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)**

DECLARATION OF MEDIATOR PROFESSOR ERIC D. GREEN OF RESOLUTIONS LLC IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

I, Eric D. Green, declare as follows:

1. I submit this declaration in support of preliminary approval of the proposed class action settlement between the named plaintiffs 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, in Civil Action No. 11-cv-8405(CM), and named plaintiff SPRR LLC in Civil Action No. 14-cv-8714(CM) (together, "Class Plaintiffs"), for themselves and on behalf of the proposed settlement class, and defendants Phoenix Life Insurance Company and PHL Variable Insurance Company (together, "Defendants" or "Phoenix"). I have personal, first-hand knowledge of the matters set forth herein and, if called to testify as a witness, could and would testify competently thereto.

2. I am a principal and co-founder of Resolutions LLC, an ADR firm located in Boston, Massachusetts, and I am a full-time professional mediator. I am a retired Professor at the Boston University School of Law where for thirty years I taught negotiation, mediation, complex ADR processes, resolution of mass torts, constitutional law and evidence. I am a co-founder and principal of Resolutions LLC. I previously co-founded JAMS/Endispute and was a member of the Center for Public Resources Institute of Dispute Resolution virtually since its inception and have served on many of its panels and committees and spoken at numerous of its conferences and programs on mediation and ADR. I was a co-author with Professors Frank Sander and Stephen Goldberg of the first edition of Dispute Resolution, the first legal textbook on ADR, and have written numerous books and articles on dispute resolution and evidence. I maintain an active ADR/mediation practice for complex, legally-intensive disputes, including class actions such as the present dispute.

3. I have successfully mediated many high stakes cases, including the *United States v. Microsoft* antitrust case, the various MasterCard/Visa merchants' class action antitrust cases, portions of the Enron Securities class action cases, the Monsanto PCB cases in Alabama, the childhood and adult cancer cases in Toms River, New Jersey, numerous large construction cases, including most of the disputes arising out of the design and construction of major league baseball and football stadiums, insurance coverage, intellectual property, international disputes, ERISA cases, and consumer cases. I have also mediated many complex, multi-party class action cases involving horizontal and vertical price-fixing anti-trust claims, mergers and acquisitions, contract disputes, patent disputes, securities fraud, shareholder derivative claims, accounting problems, mass torts, employment and consumer claims.

4. I am a 1968 Honors graduate of Brown University and graduated in 1972 from Harvard Law School, magna cum laude, where I was Executive Editor of the Harvard Law Review. I am a member of the bars of the states of California (inactive) and Massachusetts, the United States District Courts for the Northern and Central Districts of California and the District of Massachusetts, several Courts of Appeals, and the Supreme Court of the United States. Prior to teaching at Boston University School of Law, I clerked for the Hon. Benjamin Kaplan, Supreme Court of Massachusetts and then was an associate and partner at Munger Tolles & Olson in Los Angeles.

5. I have delivered hundreds of lectures, panel discussions and training sessions on ADR and taught or supervised more than a thousand students in ADR while mediating more than a hundred cases a year for over 30 years. In 2001, I was awarded a Lifetime Achievement Award from the American College of Civil Trial Mediators. I was voted Boston's Lawyer of the Year for Alternative Dispute Resolution for 2011 based on my "particularly high level of peer

recognition." In 2011, I received the rarely awarded James F. Henry Award for Outstanding Contributions to the field of ADR from The International Institute for Conflict Prevention & Resolution.

6. I was retained by the Parties in the above-referenced matters (the "Phoenix Litigation"), to serve as a private mediator to facilitate potential settlement discussions. As discussed below, I believe the settlement of the class action, negotiated after an extended mediation process and hard-fought litigation represents an arms-length principled, well-reasoned, and sound resolution of highly uncertain litigation. The Court, of course, will make determinations as to the fairness, reasonableness, and adequacy of the settlement under applicable legal standards. From the mediator's perspective, however, I can attest that the proposed settlement represents the result of a settlement obtained at arm's-length after a difficult, protracted, adversarial negotiation, and is consistent with the risks and potential rewards of the claims asserted when measured against the "no-agreement alternative" of continued, uncertain litigation. Based on my over-30 years of experience as a mediator, the extensive materials submitted to me in connection with the mediation, and my personal discussions with the Parties, I believe that the proposed settlement is the result of fair and reasonable bargaining between well represented parties. Without waiving the mediation privilege, I provide the following information in support of my opinion.

7. The first in-person mediation was conducted in my offices on April 1, 2014. In advance of the mediation, counsel for the Parties submitted detailed mediation statements, with multiple exhibits, including expert reports, setting forth their positions on the key liability and damages issues. During this initial mediation session, the Parties engaged in vigorous, arms-length debate about all aspects of the merits of the case and damages. I met with each party

individually to discern areas of common ground. In these individual sessions, I engaged in candid discussions with counsel from each party concerning the risks associated with their respective positions. The session was also attended by Mr. Fleisher, one of the named Plaintiffs, as well as two representatives from Phoenix. Throughout the April 2014 mediation, the Parties held divergent views on almost every issue. The session lasted the entire day, and this meeting did not result in an agreement to settle the Plaintiffs' claims.

8. The Parties met again for a second in-person mediation session at my offices on May 9, 2014. This session was again attended by counsel for both Parties, as well as Mr. Fleisher and representatives of Phoenix. Again, the Parties engaged in vigorous, arms-length debate about all aspects of the merits of the case and damages. The session lasted another full day and consisted of individual and group sessions to discuss the risks associated with their respective positions. This meeting also ended without agreement, except to continue discussions in the future.

9. The Parties met for a third in-person mediation session at my offices in Boston on June 25, 2014. This session was again attended by counsel for both Parties, as well as Mr. Fleisher and representatives of Phoenix. As they had done before, the Parties engaged in vigorous, arms-length debate about all aspects of the merits of the case and damages. The session lasted another full day and consisted of individual and group sessions to discuss the risks associated with their respective positions. This meeting also did not result in an agreement to settle the Plaintiffs' claims.

10. After the third mediation session, the Parties scheduled a fourth in-person session to take place on September 17, 2014, in my offices. However, this session was canceled after the Parties determined that there was no common ground between their respective positions. The

litigation therefore continued and the Parties prepared for a trial in March 2015. The trial was thereafter moved to June 2015, and the Parties filed their Joint Pretrial Statement and multiple motions *in limine*. In advance of the Pretrial Conference, scheduled to take place on April 30, 2015, the Parties informed me that they were prepared to resume settlement discussions. The Parties proceeded to exchange additional information electronically and participated in substantial telephone discussions regarding the terms of a potential settlement.

11. Through these combined efforts spanning more than a year, and after meeting again in-person on April 30, 2015, in the New York City offices of counsel for Plaintiffs, during which I participated telephonically as necessary to assist them, the Parties finally arrived at the present settlement and signed a binding memorandum of understanding. Only after agreeing to the principal terms set forth in the memorandum of understanding did counsel, with my assistance, negotiate about attorneys' fees.

12. Throughout the settlement process, including the direct negotiations outside the formal mediation process, this case was conducted on both sides by highly experienced and capable counsel who were fully prepared and had an excellent understanding of the strengths and weaknesses of the contrasting claims and defenses. The quality of the advocacy on both sides was extremely high. All counsel were professional and cooperative, but each side zealously advanced their respective arguments in the best interests of their clients. Moreover, each side demonstrated a willingness to continue to litigate rather than accept a settlement that was not in the best interest of their clients. During the negotiations, the Parties had extensive discussions about potential resolutions, and made several proposals, offers and counter-offers, after extensive discussions with the mediator.

13. Although all Parties were confident in the strength of their respective positions, it was clear that continued litigation carried substantial risks for both sides. If the case had not settled, the litigation and appeals process would have continued for a very long time and at great expense to both sides with uncertain results. Defendants, while adamant that they were not liable, could not be sure of a favorable jury verdict. The Class faced serious obstacles to establishing liability and was also confronted with the possibility that future rulings at the Pretrial Conference or at trial could undermine their claims. The Class also faced several challenges in establishing damages. In fact, even if the Class was successful and established liability at trial, the jury could have awarded damages much less than those sought by the Class or the amount of settlement. Both sides also faced the risk that a jury could react unfavorably to the evidence presented.

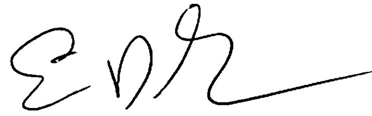
14. From the inception of the mediation process, it was apparent that the litigation was extremely complex and involved numerous difficult legal and factual issues. Based on my review of the mediation briefing and supporting documentation supplied to me by the Parties, the detailed presentations by Class Counsel and Defendants' Counsel, the mediation sessions, and the many hours of telephone and in-person conversations I conducted with respective counsel, it is my opinion that continued litigation posed great risks for both sides and that therefore a settlement would be in the interest of each side.

15. Based on the facts and circumstances presented by the Parties and my experience in the mediation of class actions, it is my opinion that the settlement is an excellent result for the Class that reflects the strenuous negotiations between highly professional counsel to secure a result for the Class without the risks of continued litigation where their claims could have been denied at trial or on appeal or resulted in a disappointingly small recovery. Similarly, Defendants made a responsible business decision to avoid further litigation that had the potential to expose

them to a significant financial loss. All of this I attribute to exceptional and professional legal work on both sides. Defendants were represented by several of the premier law firms in the country. Similarly, Class Counsel are among the most capable and experienced lawyers in the country in these kind of cases. Class Counsel took on an extremely risky and complicated case, invested a lot of time and resources, and achieved an outstanding result for the Class.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 28, 2015



Professor Eric D. Green
Resolutions LLC