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 CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

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, respectfully applies 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), a figure 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) (McMahon, J.) ("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.").[1] 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

[1] All emphases added unless otherwise indicated. All capitalized terms shall have the meaning set forth in the Stipulation of Settlement, Dkt. 299-2.

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, 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. And this class action was risky from the outset, and not just because of the changing landscape of the law with respect to class actions. *See* Dkt. 83, Ex. T (Dec. 14, 2012 H'rg Tr. at 13:11-12) (Judge McMahon: "I believe that the Supreme Court is entirely changing the rules on class certification."). For example, although Plaintiffs allege that actuarial standards of practice define a "class" of policies for purposes of 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 that class, Defendants vigorously disputed Plaintiffs' definition, and its contention that the increase was unfairly discriminatory, relying on extensive expert reports. Phoenix's reliance on the filed-rate doctrine as an affirmative defense and as argued during summary judgment, if successful, would have completely wiped out any chance of any recovery. *Cf. Rothstein v. Balboa Ins. Co.*, No. 14-2250-CV, 2015 WL 4460713, at *3 (2d Cir. July 22, 2015) (filed rate doctrine barred challenge to alleged overbilling by an intermediary because rates charged were approved by New York state insurance regulators).

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 may 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) (McMahon, J.) ("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.

BACKGROUND

The relevant facts supporting the motion are set forth in detail in the memorandum of law submitted in support of Class Plaintiffs' Motion for Final Approval of Class Action Settlement ("Settlement Brief") and the accompanying declarations, all filed concurrently herewith.

ARGUMENT

I. CLASS COUNSEL'S FEE REQUEST IS REASONABLE

A. 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) (McMahon, J.) (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) (McMahon, J.). As this Court has previously observed, "[c]ourts in this Circuit have consistently adhered to these teachings." *City of Providence*, 2014 WL 1883494, at *11.

B. The Requested Fee is Fair and Reasonable Under the Percentage Method

1. Percentage Method is Favored

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).[2] "[T]he percentage 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) (McMahon, J.); *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) (McMahon, J.) ("[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.").[3]

2. Fee of 9.9% of the Overall Settlement Value is Fair and Reasonable

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

[2] 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).

[3] *See also In re Beacon Assocs. Litig.*, No. 09 Civ. 3907 (CM), 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013) (McMahon, J.) ("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).

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.[4] 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 $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,[5] as do courts in this Circuit and nationwide.[6] The Federal Judicial Center provides an example of

[4] 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**.").

[5] 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.").

[6] *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.*,

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."[7] 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 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.

---

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").

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

Id. at *18. Similarly 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,[8] or one-third of the entire remaining cash portion of the settlement—all of which falls well within the mainstream of percentage of awarded granted by courts in this Circuit.

As this Court previously observed, "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*, 2010 WL 4877852, at *21.[9] Courts

[8] 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.

[9] *See also Beacon*, 2013 WL 2450960, at *5 ("In this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund."); *Morris*, 859 F. Supp. 2d at 623 (a fee of one-third of the recovery "is reasonable and consistent with the norms of class litigation in this circuit." (quoting *Gilliam v. Addicts Rehabilitation Center Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008)); *Moloney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *In re Payment Card Interchange Fee Lit.*, 991 F. Supp. 2d 437, 446 (E.D.N.Y. 2014) (surveying cases and concluding "it is very common to see 33% contingency fees in cases with funds of less than $10 million, and 30% contingency fees in cases with funds between $10 million and $50 million");

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.[10]

This Court has also observed that a much higher 33% award is appropriate in cases, like this one, that have been actually 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

---

cf. Torres v. Gristede's Operating Corp., 519 F. App'x 1, 5 (2d Cir. 2013) (while not a common fund case, court noted award would be appropriate in a common fund case even though "the $3.86 million total award of costs and fees here represents 52.2% of the entire $7.39 million recovered by plaintiffs").

[10] *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) (McMahon, J.) (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) (McMahon, J.) (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).

heads together and got you to settle it.").[11]

In further support of its fairness, the requested fee is far less than the 45% that SG 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**.").

Finally, 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.[12] As discussed above, a 33% fee (using the most conservative number) is well

[11] *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").

[12] *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,

within the range approved by this district. A 33% fee would be especially appropriate in this case because of the very substantial injunctive relief, the tremendous risks at the outset of the litigation including those that remain, and the fact that the case was litigated vigorously until the eve of trial.

C. The Requested Fee is Reasonable Under 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. *See* Sklaver Decl.

---

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").

¶¶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.[13] 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 regularly award lodestar multipliers significantly greater than the 4.87 multiplier sought here. *See e.g.*, *Maley*, 186 F. Supp. 2d at 369 (McMahon, J.) (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) (McMahon, J.) ("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.").

Class Counsel's hourly rates are also reasonable. The rates for Class Counsel who billed meaningful time to this case (ranging from $225 to $675 per hour) are comparable to peer

[13] *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.").

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.").[14]

D. 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.

[14] 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 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).

1. 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.

- 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.

2. 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.

3. 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.

a. Contingency Risk

"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).[15]

Unlike counsel for the Defendants, who are paid hourly rates and reimbursed for their expenses on a regular basis, SG 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, SG 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 (McMahon, J.) ("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 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.

b. Risks to Establishing Liability

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *City of Providence*, 2014 WL 1883494, at *14 (quotations omitted). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost

[15] *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").

factor to be considered in determining [a reasonable award of attorneys' fees.]." *In re Marsh & McLennan Cos.*, 2009 WL 5178546, at *18 (McMahon, J.) (citing *Goldberger*, 209 F.3d at 54).

Plaintiffs believe their position on liability is strong, but recognize that complex issues pose risk. This is especially true when the case is considered from the outset, before Class Counsel obtained the hard-fought rulings that made this Settlement possible. The Court is well aware of the challenges that Plaintiffs faced in this lawsuit and 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. Although Plaintiffs believe in the merit of their arguments, it is not clear how a jury would resolve these 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.").

c. Risks to Establishing Damages

Plaintiffs also faced risks in establishing damages from the outset of this case, and during the separate damages phase of trial. Plaintiffs' submitted a comprehensive damages expert report by an expert 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 the conclusions of Plaintiffs' damages expert 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 the right to recovery for all Class members without decertification adds substantial risk to Plaintiffs' claims. *See FLAG Telecom*, 2010 WL 4537550, at *18 (McMahon, J.) (burden in proving the

extent of the class's damages weighed in favor of approving fee request, and "The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *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).

* * *

The only certainties from the outset of this litigation were that there would be no fee or expense reimbursement without a successful result, and that a successful result, if any, could be achieved only after lengthy and difficult effort.

4. 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 SG as Class Counsel because the firm met all the requirements of Rule 23(g).[16] Susman Godfrey has

[16] *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)).

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.

"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.[17] Defendants are represented by 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.

5. 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.

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

Finally, the sixth *Goldberger* factor, which addresses "public policy considerations,"

[17] *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 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.").

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)).

7. 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).

II. COUNSEL'S EXPENSES SHOULD BE REIMBURSED

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)).[18]

[18] *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.").

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 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.").[19]

III. INCENTIVE AWARDS FOR NAMED PLAINTIFFS ARE APPROPRIATE

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

[19] 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.

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.[20]

This is not a case where the named plaintiffs had little or no involvement. Rather, Marty 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 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

[20] *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").

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.

Courts have approved similar and higher incentive awards in numerous cases. *See, e.g.*, *Anwar*, 2012 WL 1981505, at *4 (awarding $25,000 to class representative); *Duchene v. Michael Cetta, Inc.*, No. 06 CIV 4576 (PAC)(GWG), 2009 WL 5841175, at *9 (S.D.N.Y. Sept. 10, 2009) (award of $25,000 representing 0.8% of $3,150,000 settlement amount); *Duchene v. Michael Cetta, Inc.*, No. 06 CIV 4576 (PAC)(GWG), 2009 WL 5841175, at *9 (S.D.N.Y. Sept. 10, 2009) (award of $ 25,000 representing 0.8% of $ 3,150,000 settlement amount); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118 (S.D.N.Y. 2001) (noting case law supports payments of between $2,500 and $85,000 to representative plaintiffs in class actions); *Yap v. Sumitomo Corp. of Am.*, No. 88 Civ. 700 (LBS), 1991 WL 29112, at *9 (S.D.N.Y. Feb.22, 1991) ($30,000 incentive awards to the named plaintiffs). Here, the total requested service awards represent a mere .03% of the gross value of the settlement.

CONCLUSION

For the reasons set forth herein, SG respectfully requests that this Court award its requested fees in the amount of $13,500,000, expenses in the amount of $902,564.49, and service awards in the amounts proposed.

DATED: August 19, 2015

Respectfully submitted,

/s/ Steven G. Sklaver

Steven G. Sklaver (*pro hac vice*)
Frances S. Lewis
SUSMAN GODFREY LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Phone: 310-789-3100
Fax: 310-789-3150
Email: ssklaver@susmangodfrey.com
flewis@susmangodfrey.com

Seth Ard
SUSMAN GODFREY LLP
560 Lexington Avenue, 15th Floor
New York, New York 10022-6828
Phone: (212) 336-8330
Fax: (212) 336-8340
Email: sard@susmangodfrey.com

Attorneys for Plaintiffs and the Class