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January 26, 2012

Molly Dwyer, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: ***Yue v. Conseco Life Insurance Company***
Nos. 11-55275(L), 11-55359

Dear Ms. Dwyer:

Plaintiff-Appellee Yue (“Plaintiff”) respectfully responds to Defendant-Appellant Conseco Life Insurance Company’s (“Conseco”) submission of *Mazza v. American Honda Motor Co., Inc.* __F.3d __, No. 09-55376, 2012 WL 89176 (9th Cir. Jan. 12, 2012) as supplemental authority.

First, nothing in *Mazza* departs from longstanding Ninth Circuit precedent that Article III standing analysis turns on the status of representative party, not absent class members. *See, e.g., Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (*en banc*); *Stearns v. TicketMaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011); *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011); *accord* Second Br. at 45. *Mazza* cites both *Bates* and *Stearns* without suggesting any deviation from established Ninth Circuit law. 2012 WL 89176, at *10-11. Nor could the panel in *Mazza* overrule the *en banc* decision in *Bates*.

Second, *Mazza* addresses Article III standing in the context of a Rule 23(b)(3) predominance analysis involving damages claims that required proof of reliance. 2012 WL 89176, at *10-11. Our case involves certification under Rule 23(b)(2) for declaratory relief premised on a standardized insurance contract, without damages or any predominance or reliance requirements. *See* Second Br. at 45 (quoting Adv. Committee Note to 1966 amendment to Rule 23 (“Action or inaction is directed to a class within the meaning of [Rule 23(b)(2)] even if it has taken effect or is threatened to only as to one or a few members of the class, provided it is based on grounds which have general application to the class.”)).

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Third, here as in *Mazza*, every member of the certified class **does** in any event satisfy Article III's standing requirement, because the Class is defined as all persons owning the life insurance policies subjected to Conseco's challenged cost of insurance increase; all members suffered injury when those policies were allegedly reduced in value by Conseco's cost increase. ER 50, 53, 54. *See Mazza*, 2012 WL 89176, at * 11; *accord* Second Br. at 15-16, 27-31, 45-46.

Respectfully submitted,

/s/ Timothy P. Dillon

Timothy P. Dillon

TPD/ll

cc: Adam J. Kaiser, Esq.
Harvey Kurzweil, Esq.