UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN FLEISHER, AS TRUSTEE OF THE MICHAEL MOSS IRREVOCABLE LIFE INSURANCE TRUST II and JONATHAN BERCK, AS TRUSTEE OF THE JOHN L. LOEB, JR. INSURANCE TRUST, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

PHOENIX LIFE INSURANCE COMPANY,

Defendant.

Civil Action No. 11-cv-8405 (CM)

SPRR LLC, on behalf of itself and all others similarly situated,

Plaintiff,

vs.

PHL VARIABLE INSURANCE CO.,

Defendant.

Civil Action No. 14-cv-8714 (CM)

DECISION AND ORDER APPROVING CLASS ACTION SETTLEMENT AND APPROVING MOTION FOR ATTORNEYS' FEES

McMahon, J.:

After three-plus years of hard-fought litigation and one year of arm's-length negotiations conducted with the assistance of a highly experienced mediator, Plaintiffs have agreed to settle this complex insurance class action after securing an excellent result for the Class. The Settlement was reached on the eve of trial, after class certification and decertification briefing and rulings, voluminous cross-motions for summary judgment and rulings, and the submission of the Joint Preliminary Trial Report, exhibit and witness lists, objections, and deposition designations, voir dire questions, and proposed jury instructions. Preliminary approval of the Settlement was granted on June 3, 2015, and Notice to the Class was mailed on June 17, 2015. Not a single objection to the Settlement has been filed. Only three requests for exclusion were made by anyone not affiliated with the pending *U.S. Bank* actions, which were not settled along with the Fleisher and TIGR actions.

The Settlement gives the Class an outstanding recovery. When the monetary and non-monetary benefits are combined, the Class will receive over $130 million in total value. This includes over $40.5 million in cash payments by Phoenix. Checks will be mailed directly to all Class members with no need to submit claim forms. No funds will revert to Defendants.

The non-monetary benefits also provide very substantial benefits to the Class. First, Phoenix has agreed to waive any further challenges to the validity of the Class Policies on the grounds of misrepresentations in the application or a lack of insurable interest, permanently giving up the "stranger-originated life insurance" or "STOLI" defense. Phoenix's agreement to end all STOLI challenges represented by these lawsuits, despite having an industry-high rate of resisting payment of claims, will ensure that, upon the occurrence of a maturity event, hundreds of millions in death benefits otherwise owed to members of the Class will be paid. Second, Phoenix has agreed

not to impose any additional COI increases through December 31, 2020, even if otherwise permitted by the express language of the policies. Plaintiffs' expert, Ann Juliano from Demeter Investments Ltd., an independent consultant for large, institutional life settlement investors globally, has opined that the net present value of the STOLI and fraud defense waiver and five-year COI freeze creates an additional $94.3 million in value to the Class.

These are exceptional results for the Class in this hotly-contested litigation.

In November 2011, Plaintiffs filed suited asserting that Phoenix's COI rate increases on certain PAUL policies in April 2010 and November 2011 were made in violation of the policy terms. Phoenix disputed these allegations and challenged Plaintiffs on the sufficiency of the allegations of the complaint, energetically litigating class certification, discovery, liability, and damages at every turn. The summary judgment briefing and the parties' Preliminary Joint Pretrial Report previewed the many difficult and complex issues that remained for trial, including disputed questions of fact about Phoenix's pricing assumptions and applicable actuarial standards of practice. Class Counsel achieved this Settlement only after undertaking significant labor in prosecuting this litigation and investing substantial sums, all entirely at their risk if they did not prevail, including: obtaining and analyzing more than 1.2 million pages of documents, working with liability and damages experts, briefing numerous motions, and taking and defending twenty depositions. The arm's-length settlement negotiations were also extensive: the parties along with counsel attended three in-person mediation sessions with Professor Eric Green, a highly experienced and very well-regarded mediator.

The positive reaction to the Settlement by the Class also confirms that the terms are fair, adequate, and reasonable. The deadline to object or request exclusion from the Class has passed, and *not a single Class member objected*, and this is a Class that contains many large and

sophisticated investors who are all owners of million dollar-plus life insurance policies. Furthermore, after removing the opt-outs affiliated with the *U.S. Bank* actions, only three other Class members requested exclusion—less than 2% of the Class.

For each of the foregoing reasons and additional reasons provided for below, the court grants final approval to the settlement.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Class Action Litigation

In 2010 and 2011, Phoenix announced that it was raising COI rates on more than a thousand life insurance policies it had previously issued. On November 18, 2011, Plaintiffs challenged both rate hikes in a class action brought against Phoenix Life Insurance Company ("*Fleisher* Action"), Case No. 11-cv-8405-CM. The complaint alleged four claims for relief: breach of contract, breach of the implied covenant of good faith and fair dealing, violation of New York General Business Law § 349, and declaratory judgment. On May 2, 2012, the Court dismissed three of these four claims for relief, but denied the motion to dismiss Plaintiffs' breach of contract claim. Dkt. 29.

Merits discovery began in December 2011. *See* Dkt. 43 at 1. Plaintiffs filed two, important motions to compel in November 2012, which were granted by Magistrate Judge Francis and confirmed by this Court, despite heavy opposition and reconsideration requested by Phoenix. Dkt. 72 & 77; Dkt. 93, 101, 112-13, 115, 117, 123-24, 140. During discovery, Class Counsel analyzed over a million pages of documents, including complicated actuarial tables, took and defended over 20 days of depositions of 17 witnesses, and subpoenaed Defendants' reinsurers and actuarial and financial advisors. Declaration of Steven G. Sklaver in support of Plaintiffs' Motion for Final Approval of Class Action Settlement, filed Aug. 19, 2015, ("Sklaver Decl.") ¶¶ 5-6. Class Counsel also defended the depositions of Mr. Fleisher and Mr. Berck, named Plaintiffs, as well as Plaintiffs' actuarial expert, Larry N. Stern, and Plaintiffs' economist, Robert Mills, among others. *Id.*

On January 11, 2013, Plaintiffs moved to certify the 2010 and 2011 classes. Dkt. 81. The Court initially certified both classes. Dkt. 135. The Court subsequently decertified the 2010 class, but denied two motions to decertify the 2011 class. On December 6, 2013, both parties filed motions for summary judgment, supported by extensive expert reports, exhibits and declarations. Dkt. 184, 190. The Court denied Plaintiffs' motion and granted Phoenix's motion in part. Dkt. 235. The Court also denied a second motion to dismiss and a motion for partial summary judgment of Mr. Berck's claim. Dkt. 231. On March 13, 2015, the parties filed a Preliminary Joint Pre-trial Report totaling over a 100 pages on the liability phase alone. Dkt. 262. The parties also proposed jury instructions, verdict forms, and voir dire questions. Dkt. 263, 265. On April 7, 2015, the parties filed 10 motions *in limine*. Dkt. 268, 273. The Settlement was reached in principle the morning of the pre-trial conference while those motions were pending.

On October 31, 2014, Plaintiff SPRR, LLC, also represented by Class Counsel, filed a complaint against PHL Variable Insurance Company challenging the same 2011 COI increase on behalf of a putative national class and alleging a breach of contract claim ("*SPRR* Action"), Case No. 14-cv-8714-CM. Because discovery overlapped with the *Fleisher* Action, and the same issues and counsel for plaintiff and defendant were involved, the parties agreed that discovery in the *Fleisher* Action was deemed to be produced in the *SPRR* Action. After making their initial discovery requests, the parties continued several deadlines until after the conclusion of the *Fleisher* Action. *SPRR* Dkt. 30. The *SPRR* Action was reassigned to this Court on April 30, 2015. *See* Notice of Case Reassignment, *SPRR* Action, Dkt. Entry 4/30/15.

B. Settlement Negotiations and Terms

The Settlement was reached only after the parties conducted extensive, arm's-length negotiations with the assistance of an experienced, nationally known mediator. Professor Eric D. Green is the co-founder of Resolutions LLC. Declaration of Professor Eric Green in support of

Plaintiffs' Motion for Preliminary Approval ("Green Decl."), filed May 29, 2015, Dkt. 300, ¶ 2. Prof. Green was a member of the faculty of Boston University School of Law where he taught mediation for thirty years, co-founded JAMS/Endispute, was a co-author of Dispute Resolution, which was the first legal textbook on ADR, and has successfully mediated many high stakes cases, including complex class actions and the *United States v. Microsoft* antitrust case. *Id.*

The mediation process began in April 2014 and lasted over a year. Sklaver Decl. ¶¶ 9-10; Green Decl. ¶¶ 7-11. On April 1, May 9, and June 25, 2014, the parties participated in three, full-day, in-person mediation sessions with Prof. Green at his offices in Boston, which were preceded by mediation briefing. Sklaver Decl. ¶¶ 10-12; Green Decl. ¶¶ 7-9. All three sessions were attended by counsel for Phoenix, Class Counsel, as well as Mr. Fleisher. Sklaver Decl. ¶ 10; Green Decl. ¶¶ 6-9. The terms of the Settlement were also negotiated in extensive teleconference and email discussions. Sklaver Decl. ¶ 12. A Memorandum of Understanding ("MOU") was negotiated in-person at Susman Godfrey's offices in New York City, with the assistance of Prof. Green who participated by telephone. Sklaver Decl. ¶ 11; Green Decl. ¶ 11. Thereafter, the long-form Stipulation of Settlement was exchanged, edited, drafted, and heavily negotiated and ultimately agreed to and signed on May 29, 2015. Sklaver Decl. ¶ 7, 11.

Prof. Green believes that the proposed Settlement is fair and reasonable, and is a highly successful result for the Class. Green Decl. ¶ 6, 15. Class Counsel was well informed of the strengths and weaknesses of the parties' claims and defenses, and the negotiations were hard-fought and non-collusive. Sklaver Decl. ¶¶ 12, 14-16; Green Decl. ¶ 12-15. The Settlement was also made in light of the results of an all-day mock jury trial conducted by Class Counsel in advance of trial. Sklaver Decl. ¶ 5.

1. Monetary and Non-Monetary Relief to Class Members

The Settlement provides the following substantial benefits to the Class members:

- **Cash Payment of $40,759,820.88 – *Not* Claims Made.** This includes $34,759,820.88[1] in cash (minus fees and expenses) for the benefit of Class members that will be automatically distributed *without* requiring them to submit proofs of claim, plus Phoenix's agreement to separately pay the first $6 million in attorneys' fees awarded by the Court.

- **COI Freeze valued at $61 million.** A total and complete COI freeze through December 31, 2020. Thus, even if Phoenix has a change in expectations that would otherwise permit a COI rate increase under the policies, Phoenix will not increase COI rates for more than five years.

- **Policy Validity and STOLI Waiver valued at $33.3 million.** Phoenix has agreed not to challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of lack of an insurable interest or misrepresentations in the application.[2]

Sklaver Decl. ¶ 8; Declaration of Robert Mills, filed Aug. 19, 2015 ("Mills Decl.") ¶ 7; Declaration of Ann Juliano, filed Aug. 19, 2015, ("Juliano Decl.") ¶ 14 & Ex. A (Report).

The Settlement defines the Class as:

> "Class" or "Settlement Class" means the Owners of PAUL Policies for which Phoenix sent notice that the Policy was subject to the 2010 Adjustment or 2011 Adjustment (the "Class Policies").

Preliminary Approval Order, Dkt. 303, ¶ 5. Excluded from the Class are (1) any officers, directors, or employees of any Defendant; the affiliates, legal representatives, attorneys, successors, or assigns of any Defendant; attorneys, successors, or assigns of any Defendant; Class Counsel and their employees; and any judge, justice, or judicial official presiding over the Actions and the staff

[1] The Settlement provided for the reduction of a $42.5 million cash fund based on opt-outs, calculated using the proportional amount of COI overcharges paid by the opt-outs compared to the rest of the Class.

[2] Phoenix's frequent assertion of STOLI challenges on multi-million dollar universal life policies is well documented in litigation filed across the country. *See* Sklaver Decl. ¶ 26 (listing cases); *Wall Street Journal*, "Vulture Investor Battles for Death-Bet Payouts," April 19, 2012, ("Phoenix has denied tens of millions of dollars in investors' claims for death benefits, its regulatory filings show. In 2008, its peak year for challenges, it reported seven claims in dispute, totaling $50 million, or 7.6% of the face amount of claims that it received that year. The industry average is less than 1%. It has been involved in dozens of lawsuits asking courts to void policies. . . . But Phoenix has continued to bring lawsuits.").

and immediate family of any such judge, justice, or judicial official; (2) Owners of Policies that received a decrease in their COI rates or whose COI rates were unchanged as part of the 2011 Adjustment; (3) Owners of confidentially identified Policies for which Phoenix covenants that a prior settlement bars claims; and (4) Owners of two designated Policies that are the subject of pre-existing litigation. *Id.* at ¶ 6.

2. Release of COI-Related Claims against Defendants

In exchange for the consideration provided, Plaintiffs and Class members will release any and all claims, causes of action, debts, liabilities, damages, restitution, equitable, legal and administrative relief, known and unknown, at law or in equity, whether brought directly or indirectly, including any further claim to recovery or relief as a result of actions by any state or federal government agencies, arising out of or relating to any and all matters concerning the COI rates and COI charges assessed in the past or in the future by Defendants as a result of the 2010 or 2011 COI rate adjustments as stated in the Stipulation of Settlement.

3. Attorney's Fees, Costs, and Class Representative Incentive Awards

The Settlement recognizes that Class Counsel may seek attorneys' fees and reimbursement of costs and expenses incurred in the prosecution of these actions, subject to approval of the Court. The Notice informed Class Members that Class Counsel may seek fees up to one-third of the cash portion of the settlement plus $6 million that Phoenix agreed to pay over and above the benefits provided to class in cash and other relief, which would have equaled $17.5 million. *See* Declaration of Scott Exley of Rust Consulting, filed July 7, 2014, Dkt. 307 ("Exley Decl."), Ex. A ("Notice") ¶18. In a concurrently filed motion, Class Counsel seeks payment of a total of $13.5 million in attorney's fees, representing 9.9% of the overall Settlement value or 22% of the cash fund plus Phoenix's agreement to separately pay the first $6 million in fees awarded. Class Counsel also seek $902,564.49 in unreimbursed expenses necessarily incurred in connection with the

prosecution of this action, plus future such expenses, and incentive awards of up to $25,000 for Mr. Fleisher and $5,000 for the two other named Plaintiffs. No Class member objected to these terms, which were all described in the Notice to the Class. *Id.*

4. Distribution Plan

The Distribution Plan, as also set forth in the Notice, allocates funds to Class members on a *pro rata* basis. The cash payment will be allocated as follows: (1) $2 million will be distributed to those whose policies lapsed after receiving notice of a COI increase but before ever paying an overcharge, and (2) the remaining funds, after reduction for Court approved fees, costs, and incentive awards, will be distributed among those who paid a COI overcharge. Eligible lapsed policyholders will be paid in proportion to the premiums each paid before termination. Eligible COI overcharge policyholders will be paid in proportion to their share of the COI overcharges paid through March 2015. After expiration of the deadline for any returned or uncashed check, an escheatment process will follow consistent with applicable law.

C. Preliminary Approval and Notice to the Class

On June 3, 2015, the Court entered an order conditionally certifying the Settlement Class, naming Susman Godfrey as counsel for the Settlement Class, naming Plaintiffs as representatives of the Class, and preliminarily approving the settlement with Defendants. Dkt. 303 at ¶¶ 2-3, 8, 9. The Court also appointed Rust Consulting to serve as the Settlement Administrator, approved the proposed Notice Program, and set a final approval hearing for September 9, 2015. *Id.* at ¶¶ 10, 12, 20. On June 8, 2015, the Court proposed certain amendments to the Notice. Dkt. 304. The Court approved Plaintiffs' proposed revisions, Dkt. 306, and the Notice was mailed to the last known address of all known potential Class Members on July 17, 2015. *See* Exley Decl. ¶ 7.

I. DISCUSSION

The settlement of complex litigation is strongly favored. The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("*Wal-Mart*") (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions."). The approval of a class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). "In exercising this discretion, courts should give proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . . ." *Id.* (internal quotation marks omitted).

A court may approve a class settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2012 WL 3138596, at *4 (E.D.N.Y. Aug. 2, 2012) (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart*, 396 F.3d at 116. For the negotiating process, "So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). For approval of the settlement's terms, recognizing that a settlement represents an

exercise of judgment by the negotiating parties, the Second Circuit has cautioned that although a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974); *see also In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). In assessing a settlement, then, the court should neither substitute its judgment for that of the parties who negotiated the settlement nor conduct a mini-trial on the action's merits. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983).

In addition to a presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors for a court to consider in making a Rule 23(e) fairness determination:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment . . . ; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .

Grinnell, 495 F.2d at 463. In applying these factors, "not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (internal quotation marks omitted).

A. The Proposed Class Action Settlement is Procedurally Fair

The Settlement is entitled to an initial presumption of fairness and adequacy because it was reached by experienced, fully-informed counsel after extensive arm's-length negotiations. *See Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL

1224666, at *7 (S.D.N.Y. Mar. 24, 2014). Counsel on both sides are well-versed in the prosecution of contract and insurance litigation (including life settlement litigation), and the Settlement was reached just before trial. *See* Green Decl. ¶¶ 10-12. The negotiations spanned a year and included three mediation sessions in Boston, as well as numerous telephone calls, emails, and in-person meetings. Sklaver Decl. ¶¶ 10-12; Green Decl. ¶¶ 7-11. The discussions culminated in a signed MOU the day of the pre-trial hearing. This occurred only after Class Counsel had conducted a full day of jury testing, reviewed millions of pages of documents with the assistance of experts, conducted a substantial number of depositions, and briefed or opposed—mostly successfully—motions to dismiss, motions to compel, class certification, summary judgment, and motions *in limine*.

It is the opinion of Class Counsel, Class Plaintiffs, and an experienced mediator that this settlement is fair, reasonable, and adequate. Sklaver Decl. ¶¶ 7, 14; Green Decl. ¶ 6, 15. Courts give counsel's opinion considerable weight because they are closest to the facts and risks associated with the litigation. *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-cv-8557-CM, 2014 WL 7323417, at *5 (S.D.N.Y. Dec. 19, 2014) ("[Counsel's] opinion is entitled to great weight." (quotation marks and citations omitted)); *see also PaineWebber*, 171 F.R.D. at 125. The extensive participation of an experienced mediator also "reinforces that the Settlement Agreement is non-collusive." *Johnson v. Brennan*, 10-cv-4712-CM, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) ("[The] presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation"); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator[]. . . helps to ensure that the proceedings were free of collusion and undue pressure.").

All of the above facts establish that the Settlement is procedurally fair. *See McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (There is a "presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery" (alteration and internal quotation marks omitted)).

B. The Proposed Class Action Settlement Is Substantively Fair: *Grinnell Factors*

Evaluation of this settlement under the *Grinnell* factors supports final approval.

1. Complexity, Expense, and Likely Duration of the Litigation (*Grinnell* Factor 1)

The first factor, which addresses "the complexity, expense and likely duration of the litigation," strongly supports approval. *Grinnell*, 495 F.2d at 463. The litigation was indisputably complex. The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards, the original and revised pricing assumptions used by Phoenix for the PAUL insurance products at issue, and what it means to "recoup past losses" or "discriminate unfairly" within a "class" of insured. These complex claims were bitterly fought, as Defendants developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuarial issues for the key questions. The court has issued opinions of great length of complexity in connection with motions to dismiss and for summary judgment.

The Settlement also ends future litigation and uncertainty. Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class"); *Prudential*, 163 F.R.D. at 210 ("[I]t

may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("the complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement. . . . Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all."). Thus, this factor weighs strongly in favor of approval of the Settlement.

2. Reaction of the Class to Settlement (*Grinnell* Factor 2)

The second factor, the "reaction of the class to the settlement," strongly supports approval. *Grinnell*, 495 F.2d at 463; *see, e.g.*, *In re FLAG Telecom*, 2010 WL 4537550, at *16. Specifically, "'the absence of objections may itself be taken as evidencing the fairness of a settlement.'" *PaineWebber*, 171 F.R.D. at 126 (citation omitted); *see also In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 311-12 (E.D.N.Y. 2006). This Court has noted that the reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *Veeco*, 2007 WL 4115809, at *7 (citation omitted).

Here, pursuant to the Preliminary Approval Order, a total of 758 copies of the Notice were mailed to potential Class Members. Dkt. 303 (Preliminary Approval Order); Exley Decl. ¶ 7. The Notice was also made available on a public website, and Class Members were provided a dedicated P.O. Box and toll-free hotline with live support to contact the Settlement Administrator. *Id.* at ¶ 4. After the initial mailing of 758 Notices to the last known addresses of Class members, Rust continued to investigate and update addresses. Declaration of Joel Botzet in support of Plaintiff's Motion for Final Approval of Class Action Settlement, filed Aug. 19, 2015 ("Botzet Decl.") ¶ 5. Before and after mailing, Rust undertook thorough efforts to update the mailing list using the

National Change of Address Database. *Id.* at ¶ 2, 5. The Settlement has also attracted national media attention and was disclosed in Phoenix's filings with the SEC. *See* Sklaver Decl. ¶ 13.

Class members were given until July 17, 2015, to object to or exclude themselves from the Settlement. Notice ¶¶ 14, 19. That deadline passed and not a single objection was received. Botzet Decl. ¶ 6. As expected, U.S. Bank acting as securities intermediary for Lima Acquisition LP, which has brought its own litigation against Phoenix scheduled to go to trial in September, excluded itself from the Class, as did five entities affiliated with Lima. *Id.* at ¶ 8; *see U.S. Bank Nat 'l Assoc., as securities intermediary for Lima Acquisition LP v. PHL Variable Insurance Co.*, Case No. 12-CV-6811(CM); *U.S. Bank Nat'l Assoc., as securities intermediary v. PHL Variable Insurance Co.*, Case No. 13-CV-1580(CM). Aside from the Lima-affiliated entities, only three other Class members requested exclusion from the Class, representing a total of 26 Class policies. These 3 Class members own a combined 26 policies representing only 1.5% of the total Class of policies in the Settlement. Botzet Decl. ¶¶ 8-9.

Tiger Capital LLC, a sophisticated investor which owns a significant number of Class Policies and also pursued litigation against Phoenix that was set for trial in July 2015, settled its litigation and remained a member of the Class. *See Tiger Capital LLC v. PHL Variable Ins. Co.*, Case No. 12-cv-2939(CM), Dkt. 156 (announcing "settlement in principle of all claims in this case that includes Tiger Capital, LLC's participation in the nationwide class settlement pending for Court approval in [the *Fleisher* and *SPRR* Actions").

The overwhelming response of Class members is in favor of the Settlement, as evidenced by the complete lack of any objections and only three requests for exclusion by Class members other than those who have already opted out by filing the *U.S. Bank* Action, which will be tried later this month. *Cf. Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 24 (2d Cir. 1987) (approving

class settlement where 45 of the 126 class members, or approximately 36%, expressed opposition to the settlement). This factor, too, strongly weighs in favor of approval.

3. Stage of the Proceedings and Amount of Discovery Completed (*Grinnell* Factor 3)

The third *Grinnell* factor, which addresses "the stage of the proceedings and the amount of discovery completed," also strongly supports approval of the Settlement. *Grinnell*, 495 F.2d at 463. When courts "look [] to the stage of the proceedings and the amount of discovery completed" under the third *Grinnell* factor, they "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Advanced Battery Techs., Inc. Sec. Litig.*, No. 11 Civ. 2279 (CM), 2014 WL 1243799, at *6 (S.D.N.Y. Mar. 24, 2014) (internal quotation marks omitted); *see also Visa*, 396 F.3d at 118.

At the time of Settlement—the morning of the pre-trial conference—trial was a mere 45 days away. Fact and expert discovery were both extensive (and had long since closed):

- Plaintiffs served 80 document requests and, with expert assistance, Class Counsel analyzed over 1.2 million pages of documents produced by Defendants that exceeded nine gigabytes of native files alone (over 100 gigabytes when considering TIFFs), took and defended over 20 days of depositions of 17 witnesses, and issued numerous third-party subpoenas to Defendants' reinsurers and actuarial and financial advisors. Sklaver Decl. ¶ 5.
- Plaintiffs Fleisher and Berck were both deposed during full day depositions. *Id.*
- Plaintiffs successfully obtained class certification for the 2011 COI increase in the *Fleisher* Action, extensively briefed the central legal issues on motions for summary judgment, and consulted with experts to develop a liability and damages model, both in support of their motion for class certification and for trial. Those experts included:
    - Larry N. Stern, a Fellow of the Society of Actuaries and a Member of the American Academy of Actuaries, who has worked in the insurance industry for over forty years and who has designed, developed, and priced many universal life products for life insurance companies, including drafting policy forms; and

- Robert Mills, an economist and Director at Micronomics, Inc., who has more than sixteen years of economic research and consulting experience and the calculation of economic damages.

- Class Counsel and their experts also reviewed and analyzed the expert analysis Defendants submitted. Defendants retained Douglas French, who submitted a total of 146 pages of expert reports and declarations, including extensive quantitative analysis. Plaintiffs' experts assessed these reports and provided responses to them. *Id.*

- Plaintiffs also participated in three separate in-person mediation sessions conducted by a highly experienced and respected mediator, supported by additional lengthy briefing, and conducted numerous settlement negotiations with Defendants. *Id.*

- The parties submitted a voluminous pre-trial order with hundreds of exhibits, and briefed over ten motions *in limine*. *Id.*

In sum, Class Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of the strengths and weaknesses of the Class's claims and Defendants' defenses, and the likelihood of obtaining a larger recovery for the Class if this litigation continued. Sklaver Decl. ¶¶ 15-16; *see In re Bear Stearns Cos. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and the adequacy of settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues"). To be blunt, on only one other occasion has this court seen a case that settled after such full and thorough preparation. Class counsel could not possibly have been more knowledgeable about the strengths and weaknesses of their case.

4. Risk of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial (*Grinnell* Factors 4, 5, & 6)

The fourth, fifth and sixth *Grinnell* factors, which address "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. In assessing factors 4, 5 and 6, which are often considered together, the Court is not required to decide

the merits of the case, resolve unsettled legal questions, or to "foresee with absolute certainty the outcome of the case." *Shapiro*, 2014 WL 1224666, at *10. "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Secs. And ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). In assessing the risks, courts recognize that "the complexity of Plaintiff's claims *ipso facto* creates uncertainty." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009). While Plaintiffs and Class Counsel believe that they would prevail in their claims asserted against Defendants, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial and appeals.

a. Risks to Establishing Liability

Plaintiffs believe their position on liability is strong, but accept that there are complex issues that pose risk. The Court is well aware of the challenges that Plaintiffs would face at trial. Defendants laid out their contentions for the liability phase of the trial in 38 detailed paragraphs of the pre-trial order. Dkt. 262, ¶¶ 89-126. For example, Plaintiffs allege that actuarial standards of practice define a "class" of policies for purposes of determining and re-determining rates at issuance, and that Phoenix breached the policies by changing which policies constituted a "class" and by making changes that unfairly discriminated within a class. Defendants contested these allegations, offering its own actuarial expert who was going to testify that Phoenix was permitted to re-determine which policies comprised a "class" at the time of the COI rate increases. It is unclear how a jury would decide these disputed issues at trial. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) (comparing advantages of immediate cash payments with risks involved in long and uncertain litigation).

b. Risks to Establishing Damages

Even if Plaintiffs won the liability phase, Plaintiffs also faced risks in establishing damages during the separate damages phase of trial. The Settlement removes substantial uncertainties about Plaintiffs' chances of success or potential decertification. *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[T]he litigation risks attendant to these possibilities [like decertification] weighed heavily in favor of the fairness of a settlement."). Plaintiffs' submitted a comprehensive damages expert report by Robert Mills, whom Phoenix deposed. Phoenix rebutted Plaintiffs' testimony in its own expert reports, in opposing class certification and in Phoenix's subsequent motions for decertification. Dkt. 97, 159, 172. Defendants have vigorously contested Mr. Mills's conclusions in quantifying the alleged overcharges and also the Plaintiffs' legal grounds for recovering past premiums for policies that lapsed after the COI increases were announced but before paying an overcharge. *See*, *e.g.*, Dkts. 97, 159, 172. The prospect of a battle at trial and establishing recovery for all Class members without decertification adds substantial risk to Plaintiffs' claims. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited") (internal quotation marks omitted); *In re FLAG Telecom*, 2010 WL 4537550, at *18 ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable.").

c. Risks on Appeal.

Even if Plaintiffs succeed at trial, Defendants are certain to file post-trial motions and, if necessary, an appeal. The appeal of the complex insurance and actuarial issues in this case is likely

to be lengthy and expensive, and there is no assurance that Plaintiffs would prevail. *See In re Michael Milken & Assocs. Secs. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting that "[i]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success" and citing a case where a multimillion dollar judgment was reversed). There is also a huge appellate risk for Phoenix: if an appellate court overturned this court's determination that "changed investment expectations" (assuming those expectations did indeed change), which may properly be considered in setting new COI rates, includes changes in the amount of money to be invested (which is not Plaintiffs' position at all), Phoenix's entire defense would crumble.

5. Ability of Defendants to Withstand a Greater Judgment (*Grinnell* Factor 7)

The seventh *Grinnell* factor addresses the defendants' ability to withstand a greater judgment. Even if Phoenix could withstand a greater judgment, "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato*, 236 F.3d at 86. Indeed, "a defendant is not required to empty its coffers before a settlement can be found adequate." *Sony*, 2008 WL 1956267, at *8 (internal quotation marks omitted). The mere fact that a defendant "is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Global Crossing*, 225 F.R.D. at 460.

6. Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery and All the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

The final two *Grinnell* factors, "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. Courts typically combine their analysis of the final two *Grinnell* factors. *See Global Crossing*, 225 F.R.D. at 460. In analyzing these two factors, a

reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. "The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Rather, "there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Visa*, 396 F.3d at 119. Moreover, the settlement amount must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Shapiro*, 2014 WL 1224666, at *11. The overall value of the settlement comprises monetary as well as non-monetary relief. *See, e.g.*, *Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *8, *18 (S.D.N.Y. Nov. 30, 2010) (both monetary and non-monetary relief considered in calculating value of settlement).

Here, the overall Settlement value exceeds $130 million, including substantial monetary as well as non-monetary benefits. Subject to Court approval, Phoenix will be paying $40,759,820.88 in cash, which includes $34,759,820.88 for distribution to Class members along with Phoenix's agreement to separately pay the first $6 million in attorneys' fees awarded for, amongst other things, the substantial non-monetary relief obtained for the Class. *See, e.g.*, *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 386-87 (S.D.N.Y. 2005) (holding value of settlement includes the value of any legal fees paid by defendants); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996) ("The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best

viewed as an aspect of the class' recovery."). The $34,759,820.88 amounts to 68.5% of the Plaintiffs' overcharge damages through March 2015. Mills Decl. ¶ 7.

The non-monetary relief provided by the Settlement is also substantial and has an estimated value of over $93.4 million. Juliano Decl. ¶ 14 & Ex. A (Report) at 1. First, Phoenix has agreed never to contest the validity and enforceability of Class Policies on the grounds of lack of an insurable interest or misrepresentations in the application for such policies. And second, Phoenix has agreed to implement a total and complete COI freeze through December 31, 2020. Plaintiffs' expert, Ann Juliano of Demeter Capital, who has over 10 years of experience in analyzing the buying and selling of life insurance policies on the secondary market, including Phoenix policies, has evaluated both of these guarantees by Phoenix. Juliano Decl. ¶¶ 6-9. For the validity guarantee, Ms. Juliano analyzed the historical challenge rate by Phoenix to the validity of these Class policies, as well as Phoenix's likelihood of success based on historical industry data. *Id.*, Ex. A, Section 2.2. Based on the ownership make-up of the Class Policies, life expectancy estimates for each policy generated to assess the longevity expectations of the policies, and lapse assumptions and future premiums owed for the Class Policies based on historical data from Phoenix, Ms. Juliano estimates that Phoenix's commitment not challenge the Class Policies upon the occurrence of a maturity event saves Class members an estimated $33.3 million in claims payments that Phoenix otherwise would have recovered. *Id.*

With respect to the COI freeze, Ms. Juliano analyzed Phoenix's previous COI rate adjustments and calculated the likelihood of a future COI increase in the next five years—the period of the freeze—and the impact Phoenix's guarantee not to adjust rates would have on the value of the life insurance policies in question on the secondary market. Ms. Juliano's analysis

concludes that the promise of a COI freeze adds another $61 million in value to the Settlement. *Id.*, Ex. A, Section 2.1.

The combination of monetary and non-monetary benefits is a sizable recovery in light of the total projected damages and the risks of litigation. In fact, this is one of the most remunerative settlements this court has ever been asked to approve. Even considering just the cash component, the settlement is well within the permitted range on final approval. *See Grinnell Corp.*, 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 229 (E.D.N.Y. 2013) (granting final approval to antitrust class action settlement representing approximately 2.5% of the highest damages estimate as "within the range of reasonableness in light of the best possible recovery and in light of all the attendant risks of litigation"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, Case No. 06-MD-1775, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement in price-fixing class action representing approximately 10.5% of the surcharges incurred by class members during the class period); *In re Med. X-Ray Film Antitrust Litig.*, CV-93-5904, 1998 WL 661515, *5-6 (E.D.N.Y. Aug. 7, 1998) (granting final approval to antitrust class action settlement representing approximately 17% of the estimated best possible recovery).

The Settlement is even more significant given the considerable risks involved in the litigation as set forth above. Plaintiffs and Class Counsel carefully and thoroughly analyzed these risks when negotiating the present Settlement. The proposed Settlement is a favorable result for the Settlement Class in light of the range of possible recoveries and the risks of continued litigation. *Massiah*, 2012 WL 5874655, at *5 ("[W]hen a settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a

hypothetically larger amount years down the road, settlement is reasonable under this factor.") (internal quotation marks omitted).

In short, all the Grinnell factors are satisfied.

The settlement is approved.

C. The Notice Program Satisfied Rule 23 and Due Process

Due process and the Federal Rules require that the class receive adequate notice of a class action settlement. *See Wal-Mart*, 396 F.3d at 114. The standard for the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id.* at 113 (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); Fed. R. Civ. P. 23(e)). As the Second Circuit has held, "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 113-14 (internal quotation marks omitted). The notice sent to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Here, the robust Notice Program, which included mailing individual Notices to the last known address of all Class members, more than meets the requirements of due process, Rule 23, and the notice standards articulated by the Second Circuit. Pursuant to the Preliminary Approval Order, Rust Consulting individually mailed the Notice to Class members via First-Class mail. Exley Decl. ¶¶ 6-7; Botzet Decl. ¶¶ 3, 5. Rust conducted skip tracing for any Notices returned as undelivered, and Class Counsel and Phoenix assisted in investigating additional approaches where the mailing was returned, such as contacting the servicer for the policies to acquire updated

information. Botzet Decl. ¶ 5. Through these methods, Rust was able to reduce the total number of undelivered Notices to under fifty. *Id.* Rust also made the Notice publicly available on a website, and maintained a call center for Class members with questions. Exley Decl. ¶¶ 3-5.

The Notice communicated in plain language the essential elements of the Settlement and the options available to Class Members in connection with the settlement. Exley Decl., Ex. A. The Notice describes the litigation, summarizes the Settlement's terms and benefits, describes the manner of allocating the cash payments among eligible Class members, quotes the releases verbatim, discloses the request for Court approval of attorneys' fees, expenses, and named plaintiff incentive awards, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the cash settlement class. *Id.* Additionally, the Notice prominently notifies class members how they can obtain more information from Class Counsel or the Settlement Administrator though a toll-free number, a website, and traditional channels including mail and telephone. *Id.* These features of the Notice all demonstrate due process and that the federal rules have been satisfied. *See Wal-Mart*, 396 F.3d at 114 (quoting *Newberg* §11.53, at 167) ("Notice is 'adequate if it may be understood by the average class member.'").

D. The Distribution Plan is Fair and Reasonable

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). Courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information," not mathematical precision. *PaineWebber*, 171 F.R.D. at 133. The cash payment will be allocated *pro rata* as follows, which was fully explained in the Notice: (1) $2 million will be distributed to those whose policies lapsed after receiving notice of a COI increase but before ever paying an overcharge, and (2) the remaining funds, after reduction for fees, costs, incentive

awards, will be distributed among those who paid a COI overcharge. Exley Decl. Ex. A, at 5. Eligible lapsed policyholders will be paid in proportion to the premiums each paid before termination, relative to the premiums paid by all such policyholders. Eligible COI overcharge policyholders will be paid in proportion to their share of the overall COI overcharges paid by Class members through March 2015. *Id.* For uncashed or returned checks, after the time to request reissuance for any lost checks expires, an escheatment process will follow consistent with applicable state law.

This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.*, No. 99-CV-197, 2000 WL 1737867 at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."); *In re Lloyds' Am. Trust Fund Litig.*, No. 96-CV-1262, 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."); *PaineWebber*, 171 F.R.D. at 135 (approving pro rata distribution). Counsel's conclusion that the distribution plan is fair, adequate, and reasonable, Prelim. Sklaver Decl. ¶ 14, is entitled to great weight. *See In re Am. Bank Note Holographics*, Inc. 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (approving allocation plan and according counsel's opinion "considerable weight"). Furthermore, no Class member has objected to this straightforward and equitable allocation.

Accordingly, the distribution plan is fair and reasonable, and is approved.

E. The Motion for Approval of Counsel's Fee Request is Granted

Court-appointed Class Counsel Susman Godfrey L.L.P. ("SG" or "Class Counsel"), having recovered $134 million in total relief for the benefit of the Class, has applied for an award of

attorneys' fees in the amount of $13.5 million, which is 9.9% of the gross settlement benefit (or using a less-accepted and more conservative methodology, 1/3 of the cash component of the settlement viewed in isolation). The proposed figure is well within the range approved by courts in this Circuit. *See Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the **gross settlement benefit,**" which includes the value of both monetary and nonmonetary relief, and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater.").[3] Here, the requested award is warranted by the outstanding results achieved for the Class through the efforts of Class Counsel, and the enormous risks taken and overcome in litigation brought entirely on a contingency fee basis.

The Settlement was achieved as a result of the tenacious prosecution of the case by Class Counsel. As this Court is well aware, the litigation was hard-fought. Class Counsel briefed (or opposed) motions to dismiss, motions for class certification and decertification, several motions to compel, took and defended a large number of depositions, including the depositions of senior current and former employees of Phoenix and its actuarial advisors, assisted in the preparation of four detailed expert reports on liability and damages in addition to other expert submissions, reviewed more than 1.2 million pages of documents produced in discovery, filed and responded to motions for and against summary judgment, prepared and filed a 100+ page Joint Preliminary Trial Report, briefed ten motions *in limine*, prepared exhibit and witness lists, submitted jury instructions, and proposed voir dire questions—all after significant jury testing was conducted in an all-day mock trial. The Settlement was reached on the eve of trial, and only after protracted,

[3] All capitalized terms shall have the meaning set forth in the Stipulation of Settlement, Dkt. 299-2.

arm's-length settlement negotiations, including three full-day mediations in Boston facilitated by Professor Eric D. Green, an experienced and highly respected mediator.

Class Counsel faced and overcame substantial risks to achieve this settlement. Class Counsel invested over ***$3.6 million in time and money*** into this case, with the real possibility of getting nothing in return. Class Counsel undertook this litigation on a wholly contingent basis, with no assurance either of payment or of recouping expenses. On damages, Defendants vigorously contested the conclusions of Plaintiffs' damages expert in quantifying the alleged overcharges and also the Plaintiffs' legal grounds for recovering past premiums for policies that immediately lapsed after the COI increases were announced. Finally, class certification was a hotly disputed issue, and the Court noted that it would entertain motions to decertify after trial. Dkt. 230 (Jan. 31, 2014 Order) at 3 ("Only if Fleisher and his class prevail on [liability] will I even begin to consider the argument that this group of people can prove damages on a class-wide basis. I admit that I am skeptical of that argument – I said that last August – but I will approach the issue with an open mind . . ."). Notwithstanding these issues and many more, SG achieved a settlement value of $134 million that will provide Class members with outstanding relief.

The Class was advised in the Notice that Class Counsel could apply for fees equal to one-third of the cash portion of the settlement plus $6 million that Phoenix agreed to pay over and above the benefits provided to the Class in cash and other relief, which would have equaled $17.5 million. Declaration of Scott Exley re: Notification and Settlement Administrative Services, filed July 7, 2015, Dkt. 307 ("Exley Decl."), Ex. A (the "Notice") ¶ 18. No Class member objected to a fee award in that amount. This is particularly significant where, as here, the Class contains many large and sophisticated investors. *See* Dkt. 97 (Phoenix's Opp. to Class Cert.) at 16 ("the putative class members are all owners of million dollar-plus life insurance policies capable of paying large

premiums, including many sophisticated life settlement investors or their nominees."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008) ("That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable"). In addition, the non-cash benefits of a COI freeze and a STOLI and fraud waiver have an easily quantifiable value and do not depend on any redemption rates. An application for $17.5 million as provided for in the Notice would be fair and reasonable in light of all the circumstances.

Despite these facts, Class Counsel has determined to only apply for a fee equal to $13.5 million, and amount which equals less than 10% of the gross settlement benefit (including the value of the nonmonetary benefits), or $6 million that Phoenix has agreed to separately pay plus 22% of the cash fund, or 33-1/3% of the cash portion of the settlement considered in isolation from the other components of the Settlement. The $13.5 million applied for would be reasonable under governing standards even if there had never been a non-cash component of the Settlement's benefits. If this application is approved, the Class will end up with 78% of the cash fund because $6 million of the fees are being separately paid by Phoenix.

For each of these reasons, SG respectfully moves this Court for an award of attorneys' fees of $13,500,000. SG also seeks reimbursement for $902,564.49 in litigation expenses and incentive awards for the named Plaintiffs to compensate them for their time and efforts in bringing this case to a successful resolution.

1. Class Counsel is Entitled to Fees From the Common Fund

The Supreme Court has long recognized that a lawyer who obtains a recovery "for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The court's authority to reimburse the parties stems from the fact that the class action [device] is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the

federal courts." 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d §1803, at 493-94 (2d ed. 1986). The purposes of the doctrine are to fairly and adequately compensate class counsel for services rendered; to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf; and to encourage skilled counsel to represent those who seek redress for injury inflicted on an entire class and thereby discourage future misconduct of a similar nature. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), 2014 WL 1883494, at *10-*11 (S.D.N.Y. May 9, 2014) (citing *Goldberger v. Integrated Res.*, 209 F.3d 43, 47 (2d Cir. 2000) and *Hicks v. Morgan Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005)); *accord Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002). As this Court has previously observed, "Courts in this Circuit have consistently adhered to these teachings." *City of Providence*, 2014 WL 1883494, at *11.

2. Percentage Method

Under the percentage method, the "court sets some percentage of the recovery as a fee." *Goldberger*, 209 F.3d at 47. While Courts may award attorneys' fees under either the "lodestar" method or the "percentage of the recovery" method, "[t]he trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (quotations and citation omitted). The percentage method is preferable because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Id.* (quotations omitted).[4] "[T]he percentage

[4] The Second Circuit has also explained the disadvantages of the lodestar method: "In contrast, the lodestar [method] creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Id.* (citations and alterations removed).

method continues to be the trend of district courts in this Circuit and has been adopted in the vast majority of circuits." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at * 14 (S.D.N.Y. Dec. 23, 2009); *accord City of Providence*, 2014 WL 1883494 (CM), at *11 ("The trend among district courts in the Second Circuit is to award fees using the percentage method."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 & n.7 (S.D.N.Y. 2008) ("[T]here is a strong consensus - both in this Circuit and across the country - in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery.").[5]

Here, Class Counsel is seeking a $13.5 million fee, which represents ***less than 10% of the overall settlement value***, including monetary and non-monetary benefits. As set forth in the Final Approval Memorandum supporting declarations and accompanying expert report, financial analysts with expertise in longevity markets who work with large, institutional investors to acquire life settlements value the nonmonetary relief provided in the Settlement at $94.3 million. The overall cash payment by Phoenix is $40,759,820.88, consisting of a $34,759,820.88 payment from which distributions to the Class will be made (net fees and costs) and a separate payment for the first $6 million in fees awarded.[6] The overall cash payment made available for the benefit of the Class, prior to the opt-out reduction, was $48.5 million. The gross settlement value, combining the monetary and nonmonetary benefits, is approximately $134 million after removing opt-outs, or

[5] *See also In re Beacon Assocs. Litig.*, No. 09 Civ. 3907 (CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) ("The trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *In re IMAX Sec. Litig.*, No. 06 Civ. 6128, 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (same); *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194, 2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) (same); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06 Civ. 1825, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010) (same); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 480 (S.D.N.Y. 2009) (same).

[6] In calculating the value of the monetary benefit, Courts include any amounts earmarked for attorneys' fees. *See id. See Velez*, 2010 WL 4877852, at *18 ("Based on the 'percentage of the fund' approach for evaluating class action fees, the amount of attorneys' fees in question is compared to the overall settlement value, **including any portion earmarked for said fees**.").

$142 million when the entire benefits made available to the Class are considered.

In calculating the overall settlement value for purposes of the "percentage of the recovery" approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class. *See Velez*, 2010 WL 4877852, at *8, *18 (approving settlement that was "21.8 percent of the ***total relief*** available through the settlement," which included "both nonmonetary and monetary relief valued at up to $175 million"). Leading authorities agree,[7] as do courts in this Circuit and nationwide.[8] The Federal Judicial Center provides an example of when it is appropriate to base a percentage fee on the value of injunctive relief through objective criteria: "an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future."[9] In this case, the valuation of the COI freeze follows a similar formula.

In *Velez*, this Court explained that, in addition to monetary relief, the Settlement provided equitable relief that would improve Novartis' employment practices in order to ensure that its sales

[7] Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges, 3d. Ed., 35 (2010) ("Courts use two methods to calculate fees for cases in which the settlement is susceptible to an objective evaluation. **The primary method is based on a percentage of the actual value to the class of any settlement fund plus the actual value of any nonmonetary relief.**"); Principles of the Law of Aggregate Litigation, The American Law Institute, Mar 1, 2010, §3.13 ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary **value** of the judgment or settlement.").

[8] *See Sheppard v. Consol. Edison Co. of New York*, No. 94-CV-0403(JG), 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) (approving fee petition where fee was measured as a percentage of the "total settlement," which included $6.745 million in monetary relief and "an estimated $5 million in non-monetary, injunctive relief); *In re Auction Houses Antitrust Litig.*, No. 00 CIV. 0648 (LAK), 2001 WL 170792, at *10, *17 (S.D.N.Y. Feb. 22, 2001) *aff'd*, 42 F. App'x 511 (2d Cir. 2002) (approving fee measured as a "percentage of the recovery," which was valued at $512 million based on cash payments and nonmonetary discount certificates; the court noted that valuing the certificates, through expert testimony, was relevant to "fixing the amount of lead counsel's fee, which is fixed as a percentage of the gross recovery"); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448 (D.N.J. 2008) (awarding fee of $69.7 million, which represents "28% of the $249 million value of the common fund **plus the parties' lowest estimated value of the injunctive relief**" of $28 million and noting: "The value of the injunctive relief here is a highly relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees."); *cf. Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (district court properly determined that settlement was fair based in part on its valuation of the "nonmonetary antitrust" benefits, principally a "price freeze").

[9] A Pocket Guide for Judges, 3d. Ed., 34-35 (2010).

force was treated fairly. *Id.* at *1. This Court valued this programmatic relief at "at least $22.5 million." *Id.* at *15. In granting the requested $38.125 million fee, this Court compared the fee to the "gross value of the settlement," which combined the values of the monetary relief, the non-monetary benefits and the money earmarked for attorneys' fees:

> The Settlement Agreement provides that, subject to Court approval, Class Counsel will receive $38,125 million in attorneys' fees—which equals 21.8 percent of the $175 million **total gross value of the settlement**, including the attorneys' fee provision…
>
> Based on the "percentage of the fund" approach for evaluating class action fees, the amount of attorneys' fees in question is compared to the overall settlement value, including any portion earmarked for said fees. Here, the requested fees represent approximately 21.8 **percent of the total relief** available through the settlement. Even if calculated in **the more conservative and less-accepted methodology of percent against monetary fund** (rather than overall value), the requested fees represent approximately 25 percent of the monetary relief available through settlement. As such, the fee falls well within the mainstream of percentage of awards granted by courts in the Second Circuit in class suits of similar size and complexity—and is less, percentage-wise, than many.

Id. at *18. Here, the requested fee represents less than 10% of the total gross value of the Settlement, which is *far below* the mainstream of percentage awards in this Circuit. Even if calculated in "the more conservative and less-accepted methodology of percent against monetary fund (rather than overall value)," *id.*, the requested fees represent just 22% of the cash fund that is available for distribution to the Class plus Phoenix's separate $6 million payment (or 27.8% of the $48.5 million made available for the benefit of the class,[10] or one-third of the entire remaining cash

[10] The Second Circuit has held that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available whether claimed or not." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir.2007). District courts in the Second Circuit agree that the entire-fund rule applies even if some portion of the unclaimed fund reverts to defendants. *See, e.g., In re Nigeria Charter Flights Litig.*, No. 04-CV-304, 2011 WL 7945548, at *5 (E.D.N.Y. Aug. 25, 2011) *report and recommendation adopted,* No. 04-CV-304, 2012 WL 1886352 (E.D.N.Y. May 23, 2012); *Aros v. United Rentals, Inc.*, No. 3:10-CV-73 JCH, 2012 WL 3060470, at *5 (D. Conn. July 26, 2012); *Bozak v. FedEx Ground Package Sys.*, Inc., No. 3:11-CV-00738-RNC, 2014 WL 3778211, at *6 (D. Conn. July 31, 2014). Here, the entire fund, prior to the opt-out, is $42.5 million, plus the $6 million earmarked for attorneys' fees. That is one proper benchmark for the monetary portion of the fund.

portion of the settlement—all of which falls well within the mainstream of percentage of awarded granted by courts in this Circuit.

Courts in this district regularly approve percentage-based awards that far exceed the 10% requested here. *See, e.g., Novartis*, 2010 WL 4877852, at *8 (approving $38 million in fees that were approximately 22 percent of the total settlement value and 25 percent of monetary award); *Central States S.E. and S.W. Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229 (2d Cir. 2007) (affirming 30% award of a $42.5 million settlement). That is true in cases with similar or higher fee requests as this one.[11]

This Court recently approved a much higher (33%) award in a case that, like this one, was litigated to the brink of trial, after extensive and hard-fought discovery. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), Oral Arg. Tr. (Dkt 68, May 15, 2014) at 4 ("[T]his is the rare case where I have no problem with a 33 percent fee … because this case has actually been litigated. This is not a case where … there was a relatively quick settlement followed by confirmatory discovery. This was a case where you all were way, way down the pike in the litigation before Judge Weinstein came in and knocked your heads together and got you to settle it.").[12] In the circumstances, the fee request is entirely reasonable.

[11] *See,e.g.,City of Providence*, 2014 WL 1883494, at *20 (awarding 33% of $15 million settlement recovery); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement recovery); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 135 (S.D.N.Y. 2010) (1/3 of $35 million); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% fee of $510 million net settlement recovery); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement recovery); *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 1/3 of $11.5 million recovery); *see also In re Oxford Health Plans, Inc. Sec. Litig.*, No. MDL–1222 (CLB) slip op. at 7 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement recovery).

[12] *See also In re Payment Card Interchange Fee Lit.*, 991 F. Supp. 2d 437, 446 (E.D.N.Y. 2014) (award of $554.8 million was appropriate partly because "this case settled only after many years of hard-fought litigation. Privately negotiated fees in complex cases … often include a higher fee for cases that proceed past a motion to dismiss, discovery, summary judgment, or other benchmarks").

Finally, the requested fee is far less than the 45% that Sussman Godfrey would obtain on the open market under its standard contingency fee arrangement in which expenses are advanced. *See* Declaration of Steven G. Sklaver in support of Final Approval, filed Aug. 19, 2015 ("Sklaver Decl.") ¶ 17. This fact is highly relevant to determining the appropriateness of the award because the Court's ultimate task is to "approximate the reasonable fee that a competitive market would bear." *Johnson v. City of New York*, No. 08-cv-3673 (KAM)(LB), 2010 WL 5818290, at *4 (E.D.N.Y. Dec. 13, 2010) (citing *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010)); *see also McDaniel,* 595 F.3d at 422 (district court's focus should be "on mimicking a market"); *see also In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262 (RWS), 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) ("[T]he percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the **marketplace contingency fee model**.").

All this is predicated on the non-csh portion of the settlement's having considerable value – and it does. But even if no specific monetary value were attributed to the injunctive relief, the fee request would still be fair and reasonable under the percentage approach. The substantial injunctive relief is a major factor in favor of the fee request, even if no specific monetary value is assigned to it.[13]

[13] *See, e.g., In re Payment Card Interchange Fee Lit.*, 991 F. Supp. 2d 437, 446 (E.D.N.Y. 2014) (awarding although it is impossible to know with certainty the ultimate value of the injunctive relief, it may very likely exceed the value of the monetary relief in the long run. The injunctive relief is therefore a "relevant circumstance," to say the least (citation omitted); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524-25 (E.D.N.Y. 2003) *aff'd* 396 F.3d 96 (2d Cir. 2005) (awarding $220 million fee and explaining: "the Settlements are so large, particularly considering the injunctive relief, that even the exorbitant fee I award seems small in comparison … I agree that the substantial injunctive relief here should inform my decision on awarding fees, and it has"); *see also Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (where fee award was analogized to a common fund percentage award, fee was justified in part by "injunctive and other non-monetary relief").

3. Lodestar "Crosscheck"

The Second Circuit also permits courts to utilize a lodestar "crosscheck" to further test the reasonableness of a percentage-based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paraprofessional by their current hourly rate, and totaling the amounts for all timekeepers. Additionally, "[u]nder the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47); *see also In re Flag Telecom Holdings, Ltd. Secs. Litig.*, Case No. 02-cv-3400(CM), 2010 WL 4537550, at *25-26 (S.D.N.Y. Nov. 8, 2010). Where the lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

In these entirely contingent actions, as of August 6, 2015, Class Counsel collectively spent over 6,500 hours, representing a lodestar of $2,770,410, and advanced $902,564.49 in expenses, in investigating, prosecuting and ultimately settling these claims over a multi-year period. *See* Sklaver Decl. ¶¶18-21. This lodestar is calculated at current hourly rates, which has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation.[14]

[14] *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (rates "should be 'current rather than historic'") (citation and internal quotations omitted); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates "should be applied in order to compensate for the delay in payment"); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (citation omitted) (Using current rates helps "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest.").

Based on the requested fee ($13,500,000), class counsel's aggregate lodestar yields a "crosscheck" multiplier of 4.87. This is well within the range of crosscheck multipliers awarded in this circuit.

"Courts regularly award lodestar multipliers from 2 to 6 times lodestar" in this Circuit, *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623-24 (S.D.N.Y. 2012), and have been known to award lodestar multipliers significantly greater than the 4.87 multiplier sought here. *See e.g., Maley*, 186 F. Supp. 2d at 369 (awarding percentage method with cross-check lodestar multiplier of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country," and citing cases with a 7.7 multiplier and 5.5 multiplier); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court" (citing *Maley*)); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District.").The multiplier is on the higher end, but that is entirely appropriate, given the fact that counsel were ready to go to trial when they settled.

Class Counsel's hourly rates are reasonable. The rates for Class Counsel who billed meaningful time to this case (ranging from $225 to $675 per hour) are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude. *See* Sklaver Decl. ¶ 18-20; *see In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12 Civ. 8557 (CM), 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) ("The rates billed by Lead Counsel (ranging from $425 to $825 per hour) for attorneys, are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude.").[15]

[15] Courts compare hourly rates with those prevailing in the community. *See Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (internal quotations omitted). One source commonly used by courts in this Circuit to assess prevailing rates in this District is the National Law Journal

4. The *Goldberger* Factors Support the Requested Fee Award

Under either the percentage method or the lodestar multiplier approach, the "'*Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal-Mart*, 396 F.3d at 121. The *Goldberger* factors, which the Court weighs in its discretion, are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation omitted). Each of these factors confirms that the requested fee is reasonable on a percentage basis.

(i) Time And Labor Expended By Counsel (*Goldberger* Factor 1)

The first *Goldberger* factor, which addresses the "the time and labor expended by counsel," strongly supports approval of the requested fee. Class Counsel spent over 6,500 hours prosecuting this case and, as discussed above, the lodestar multiplier is well within the range approved by Courts in this Circuit. The substantial time devoted to this litigation over three and a half years reflects the intensive effort Class Counsel exerted to bring this case to a favorable resolution, and was reasonable. Class Counsel among other things:

- Conducted an initial investigation of this case to develop the theories and facts that formed the basis of the allegations in the complaint, and responded to and, with for the claims that gave rise to the settlement, defeated Defendants' two complex motions to dismiss, filed years apart. Dkt. 29; Dkt. 231.
- Filed two important motions to compel in November 2012, which were granted and reaffirmed, despite heavy opposition and re-litigation by Phoenix. Dkt. 72 & 77; Dkt. 93, 101, 112-13, 115, 117, 123-24, 140.

Survey. *See, e.g.*, *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, No. 76 Civ. 2125, 2005 U.S. Dist. LEXIS 5200, at *35 (S.D.N.Y. Apr. 4, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $ 750 per hour and junior partners charge as much as $ 490 per hour"). Current median rates are often above $500 in New York. *See* Jones, Leigh, *The best still charge the most: For high-end legal work, firms remain in the driver's seat over hourly rates*. The National Law Journal (Online) (Dec. 17. 2012) at *2 ("Not surprisingly, the biggest firms in the biggest markets generally had the highest rates. Several firms that have their largest offices in New York and Washington had median rates above $500, according the NLJ survey."). The National Law Journal survey for 2012 shows that partners at New York firms charge between $330 to $1200 and associates range between $215 to $760. *See* Sklaver Decl. Ex. 1 (2012 National Law Journal survey).

- Completed fact discovery:
  - Served 80 document requests and, with expert assistance, analyzed over 1.2 million pages of documents produced by Defendants that exceeded 9 gigabytes of native files. Class Counsel also issued numerous third-party subpoenas to Defendants' reinsurers and actuarial and financial advisors (some of which required litigation to compel production). Sklaver Decl. ¶ 5.
  - Assisted in gathering and reviewing the production of 3,632 documents by Class Plaintiffs. *Id.*
  - Took and defended over 20 days of depositions of 17 witnesses, including senior executives of Phoenix. Plaintiffs Fleisher and Berck were both deposed during full day depositions. *Id.*
- Obtained class certification for the 2011 COI increase in the *Fleisher* Action, supported by two expert reports, and defeated two motions to decertify the 2011 class. Dkt. 81, 135, 149, 230.
- Briefed motions for summary judgment filed by both parties, supported by extensive expert reports, exhibits and declarations, and defeated Phoenix's motion in the part that gave rise to this settlement. Dkt. 184, 190, 235.
- Conducted all-day jury testing in advance of trial before 24 mock jurors, divided into 3 panels of 8 for deliberations. Sklaver Decl. ¶ 5.
- Filed a joint pre-trial order totaling over a 100 pages on the liability phase alone. Dkt. 262. The parties also proposed jury instructions, verdict forms and voir dire questions. Dkt. 263, 265.
- Filed or opposed 10 motions *in limine*. Dkt. 268, 273.
- Attended three full day, in-person mediation sessions in Boston conducted by a highly experienced mediator, preceded by mediation briefing. Sklaver Decl. ¶ 5; Green Decl. ¶¶ 7-9. All sessions were attended by counsel for Phoenix, counsel for Plaintiffs, as well as Mr. Fleisher. The terms of the Settlement were also negotiated in extensive teleconference and email discussions. Sklaver Decl. ¶ 5. A memorandum of understanding was negotiated in-person at Susman Godfrey's offices in New York City. Sklaver Decl. ¶ 5.
- Obtained the excellent result for the class, as described in the Final Approval Memorandum and supporting papers.

In sum, Class Counsel committed substantial time and resources to achieve an excellent recovery in this case. The time and lodestar figures will increase as counsel prepare for final-approval proceedings, handle claims administration issues, and continue to respond to class member inquiries.

(ii) Magnitude and Complexity of the Litigation (*Goldberger* Factor 2)

The second *Goldberger* factor, which addresses "the magnitude and complexities of the litigation," also strongly supports approval of the requested fee. The litigation was indisputably complex, as attested by the parties' extensive discovery and pre-trial order and the summary judgment records. *See City of Providence*, 2014 WL 1883494, at *16 (the "magnitude and complexity" of litigation supported award when counsel analyzed "1.3 million documents," "prepared for and took 12 fact depositions of executives of the Company," and "prepared an extensive motion for class certification").

The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards of practice, the original and revised pricing assumptions used by Phoenix for the PAUL insurance products at issue, and what it means to "recoup past losses" or discriminate unfairly "within a class of insured." These complex claims were bitterly fought, as Defendants developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuarial issues for the key questions. If the litigation had not been settled, Class Counsel would have faced additional obstacles as Defendants continued to mount a vigorous defense, including a trial that would require substantial fact and expert testimony, and certain appeals thereafter.

(iii) The Risk of the Litigation (*Goldberger* Factor 3)

The third *Goldberger* factor, which addresses the "risk of the litigation," also strongly supports approval of the requested fee. The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable fee award]." *Goldberger*, 209 F.3d at 54 (citation omitted); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) ("Courts have repeatedly recognized that 'the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in

class actions."). Class Counsel confronted and overcame myriad risks in reaching the Settlement. Those litigation risks are discussed extensively above.

In addition, "The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award." *City of Providence*, 2014 WL 1883494, at *14. As the Second Circuit has observed:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir.1974).[16] Unlike counsel for the Defendants, who are paid hourly rates and reimbursed for their expenses on a regular basis, Sussman Godfrey has not been compensated for any of its time (above 6,500 hours) with a lodestar value of over $2.7 million, or for any of its more than $900,000 in litigation expenses incurred since the case commenced in November 2011. Moreover, the firm would not have been compensated for its time or expenses at all had it been unsuccessful in this litigation. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("[D]espite the most vigorous and competent of efforts, success is never guaranteed."); *Marsh & McLennan*, 2009 WL 5178546, at *18 ("In numerous class actions . . . plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever." (citing examples of cases dismissed)). The risk of no recovery in complex cases of this type is real, and is heightened when Class Counsel

[16] *See also In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 CV 4318 HB, 2001 WL 709262, at *6 (S.D.NY. June 22, 2001) ("Contingency risk is the principal, though not exclusive factor, courts should consider in their determination of attorneys' fees."); *Flag Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

opt to fight up to the eve of trial, in order to achieve the very best result for the class, rather than reaching a less attractive settlement early in the litigation.

(iv) The Quality of the Representation (*Goldberger* Factor 4)

The fourth *Goldberger* factor, which addresses the "the quality of representation," also supports approval of the requested fee. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Class counsel respectfully submits that the Settlement—which creates an overall value of $134 million—achieved in face of complex litigation and the real risk from the outset that the case could be dismissed and/or the class not certified, evidences the quality of Class Counsel's representation.

Regarding the skills of Class Counsel, the Court previously appointed Sussman Godfrey as Class Counsel because the firm met all the requirements of Rule 23(g).[17] Susman Godfrey has significant experience with insurance litigation and class actions, including settlements thereof. *See* Sklaver Decl. ¶ 3. The lawyers working for the Class have substantial experience prosecuting large-scale class actions and life settlement litigation. *Id.* The work that Class Counsel has performed in litigating and settling this case, and the substantial resources they have committed to prosecuting the case, demonstrates their commitment to the Class and to representing the Class's interests. *See Morris*, 859 F. Supp. 2d at 622. They also, frankly, did very good work.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *City of Providence*, 2014 WL 1883494, at *17.[18] Defendants are represented by

[17] *See Morris*, 859 F. Supp. 2d at 621-22 (noting that Rule 23(g) requires the court to consider "the work counsel has done in identifying or investigating potential claims in the action, ... counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, ... counsel's knowledge of the applicable law, and ... the resources counsel will commit to representing the class") (internal quotation marks omitted)).

[18] *See also Anwar*, 2012 WL 1981505, at *2 (considering "the quality and vigor of opposing counsel"); *Marsh & McLennan*, 2009 WL 5178546, at *19 (reasonableness of fee was supported by fact that defendants "were

skilled and highly regarded counsel from prestigious firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases. In sum, all of the customary metrics indicative of high quality of representation weigh in favor of the requested fee.

v. Requested Fee In Relation to the Settlements (*Goldberger* Factor 5)

The fifth *Goldberger* factor, which addresses "the requested fee in relation to the settlement," also strongly supports approval of the requested fee. In *Costco*, the court held that "the fact that the requested fee is comparable to fees that courts have found reasonable . . . weighs in favor of the fee's reasonableness." *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 244 (E.D.N.Y. 2010). As discussed above, the proposed award is well within the range of fees awarded by courts under the percentage method.

vi. Public Policy Considerations (*Goldberger* Factor 6)

Finally, the sixth *Goldberger* factor, which addresses "public policy considerations," supports approval of the request fee. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("[T]o attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives"); *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("'To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding'" (citation omitted)).

represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

5. The Class's Reaction to the Fee Request

In addition to the criteria set forth in *Goldberger*, courts in the Second Circuit consider the reaction of the Class to the fee request in deciding how large a fee to award. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008) ("That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable"); *In re Veeco Instruments Inc. Secs. Litig.*, Case No. 05-MDL-01695(CM), 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007); *Maley*, 186 F. Supp. 2d at 374 374 (when no one objected to fee request, finding that the "overwhelmingly positive" reaction by members of the Class "is entitled to great weight by the Court"); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("The class's reaction to the fee request supports approval of the requested fees"). The Notice provided that Counsel may seek "an award for attorneys' fees of $6 million for, among other things, the non-monetary benefits conferred, to be paid for by Phoenix and not from the Settlement Fund, and up to one-third of the Settlement Fund after any reduction for Class members who opt-out," which amounts to $17,586,606.96 (= $6 million plus $11,586,606.96, *i.e.*, a third of $34,759,820.88). Notice ¶ 18. Class members, including many large and sophisticated businesses, were given until July 17, 2015, to object or exclude themselves from the Settlement. *Id.* That deadline passed and not a single objection was received. Declaration of Joel Botzet re: Notification, Requests for Exclusion and Settlement Administration Services, filed Aug. 19, 2015 ("Botzet Decl.") ¶ 7. Furthermore, aside from the Lima-affiliated entities, only three other Class members requested exclusion from the Class, representing a total of 26 Class policies. These 3 Class members own a combined 26 policies representing only 1.5% of the total Class of policies in the Settlement. *Id.* ¶¶ 8-9. "When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.'" *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ.

03-0085 FSH, 2005 WL 3008808, at *13 n.1 (D.N.J. Nov. 9, 2005) (awarding fee of 33.3% of $75 mm settlement).

F. Counsel's Motion for Reimbursement of Expenses is Granted

Class Counsel also requests reimbursement in the amount of $902,564.49 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this Action. "Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Anwar v. Fairfield Greenwich Ltd.*, Case No. 09-cv-118(VM), 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) (citing *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)).[19]

The expenses advanced in this litigation are described in the papers filed in support of this application. *See* Sklaver Decl. ¶ 21. These expenses were reasonable and necessary in this litigation, and have been expended for the direct benefit of the Class. *See Id.* They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with this litigation. *See Anwar*, 2012 WL 1981505, at *3 (reimbursing expenses such as "mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys" (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004)). The fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this

[19] *See also In re Arakis Energy Corp. Sec. Litig.*, No. 95cv3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re Vitamins Antitrust Litig.*, No. 99-197(TFH), MDL No. 1285, 2001 WL 34312839, at *13 (D.D.C. July 16, 2001) ("[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund . . . . Courts have routinely awarded expenses for which counsel would normally directly bill their clients.").

litigation, is perhaps the best indicator that the expenditures were reasonable and necessary. *See, e.g.*, *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (noting that it is common practice to grant expense request and awarding $18.7 million in expenses where the "lion's share of these expenses reflects the cost of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, on-line legal research, and travel expenses.").[20]

G. The Motion for Incentive Fees is Granted

Finally, Class Counsel seeks an incentive award of $25,000 for named plaintiff Marty Fleisher and $5,000 for named Plaintiffs Jonathan Berk and SPRR, as stated in the Notice. No Class member objected to this award. Courts "routinely award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Morgan Stanley*, 2005 WL 2757792, at *10.[21]

This is not a case where the named plaintiffs had little or no involvement. Martin Fleisher, for example, spent at least 88 hours actively fulfilling his obligations as a Class representative, complying with all demands placed upon him during the prosecution and Settlement of this Action, and providing valuable assistance to Class Counsel for over three years. *See* Declaration of Marty Fleisher in support of Final Approval, filed Aug. 19, 2015, ¶13. Mr. Fleisher is a highly

[20] The Settlement, and the preliminary approval order, also provides that Notice and Administrative Costs shall be paid from the Settlement Fund as they become due. Settlement ¶¶ IV.E, VIII; Prel. Appr. Order, 11-cv-8405, Dkt. 303 ¶10. Class Counsel seeks the Court's approval to continue making those payments as they become due. Current amounts are set forth in the Declaration.

[21] *See also Anwar*, 2012 WL 1981505, at *3 ("Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation."); *Varljen v. H.J. Meyers & Co.*, No. 97 CIV 6742 (DLC), 2000 WL 1683656, at *4 (S.D.N.Y. Nov. 8, 2000) (reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel").

sophisticated named plaintiff, whose knowledge of the insurance industry and the pricing of life insurance products proved continually invaluable in this case.

The discovery obligations imposed on Mr. Fleisher were significant, including the Defendant taking a full day deposition of Mr. Fleisher, and a separate deposition of one of his analysts. *See* Fleisher Decl. ¶13. Mr. Fleisher reviewed pleadings and motions, reviewed other court filings, communicated regularly with Class Counsel, and was continuously involved in the litigation process. *See id.* Finally, showing his dedication to this case, Mr. Fleisher, who resides and works in New York, personally travelled to Boston to attend all three mediations in person. Mr. Fleisher is a graduate of NYU School of Law and his typical billable rate ranges from between $550 at the low end and $715 at the high end, and the opportunity cost alone for his time spent on this case well exceeds $25,000. *Id.* at ¶ 6, 13.

The contributions of the other two class members were less than Mr. Fleisher but still meaningful and set forth in the accompanying Sklaver declaration, and warrant $5,000 incentive and time award. *See Sklaver Decl.* ¶ 23.

CONCLUSION

The motions at Docket ##308 and 315 in No.11-cv-8405 and Docket ##42 and 49 in No. 14-cv-08714 are granted in their entirety. The Clerk of the Court is directed to remove those motions from the court's list of open motions, and to close the file in these matters.

Dated: September 9, 2015

U.S.D.J.

BY ECF TO ALL COUNSEL