009, at 6-7 [Docket No. 292].) The Court noted that courts will not find a public benefit when a plaintiff is defrauded in a single one-on-one transaction involving a fraudulent misrepresentation. *Id.* at 6. But while the plaintiff must do more than merely seek damage for a large group of people, here Plaintiffs did more as Allianz's misrepresentations were "widespread." The court wrote:

It is disingenuous [of Allianz] to suggest that were a jury to determine that Allianz had misrepresented its annuities in its brochures, **the benefit from forcing it to admit its wrong and then correct it would not benefit the general public.**

Id. at 7 (emphasis added).

In addition to the public benefit that resulted, the *Paulsen* factors support an award of attorney fees. Based on the time and labor involved, the difficulties of the litigation, the time expended and significant MPCFA

violations found, fees customarily found, the abilities of counsel and other factors, the Court should award attorney fees in the amount of \$13,427,912.

1. The Time and Labor Involved.

As the Court is well aware, this has been a hard fought and vigorously litigated class action. The major proceedings can be summarized as follows:

- The Complaint: In 2006, Plaintiffs investigated this matter and filed a complaint and an amended complaint [Docket No. 23.]
- Discovery and Discovery Motion Practice: Discovery involved negotiations over a protective order [Docket Nos. 43-44] and the subsequent production of hundreds of thousands of documents. The motions included a motion to amend or correct the scheduling order, a motion for in camera review of documents and to compel production of documents [Docket No. 104], and an unopposed motion to extend the time to complete discovery [Docket No. 131]. The parties also fought over Allianz's motion to depose absent class members. [Docket No. 139.] Allianz also moved to compel discovery from Plaintiffs. [Docket No. 144.] Allianz moved for a protective order upholding the designation of confidentiality of certain documents and later for a protective order. [Docket Nos. 155, 213.] The parties also jointly stipulated to extend the time to complete pretrial deadlines. [Docket No. 228.]
- MDL Proceedings: This litigation also involved a motion before the Judicial Panel on Multidistrict Litigation. [Docket No. 98.]

- Class Certification and the First Motion to Decertify: Plaintiffs moved for class certification in June 2006. Although the Court initially denied the motion pending further briefing on choice of law issues [Docket No. 70], it eventually certified the class. [Docket No. 82.] Allianz unsuccessfully sought review at the Eighth Circuit Court of Appeals pursuant to Fed. R. Civ. P. 23(f). [Docket No. 87.] Allianz also moved unsuccessfully to decertify the class. [Docket Nos. 109, 137]. Allianz sought permission to appeal the order denying its decertification motion pursuant to 28 U.S.C. § 1292(b), which the Court denied. [Docket Nos. 150, 208.]
- Class Notice: The parties had a dispute about mailing class notice. [Docket No. 180, 221.] Allianz also objected to the Court's order on the mailing of the class notice, which the Judge Montgomery denied. [Docket Nos. 235, 258.]
- Mediation: The parties also attempted through several days of mediation (over many months) to reach an amicable settlement. Mediation was first assisted by Lew Remele and later by Magistrate Judge Noel.
- Absent Class Member Depositions: Discovery also involved taking or defending the deposition of 46 people, including the 19 deposed absent class members. Plaintiffs' counsel also analyzed the depositions from the other class actions involving Allianz, particularly *Castello v. Allianz Life Insurance Co. of North America* (Henn. Co., Minn. 4th Dist. Ct.), *Iorio v. Allianz Life Insurance Co. of North America* (S.D. Cal.), and *Negrete v. Allianz Life Insurance Co. of North America* (C.D. Cal.).
- Expert Discovery: Expert discovery also took a great deal of time, effort and expense. Allianz moved to strike an expert report. [Docket No. 228]. Plaintiffs had five experts: Dr. Akshay Rao (marketing), Dr. Ran Kivetz (survey, consumer behavior, marketing), Dr. Vincent Gallagher (actuarial

science), Arthur Cobb (damages), and James Bernstein (former Minnesota Commissioner of Commerce). Allianz deposed all of Plaintiffs experts and also produced many experts' reports of its own. Plaintiffs deposed a selection of Allianz's experts.

- Second Decertification and Summary Judgment Motions: Allianz again tried to decertify the class. [Docket No. 238.] It also moved for summary judgment. [Docket No. 245.] These two motions involved extensive briefing, particularly as they were dispositive motions and the decertification motion involved Allianz's all-out arguments based on *St. Jude II* and the nineteen deposed absent class members that the case was not certifiable under Fed. R. Civ. P. 23. The Court denied the second motion to decertify and summary judgment. [Docket No. 292.]
- Allianz's Other Motions: Allianz moved to reopen discovery to take additional class member depositions. [Docket No. 299.] It also later moved to dismiss for lack of jurisdiction, despite the case having been litigated for three and a half years. [Docket No. 318.] It also moved for permission to take a supplemental deposition after the close of discovery. [Docket No. 328.] All these motions were denied.
- Pretrial Motions: Allianz moved to exclude all five of Plaintiffs' exports. It also moved to (1) exclude evidence of other lawsuits; (2) estop Plaintiffs from contradicting their theory of the case; (3) exclude evidence of recouping or recovering the bonus; and (4) exclude evidence of regulatory proceedings. [Docket Nos. 334, 336, 342, 348, 352, 362, 368, 374, 388.] Plaintiffs moved to enforce the subpoena issued to Diane Gates for trial testimony [Docket No. 402], and they filed three motions in limine: (1) exclude evidence of LIMRA surveys and specific testimony from Allianz's expert witness, William L. Wilkie; (2) limit the number of subpoenaed absent

class members; and (3) comparison of annuities to other financial products. [Docket Nos. 380, 385, 409.]

- Trial Materials: The parties separately requested a jury questionnaire, submitted witness and exhibit lists, and designated and counter-designated deposition for trial purposes.
- Motions During Trial: After its initial wave of motions in limine, Allianz also moved to exclude testimony of non-named class members. [Docket No. 471.] During trial, Allianz moved for an order to take judicial notice of the limited nature of Plaintiffs' claims. [Docket No. 499.] They made two motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, both of which were denied.
- The Trial: A three week trial occurred, and the jury returned its verdict on October 12, 2009.

Needless to say, this litigation involved monumental efforts of time and resources from Plaintiffs' counsel and justifies an award of attorney fees.

2. **The Nature and Difficulty of the Responsibilities Assumed.**

As the history of the litigation demonstrates, significant issues were litigated and decided by the court in discovery, class certification, summary judgment, *Daubert* and other pretrial motions, and the jury instructions. The effect and application of *St. Jude II* cast a cloud over the

litigation and mediation of this matter. Many of these issues were difficult, as is typical in a large, nationwide consumer fraud class action such as this. Throughout it all, Plaintiffs' counsel assumed tremendous responsibility to the class and litigated the MPCFA all the way through trial to a successful liability determination by the jury but a disappointing result as to damages. The nature and difficulty of the responsibilities assumed give reason for an award of attorney fees.

3. The Amount Involved and the Results Obtained.

The Eighth Circuit has observed that under Minnesota law, courts consider the results obtained as being critical to the attorney fee award. *First State Bank of Floodwood v. Jubie*, 86 F.3d 755, 761 (8th Cir. 1996) (citing *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542 (Minn. 1986) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983))). Here, Plaintiffs' counsel throughout this litigation were successful in class certification, opposing two motions for class decertification and summary judgment, and convinced a jury of eleven that Allianz violated the MPCFA. Based on the jury's determination as to damages, Plaintiffs counsel suggest a 10% reduction of the total lodestar of \$14,919,903. The jury's determination of

liability under the MPCFA and the permanent injunction requested in this motion justifies an award of reasonable attorney fees of \$13,427,912.

4. The Fees Customarily Charged.

The Declarations submitted by Plaintiffs' counsel demonstrate that the hourly rates charged are typical for this type of contingent-fee litigation.

5. The Experience, Reputation, and Ability of Counsel.

The Declarations of Plaintiffs' Counsel outline the experience and qualifications of the attorneys and their respective firms who worked on the action, the time expended in rendering their services, and the attorneys' standard hourly rates. As the firm résumés attached to the Declarations attest, Plaintiffs' counsel individually and collectively have decades of experience in representing consumers and investors in consumer and securities fraud actions across the country. The firms are well known for their ability to litigate cases from inception through resolution, including trial, exactly as was done in this case.

D. Plaintiffs' Counsel are Entitled to Reimbursement of the Expenses.

The private attorney general provision allows the court to award “costs and disbursements, including costs of investigation . . .” Minn. Stat. § 8.31, subd. 3a. Minnesota appellate courts have held specifically that expert witness fees and transcript costs are awardable under Minn. Stat. § 8.31, subd. 3a for MPCFA violations. *Love v. Amsler*, 441 N.W.2d 555, 560 (Minn. Ct. App. 1989). The declaration of Plaintiffs' counsel documents the necessary and reasonable expenses incurred in this litigation, excluding expert costs associated with damages. Expenses of \$1,115,308.20 should be reimbursed.

III. CONCLUSION

Plaintiffs respectfully ask that the Court grant their request for a Permanent Injunction and award Plaintiffs' counsel attorney fees of \$13,427,912 and reimburse costs and expenses of \$1,115,308.20.

Dated: October 23, 2009

CHESTNUT & CAMBRONNE, P.A.

By s/Karl L. Cambronne

Karl L. Cambronne (#14321)
Jeffrey D. Bores (#227699)
Bryan L. Bleichner (#0326689)
Jason R. Doss (pro hac vice)
Jason M. Kueser (pro hac vice)
3700 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402
612-339-7300
612-336-2940 (fax)

PAGE PERRY, LLC

Alan R. Perry, Jr.
(Georgia Bar No. 572508)
1040 Crown Pointe Parkway,
Suite 1050
Atlanta, GA 30338
770-673-0047
770-673-0120 (fax)

THE NYGAARD LAW FIRM

Diane A. Nygaard
(Kansas Bar No. 10997)
4501 College Blvd. Suite 260
Leawood, Kansas 66211
913-469-5544
913-469-1561

*Attorneys for Plaintiffs and the
Class*