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)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

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 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 was filed. Only three requests for exclusions were made by anyone not affiliated with the pending *U.S. Bank* 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 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, 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 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 highly 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, Plaintiffs respectfully request the Court grant final approval to the Settlement.

II. 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

[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.").

Actions and the staff 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.

III. ARGUMENT

A. Final Approval of the Class Action Settlement is Appropriate

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, "[s]o 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) (McMahon, J). 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).

B. 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) (McMahon, J.). 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 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*. Further, 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) (McMahon, J.) ("[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) (McMahon, J.); *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) (McMahon, J.) ("[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)).

C. 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, as attested by the parties' extensive pre-trial order and the summary judgment records. 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 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 may 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 not affiliated with the *U.S. Bank* Action. *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 thus 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").

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 recognize 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. Although Plaintiffs believe in the merit of their arguments, it is far from clear as to 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 and 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. Although Plaintiffs are confident in their ability to prove damages, 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).

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, and even just considering the cash component 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).

D. 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.'").

E. 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 should be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval to the Settlement, approve the Notice as being in compliance with Rule 23 of the Federal Rules of Civil Procedure and due process, and approve the plan of distribution as fair, reasonable, and adequate.

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Respectfully submitted,

/s/ Steven G. Sklaver

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