UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: AXA EQUITABLE LIFE INSURANCE COMPANY COI LITIGATION [This document relates to *Brach Family Found, Inc., et al. v. AXA Equitable Life Ins. Co.*, No. 16 Civ. 740 (JMF)]	**ECF CASE** No. 1:16-cv-00740 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

After litigating this case for more than seven years, Plaintiffs negotiated a **$307.5 million** settlement, which is **77 percent** of all cost-of-insurance ("COI") overcharges collected by AXA from the Class Policies through March 31, 2023. The Settlement exceeds the 68.5% of COI overcharges recovered in a case against Phoenix Life Insurance, which Judge McMahon called *"*one of the most remunerative settlements this court has ever been asked to approve." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *11 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*"). Plaintiffs obtained this exceptional recovery with the help of two highly respected mediators, former Judge Layn Phillips and David Murphy of Phillips ADR, who call the Settlement an "outstanding result." Murphy Decl. ¶ 9.

Such an extraordinary result was by no means preordained. Plaintiffs faced significant challenges on the merits. Plaintiffs' core allegation was that AXA's COI increase was fundamentally inequitable and based on unreasonable assumptions. But the New York Department of Financial Services ("NYDFS")—whom insurers widely consider to be the strictest insurance regulator in the country—had investigated AXA's COI increase and allowed it to proceed. Dkt. 19 at 13; Dkt. 19-5. AXA, moreover, touted that its mortality experience largely tracked the assumptions AXA had used to justify the increase. *See* Dkt. 463 at 3, 12, 27-28.

Plaintiffs were able to obtain this extraordinary result for the Class only by virtue of tireless, creative, high-quality work over the better part of a decade. Through extensive discovery efforts over a five-year period—during which Plaintiffs obtained and reviewed hundreds of thousands of documents, spanning nearly a million pages, and took and defended nearly forty depositions—Plaintiffs uncovered key documents on liability issues, including contemporaneous emails between AXA personnel that Plaintiffs used to attack the COI Increase. Ard Decl. ¶¶ 9-13.

After an extensive discovery battle, Plaintiffs also secured access to Milliman's MG-ALFA actuarial software, which was used by AXA to model the COI Increases and was essential to allow Plaintiffs' experts to opine on AXA's COI Increase. *Id.* ¶ 11. Because the decades-old actuarial models AXA used to price AUL II policies were all in a defunct programming language called APL, Plaintiffs' experts undertook the laborious task of learning APL and, in the process and with the aid of counsel, discovered a critical discrepancy in AXA's assumptions. *See* Dkt 457-44 (Rouse Rept.) ¶¶ 52-69.

Along the way, Plaintiffs defeated two motions to dismiss, a motion for reconsideration of the order denying the motion to dismiss, and for MDL consolidation; won a motion to certify the Contract and Illustration Classes; and defeated a Rule 23(f) petition to the Second Circuit, motions for summary judgment, *Daubert* motions, and a motion for decertification. Ard Decl. ¶¶ 15-20.

The Settlement reflects Plaintiffs' tremendous efforts. The Class will get extensive cash and other benefits, obviating the substantial risks that Plaintiffs face at trial—the risk of zero recovery or recovery of far less than what Plaintiffs seek. *See, e.g.,* Ard Decl., ¶ 8 & Exs. 3-4 (verdict in recent COI trial, where plaintiffs sought $18 million but recovered only $5 million). The checks will be mailed directly to Class Members, using the addresses in AXA's files and, in the case of substituted entitlement holders, the files of registered securities intermediaries, with no need to fill out claims forms, and with no possibility of reversion to AXA. Ard Decl. ¶ 29.

The non-monetary benefits are also highly substantial. First, AXA is agreeing to a **complete freeze** on any new COI rate schedule increase for at least the next **seven years**, which is a significant concession given AXA's claims that it could have hiked COI rates on the targeted Athena Universal Life II ("AUL II") policies even *higher* than it did. *See* Dkt. 457-36 (Pfeifer Rept.) ¶ 53. Second, AXA is giving up its right to challenge the validity of class policies for being

alleged STOLI policies, and for misrepresentations in the policy application. That is highly significant because AXA has argued in this litigation that many policies have "red flags" indicating they may be STOLI policies. *Id.* ¶¶ 211-214, 220. In *Phoenix COI*, on final approval, Judge McMahon adopted an expert valuation of similar non-monetary terms for that class at $94.3 million. *See Phoenix COI*, 2015 WL 10847814, at *11 (adopting valuation of 5-year COI rate freeze at $61 million, and a policy validity guarantee at $33.3 million). Plaintiffs here will submit expert valuation of such terms as well, in connection with their request for final approval.

On preliminary approval, the question is whether the Court "will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). The proposed Settlement easily passes both tests.

II. BACKGROUND

A. Plaintiffs Challenge COI Overcharges

Two proposed class representatives ("Plaintiffs") have prosecuted this case: (i) the Brach Family Foundation ("BFF") and; (ii) the Trustee of the Currie Children Trust ("Currie Trust"). Both BFF and the Currie Trust own AULII policies issued by AXA between 2004 and 2008. Each AUL II policy contains the following restrictions on AXA's ability to raise COI rates: "Changes in policy cost factors (interest rates we credit, cost of insurance deductions and expense charges) will be on a basis that is equitable to all policyholders of a given class, and will be determined based on reasonable assumptions as to expenses, mortality, policy and contract claims, investment income, and lapses." Dkt. 1, Ex. A at 11.

On October 1, 2015, AXA announced that it was raising COI rates on all AUL II policies with issues ages of 70 or above and face amounts of $1 million or above. Dkt. 1 ¶ 23. On February 1, 2016, Plaintiff BFF filed this lawsuit challenging the rate hike in this putative class action. The Court appointed Susman Godfrey L.L.P. as Interim Class Counsel on November 13,

2017. Dkt. 145. On March 16, 2018, Plaintiffs filed the Third Amended Complaint, adding the Currie Trust as a plaintiff and putative class representative. Dkt. 188. On August, 13, 2020, the Court certified the Contract Class and Illustration Class, along with the New York Illustration Sub-Class, appointed Susman Godfrey as class counsel, and appointed BFF and the Currie Trust as class representatives. Dkt. 403. Susman Godfrey is highly experienced in representing classes of policyowners seeking recovery of COI overcharges against insurers. Ard Decl. ¶¶ 3-4 & Ex. 1.

B. Plaintiffs Engage in Seven Years of Litigation

Plaintiffs have vigorously prosecuted this case for over seven years, through fact and expert discovery, class certification, reconsideration motions, a decertification motion, and multiple dispositive motions.

This case was filed on February 1, 2016, and fact discovery lasted until April 5, 2019. Plaintiffs and their experts analyzed over 750,000 pages of documents, which included extensive actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all Class Members' policies, and thousands of spreadsheets. In total, Plaintiffs issued 71 requests for production, 58 interrogatories, and 311 requests for admission, and Defendant issued 53 requests for production, 45 interrogatories, and 66 requests for admission. Plaintiffs engaged in myriad rounds of meet and confers with respect to these discovery requests, including extended negotiations over search terms, custodians, and other issues. Ard Decl. ¶ 9. Plaintiffs also issued numerous subpoenas to relevant third parties, including AXA's actuarial and financial advisors. Plaintiffs obtained thousands of pages of valuable documents from these subpoenas, much of which had not already been produced by AXA. *Id*. ¶ 11. And Plaintiffs took and defended 28 highly technical fact depositions (some of which took place over two days), through which Plaintiffs obtained key admissions that they deployed to overcome summary judgment and that AXA must have known created significant risk for itself at trial. *Id*. ¶ 12.

AXA did not turn over many of the key documents in the case without a fight. The parties filed 32 letters with the Court pertaining to discovery issues, with over 900 pages of attachments. Ard Decl. ¶ 10. Plaintiffs picked the right battles. For example, after issuing a subpoena and filing a motion to compel, Plaintiffs secured access to Milliman's MG-ALFA actuarial software, which was used by AXA to model the COI Increases and was essential to allow Plaintiffs' experts to opine on AXA's COI Increase. *Id*. ¶ 11.

Expert discovery in this highly technical case was also a herculean task. Plaintiffs designated three opening experts: actuarial experts James Rouse and Jeremy Brown and damages expert Robert Mills. Plaintiffs produced opening expert reports from Rouse, Brown, and Mills on May 17, 2019. In response, AXA designated actuarial expert Timothy Pfeifer, regulatory experts Mary Jo Hudson and Howard Mills, and economist Glenn Hubbard. AXA produced reports from its experts on July 15, 2019. In rebuttal, on September 25, 2019, Plaintiffs produced reports from Rouse, Brown and Mills, as well as Deborah Senn and Jeffrey Angelo – two regulatory experts engaged to rebut the opinions of AXA experts Hudson and Mills. All nine experts were deposed. Collectively, the parties produced twelve expert reports that totaled 893 pages, with over 5,633 pages of exhibits and appendices. Class Counsel also retained several consulting experts, who provided invaluable assistance to Plaintiffs and the Class. Plaintiffs' experts spent over 3,400 hours conducting their essential work in this case. Ard Decl. ¶ 13.

Throughout the long life of this case, Plaintiffs have prevailed in defeating dispositive motions and in other critical motions. At the outset, the Court adjudicated two separate Rule 12(b)(6) motions and, later, a motion for reconsideration on the Court's denial of AXA's motion to dismiss Plaintiff's claim under New York Insurance Law § 4226. Dkt. 63, 135, 261. In August 2020, after over 100 pages of briefing (and over 11,000 pages of exhibits), Plaintiffs' motion for

class certification was granted. Dkt. 403. And in 2021, the parties briefed summary judgment and *Daubert* motions, in over 200 pages of briefing (and nearly 8,000 pages of exhibits). In an 86-page order, the Court largely denied AXA's motion for summary judgment and motions to exclude Plaintiffs' experts. Dkt. 596. Shortly afterward, AXA moved for partial reconsideration of the summary judgment order and decertification of the Illustration Classes. The Court granted AXA's partial reconsideration motion, Dkt. 632, but on January 17, 2023, denied AXA's motion to decertify the Illustration Classes, Dkt. 667. Ard Decl. ¶¶ 15-20.

C. The Classes and Notice and Opt-Out Period

On August 13, 2020, the Court granted Plaintiffs' motion and certified the Contract Class, Illustration Class, and New York Illustration Subclass. Dkt. 403. As amended per the Court's October 2, 2020 order, Dkt. 447, the Classes were defined as follows:

> Contract Class: All individuals who, on or after March 8, 2016, are or were registered owners of AUL II policies that were issued by AXA and subjected to the COI rate increase announced by AXA on or about October 1, 2015, as well as those residents' heirs, successors, or assigns, and excluding Defendant AXA, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing, and the plaintiffs in all Related Actions. Dkt. 403 at 3, 18; Dkt. 447 at 3.
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> Illustration Class: All individuals who, on or after March 8, 2016, are or were registered owners of an AUL II policy unaccompanied by a Lapse Protection Rider that was issued by AXA after July 10, 2006 and subjected to the COI rate increase announced by AXA on or about October 1, 2015, excluding defendant AXA, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing, and the plaintiffs in the Related Actions. Dkt. 447 at 3-4.
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> New York Subclass: All members of the Illustration-based Claims Class who reside in New York.

After the Classes were certified, the Court appointed JND as notice administrator and approved the form and manner of notice consisting to direct mail to all members of the Classes, using the contact information for registered owners in AXA's records. *See* Dkt. 447 at 4-5. The Court also held that Class Members will "be legally bound by all Court orders and judgments made

in this class action with respect to the certified claims asserted by Plaintiffs in this lawsuit," and gave Class Members 90 days after the notice date to submit opt-out notices. *Id.* at 6.

Pursuant to the Court's order, JND mailed the approved short-form notice to members of the Classes and established the notice website on October 23, 2020. Intrepido-Bowden Decl. ¶ 14. The short- and long-form notices explained the procedure for opting out of the Classes. The deadline to opt out was January 21, 2021. *Id.* ¶ 15. JND received 475 opt-out requests during the optout period. *Id.* ¶ 16.

As noted, after the Court denied its motion for summary judgment, AXA moved for reconsideration and for decertification of the Illustration Class on the ground that registered owners who were securities intermediaries lacked standing. The Court denied AXA's motion for decertification; the Illustration Class and the New York Subclass were modified, as follows, to substitute entitlement holders of Illustration Class policies in for securities intermediaries ("Substituted Illustration Class Members"), Dkt. 667 at 7:

> Modified Illustration Class: All individuals who, on or after March 8, 2016, are or were registered owners of an AUL II policy unaccompanied by a Lapse Protection Rider that was issued by AXA after July 10, 2006 and subjected to the COI rate increase announced by AXA on or about October 1, 2015, unless the registered owner of such policy is a securities intermediary, in which case the securities intermediary is not a class member but the entitlement holder with respect to that policy is. This excludes individuals who purchased their policies after the COI rate increase was announced, and defendant AXA, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing, and the plaintiffs in the Related Actions. Dkt. 667 at 7.
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> Modified New York Subclass: All members of the Illustration-based Claims Class who reside in New York.

The definition of the Contract Class was not at issue and remained unchanged. After the Illustration Classes were modified, the parties agreed that renewed notice to the new substituted members of the Illustration Classes—*i.e.*, the entitlement holders of policies whose registered owners were securities intermediaries (hereinafter, "Substituted Illustration Class Members")—

was appropriate. Dkt. 675, 676. Plaintiffs served subpoenas on the relevant registered-owner securities intermediaries to collect identity and contact information for the Substituted Illustration Class Members. To date, Plaintiffs have received identity and contact information of entitlement holders for nearly all policies owned by Substituted Illustration Class Members. Ard Decl. ¶ 21.

Before renewed notice to the Substituted Illustration Class Members was issued, the parties reached this Settlement, and the Court stayed various deadlines. Dkt. 695.

D. Settlement Negotiations

The parties have held four separate mediation sessions over more than four years before Judge Layn Phillips and David Murphy of Phillips ADR. The first mediation took place on February 6, 2019, and the parties had subsequent mediation sessions on May 5, 2021, June 16, 2022, and most recently on May 7, 2023. Before the mediations, the parties submitted position statements, briefing on critical issues, and updated damages estimates for the case. Murphy Decl. ¶¶ 5-6; Ard Decl. ¶ 6. The parties were unable to reach agreement at any of the four mediation sessions. After the most recent mediation session on Sunday, May 7, 2023, the parties continued to negotiate with the assistance of David Murphy, and, approximately two weeks later, reached a memorandum of understanding for a settlement and promptly informed the Court of the development. Ard Decl. ¶ 6; Dkt. 694. A long-form settlement agreement was heavily negotiated and agreed to thereafter. Ard Ex. 2 ("Settlement Agreement").

Throughout the process, the Settlement negotiations were conducted by highly qualified and experienced counsel on both sides at arm's length. Ard Decl. ¶¶ 5-8; Murphy Decl. ¶¶ 7-8. Negotiations were hard-fought, non-collusive, and were fruitful only after the parties had extensively litigated key issues in the case—after the class was certified, after Plaintiffs defeated AXA's motion for summary judgment and *Daubert* motions and subsequent motions for reconsideration and decertification, and after the Court set the case for trial in October 2023. Ard

Decl. ¶¶ 15-22; Murphy Decl. ¶¶ 6-8. Class Counsel analyzed all of the contested legal and factual issues to thoroughly evaluate AXA's contentions, advocated in the settlement negotiation process for a fair and reasonable settlement that serves the best interests of the Class, and made fair and reasonable settlement demands of Defendant. Ard Decl. ¶¶ 5, 8, 32; Murphy Decl. ¶¶ 6-8. Mr. Murphy and Judge Phillips believe that the proposed Settlement is an "outstanding result." *See* Murphy Decl. ¶ 9.

E. The Settlement Agreement

1. Consideration

The Settlement awards three main benefits for the Class, Ard Decl. ¶ 24, namely:

1. **CASH:** A cash Settlement Fund of up to $307,500,000.00, which is equal to 77% of all COI overcharges collected by AXA from the Class Policies through March 31, 2023. For any Substituted Illustration Class Member that opts out, the Settlement Fund is reduced by the *pro rata* share of the maximum Settlement Fund (*i.e.,* $307,500,000) attributable to the Illustration Class damages for the policy or policies owned by that Substituted Illustration Class Member.

2. **CLASS RATE INCREASE FREEZE:** A freeze on any new COI rate scale increase for a period of seven years following the date the parties accepted the mediator's proposal. Thus, even if AXA experiences a future change in expectations that would otherwise permit a COI rate increase, AXA will not increase COI rates for seven years. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for a substantial period of time.

3. **VALIDITY CLAUSE:** AXA 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 for such policies.

2. Payments and Release

Upon final approval, the Settlement Administrator will distribute to Final Class Members their Policy Settlement Amounts, according to the Plan of Distribution discussed below. The checks will be sent automatically to Final Class Members using AXA's database of their addresses—or, in the case of Substituted Illustration Class Members, contact information received

from securities intermediaries—without requiring any Final Class Member to submit claim forms. Ard Decl. ¶ 29; Settlement Agreement § 2.3(b). To the extent that the identity and contact information of a Substituted Illustration Class Member cannot be located within one year plus 30 days after first checks are mailed, then the net settlement amounts for that Substituted Illustration Class Member will be added back to the Settlement Fund and redistributed pro rata among other Class members. Settlement Agreement § 2.3(b). This is not a claims-made settlement, so none of the settlement funds will revert to AXA. *Id*. § 2.2(e).

Plaintiffs and Final Class Members will release any and all claims that were or could have been asserted in the Action that arise out of the identical factual predicate of the allegations in the Action, but not claims that could not have been asserted in this Action. *Id*. §§ 1.22, 1.50.

3. Award, Costs, and Fees

The Settlement Agreement provides that, subject to Court approval, a portion of the Final Settlement Fund may be used for fees incurred in administering class notices and Settlement, and that Plaintiffs will move for attorneys' fees not to exceed 33 1/3% of the value of all benefits provided by the Settlement, capped at 33 1/3% of the Settlement Fund, and for reimbursement for all expenses incurred or to be incurred. *Id*. § 7.1. The Settlement also provides that Plaintiffs may request Service Awards for up to $100,000 for each Class Representative, to be paid from the Final Settlement Fund, for their services on behalf of the Classes. *Id*. § 7.4. Class members will be given an opportunity to object to that application, which will be filed prior to objection deadline.

4. Notice and Plan of Allocation

The proposed notice plan and plan of allocation distributes proceeds equitably on a *pro rata* basis. *See* Intrepido-Bowden Decl. ¶¶ 18-23 and 34-41 (notice plan); Ard Decl. Ex. 5 (plan of allocation). Class members will not need to fill out claim forms. Money will be sent to them automatically in the mail, using the addresses that AXA or the relevant securities intermediary

maintains on file. The plan distributes settlement proceeds on a pro rata basis using each Final Class Member's share of overcharges for both the Nationwide Illustration-Based Claims Class and/or Illustration-Based Claims Sub-Class, as applicable for each policy. The COI overcharges represent the difference between the COI charges AXA actually assessed on the policy after implementation of the COI increase through March 31, 2023 and the amount it would have assessed but for the COI rate increase. All members of the Class who are current owners will also benefit from the guarantee of policy validity and the seven-year COI freeze.

Under Plaintiffs' proposed notice plan, Substituted Illustration Class Members will have 45 days after notice is sent to object to the Settlement or exclude themselves from the Class by sending a letter to the Settlement Administrator. Settlement Agreement § 6.1. The Settlement Fund will be reduced proportionately for any opt-outs, based on the *pro rata* share of the Substituted Illustration Class Member's Illustration Damages, as calculated by Plaintiffs' expert Robert Mills, compared to the rest of the Class. *Id.* § 2.1(b). All other Class members, other than Substituted Illustration Class Members, will receive notice of the settlement and will have 45 days to file objections, if any. *Id*. § 6.7.

Plaintiffs request that the Court appoint JND as Settlement Administrator. Within five days of this Court's order granting the motion for preliminary approval, Class Counsel will provide JND with a Notice List containing individuals or entities, along with their addresses, who own or owned, or are or were the entitlement holders of class policies and including address information that is available from AXA's files. *Id.* § 5.4; Intrepido-Bowden Decl. ¶ 20. Within 21 days of the Court's order, JND will mail the short-form notice attached as Exhibit B to the Intrepido-Bowden Declaration to all addresses on the Notice List. Settlement Agreement § 5.1; Intrepido-Bowden Decl. ¶ 34. At the same time, JND will also mail the special notice of the right to remain a class

member or request exclusion from the Illustration Class(es) ("Special Notice") attached as Exhibit C to the Intrepido-Bowden Declaration to Substituted Illustration Class Members, who will have the opportunity to opt out of the Class. Intrepido-Bowden Decl. ¶ 34. JND will also post a copy of the long-form notice and special notice attached as Exhibits D and C, respectively, to the Intrepido-Bowden Declaration to the class website, and will establish and maintain an automated toll-free number that Class Members may call to obtain information about the litigation. *Id*. ¶¶ 38-40.

Within 30 days after the Final Settlement Date, the Settlement Administrator will calculate each Final Class Member's distribution pursuant to the plan of allocation and, within 14 days after that, send for delivery to each Final Class Member, via first-class postage prepaid, a settlement check in the amount of the share of the Net Settlement Fund to which the Final Class Member is entitled. Settlement Agreement § 2.3(b). Within one year plus 30 days after the date the Settlement Administrator mails settlement checks, the Settlement Administrator will mail additional checks to distribute any funds on a *pro rata* basis remaining in the Settlement Fund to those that cashed their checks in the first distribution, subject to the economic and administrative feasibility of mailing such additional checks. *Id*.

III. ARGUMENT

Under Rule 23(e), class action "[s]ettlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (cleaned up). The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (cleaned up). Absent "fraud or collusion," courts "should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Christine Asia Co. v. Yun Ma*, 2019 WL 5257534, at *8 (S.D.N.Y. Oct. 16, 2019).

There are two steps to approval: preliminary and final approval. *See* Fed. R. Civ. P. 23(e). At preliminary approval, the Court must assess whether it "will likely be able to approve the proposal" under the four Rule 23(e)(2) factors, discussed below. The first two factors focus on "procedural fairness," while the latter two factors focus on "substantive fairness." *Christine Asia*, 2019 WL 5257534, at *9–10.

A. The Proposed Settlement Satisfies Rule 23(e)(2).

1. The Settlement is Procedurally Fair

The Court must first consider whether "the class representatives and class counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)–(B). In assessing adequacy of representation, the court focuses on whether "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007). Where an experienced class counsel has negotiated an arm's length agreement after "meaningful discovery," a "presumption of fairness, reasonableness, and adequacy" attaches. *McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (citation omitted); *Christine Asia*, 2019 WL 5257534, at *9. That presumption also applies "when a settlement is reached with the assistance of a mediator." *Puddu v. 6D Glob. Techs., Inc.*, 2021 WL 1910656, at *4 (S.D.N.Y. May 12, 2021). Here, the presumption of fairness, reasonableness, and adequacy applies.

Plaintiffs' interests are aligned with the Classes: each suffered the same injury (improper cost-of-insurance overcharges and misleading illustrations) and have the same interest in maximizing recovery from AXA. *See In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004). ("There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.").

Class Counsel is highly qualified. They have represented classes in numerous other COI challenges, including against Phoenix, John Hancock, Voya, Security Life of Denver, Reliastar Life Insurance Company, Genworth, and North American Company for Life & Health Insurance; are highly experienced in the prosecution of contract and insurance litigation; and are also of the view that the Settlement is an excellent result. Ard Decl. ¶¶ 3-4, 28 & Ex.1. Class Counsel's view as to the fairness of the settlement is well informed: This case has been pending for more than seven years, fact and expert discovery is closed, the parties have taken nearly 40 depositions, and Plaintiffs defeated AXA's motions for summary judgment, *Daubert*, and decertification motions. All that is left is trial and, after that, appeal. Ard Decl. ¶¶ 9-22.

The agreement was also reached at arm's length. The Settlement is the culmination of negotiation and mediation efforts that spanned four years. This included four all-day mediation sessions over four years under the supervision of highly experienced, respected, and neutral mediators. *See* Ard Decl. ¶¶ 6-8; Murphy Decl. ¶¶ 5-6. As Mr. Murphy and Judge Phillips put it, the parties achieved a settlement "at arm's length, carefully, deliberately and in good faith to advance the best interests of their clients." Murphy Decl. ¶ 8; *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (recognizing mediator's involvement in "settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure").

2. The Relief Provided to the Classes Is Adequate.

Next, the Court must assess substantive fairness. Rule 23(e)(2)(C) enumerates four factors to be considered: (i) "the costs, risks, and delay of trial and appeal," (ii) "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," (iii) "the terms of any proposed award of attorney's fees, including timing of payment," and (iv) "any agreement required to be identified under Rule 23(e)(3)."

The 2018 amendments to Rule 23 were intended to "add to, rather than displace, the *Grinnell* factors," and there is "significant overlap" under the two frameworks.[1] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (citing 2018 Advisory Notes to Fed. R. Civ. P. 23, Subdiv. (e)(2)).

a. Costs, Risks, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) requires courts to consider "the costs, risks, and delay of trial and appeal." This inquiry overlaps with *Grinnell* factors one ("complexity, expense, and likely duration of the litigation") and four, five, and six (risks of establishing liability and damages and maintaining the class). *See In re Payment Card*, 330 F.R.D. at 36. The Court need not "decide the merits of the case," "resolve unsettled legal questions," or "foresee with absolute certainty the outcome." *Phoenix COI*, 2015 WL 10847814, at *8 (cleaned up). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Id.* 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).

This litigation was highly complex. Plaintiffs alleged breach of an insurance contract and misleading-illustration claims, involving technical terms and concepts from the Actuarial Standards of Practice ("ASOPs"). Resolving those claims would require "conflicting testimony by experts as to actuarial standards, the original and revised pricing assumptions used by [the insurer]

[11] The nine *Grinnell* factors are: (i) "the complexity, expense and likely duration of the litigation," (ii) "the reaction of the class to the settlement," (iii) "the stage of the proceedings and the amount of discovery completed," (iv) "the risks of establishing liability," (v) "the risks of establishing damages," (vi) "the risks of maintaining the class action through the trial," (vii) "the ability of the defendants to withstand a greater judgment," (viii) "the range of reasonableness of the settlement fund in light of the best possible recovery," and (ix) "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *City of Detroit v. Grinnell Corporation Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The Court need not consider the second *Grinnell* factor at this time. *See, e.g., In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Since no notice has been sent, consideration of this factor is premature.").

for the [universal life] insurance products at issue, and what it means to . . . discriminate unfairly 'within a class of insured.'" *Phoenix COI*, 2015 WL 10847814, at *6.

Furthermore, there would have been no guarantee of any recovery, let alone a recovery in excess of $300 million, at trial. Defendant, represented by one of the largest, most prominent law firms in the world, would no doubt raise a vigorous defense. As to one of Plaintiffs' theories of liability, the Court in denying summary judgment said that "AXA has the stronger of the competing interpretations" of the term "given class." Dkt. 596 at 19-20; *see State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

Even if Plaintiffs prevailed on liability, Plaintiffs faced still further uncertainty on damages. AXA intended to present evidence that damages should be reduced by hundreds of millions to account for a hypothetical COI increase that AXA *could have* imposed. *See* Dkt. 596 at 36-37. This risk of a lower-than-expected recovery is real. In a recent COI class trial in *Meek v. Kansas City Life Insurance Co.*, No. 19-CV-472 (W.D. Mo.), the class sought $18 million in damages but recovered only $5 million—less than one-third of the alleged overcharges. *See* Ard Ex. 3 ((*Meek* Tr.) at 69:9-16); Ard Ex. 4 (*Meek* verdict form). The Settlement Fund, by contrast, reflects 77% of COI overcharges through March 31, 2023, not to mention the substantial additional value of the COI freeze and validity clause. Ard. Decl. ¶¶ 25-26.[2]

[2] Trial would not be the end of the road. If Plaintiffs succeeded at trial, this case would likely be tied up in years of post-trial briefing and appellate practice. *See Phoenix COI*, 2015 WL 10847814, at *6 ("The Settlement also ends future litigation and uncertainty. Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years."); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) (cleaned up) ("The 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."). AXA, in fact, after class certification was granted, hired a separate law firm and the 41st Solicitor General of the United States to brief its petition for permission to appeal pursuant to Rule 23(f) to the Second Circuit. *See In re AXA Equitable Life Ins. Co. COI Litig.*, 2d Cir. No. 20-0248, Dkt. 3, 14.

The Settlement eliminates these risks, while providing substantial value to the Class. This weighs sharply in favor of preliminary approval.

b. Range of Reasonableness of the Settlement Fund

This Court must consider "the range of reasonableness of the settlement fund," both in light of the risks discussed in the previous subsection and "in light of the best possible recovery." *Grinnell*, 495 F.2d at 463. The recovery of up to $307,500,000, when compared to the damages at issue in the litigation, is extraordinary. The measure of damages on Plaintiffs' claim of breach of contract, and the measure of penalties on Plaintiffs' Section 4226 claim, represented the difference between the COI charges AXA assessed on the policy after implementation of the COI increase and the rate AXA would have charged had the COI increase not been implemented. Through March 2023, the date of AXA's pre-mediation refresh of damages data, Class Members nationally paid, under Plaintiffs' maximum damages model, approximately $399 million more than they would have had the 2018 COI increase not been implemented. Ard Decl. ¶ 23.

The Settlement Fund accounts for 77% of the $399 million in overcharges through March 2023. *Id.* ¶ 25. Courts routinely approve settlements with substantially lower-percentage awards, under the higher "final approval" standards. *See Grinnell Corp.*, 495 F.2d at 455 & n.2 (recognizing that "a satisfactory settlement" could amount to a small fraction – such as "a hundredth or even a thousandth part of a single percent of the potential recovery"); *Phoenix COI*, 2015 WL 10847814, at *11 (cash fund amount equal to 68.5% of COI overcharges was "one of the most remunerative settlements this court has ever been asked to approve").[3]

[3] *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement value that was 10.5% of total damages); *In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (approving settlement cash award that was 10–15% of total damages). Furthermore, "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.'" *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) (citation omitted).

The Settlement is even more extraordinary in light of the significant value added by the two measures of nonmonetary relief, neither of which would have been achievable even had the Class prevailed at trial. *First*, AXA has agreed to freeze COI rate scales for seven years. A decision by AXA to further increase COI rates is more than just a theoretical possibility. Among the factors AXA must consider in adjusting COI rates is its future expectations of mortality. As at least some insurers have argued, expectations of future mortality have deteriorated in recent years due to the COVID-19 pandemic.[4] Absent the COI freeze, therefore, AXA might have raised COI rates in the next seven years because of what it contends are changes to its mortality expectations due to the pandemic. The Settlement protects the Classes from that risk.

Second, the Settlement Agreement's validity clause provides significant value. Here, as in the *Phoenix COI* class action, AXA has claimed that a significant number of policies are subject to challenges for lack of insurable interest (STOLI) or misrepresentation. Dkt. 457-36 (Pfeifer Rpt.) ¶¶ 211-14, 220. The validity clause helps ensure that policyowners will get the policy benefit at maturity so long as they continue to pay sufficient premiums.

These results are excellent for the Class, especially in light of the many risks and uncertainties Plaintiffs faced. And Class Counsel's certification of the reasonableness of the settlement, *see* Ard Decl. ¶¶ 5, 8, 32, is given considerable weight because they are closest to the facts and risks associated with the litigation. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *5 (S.D.N.Y. Dec. 19, 2014) ("[Lead Counsel's] opinion is entitled to great weight." (quotation marks and citation omitted)). This factor thus weighs in favor of approval.

[4] *See, e.g.*, *Meek v. Kansas City Life Ins. Co.*,19-cv-472 (W.D. Mo.), Expert Declaration of Timothy C. Pfeifer, Dkt. 90-2 ¶ 54 (Oct. 21, 2021).

c. Effectiveness of Any Proposed Method of Distributing Relief

Next, Rule 23(e)(2)(C)(ii) requires that the "proposed method of distributing relief" be "effective." A distribution plan satisfies the Rule if it is "reasonable" and has a "rational basis," especially if "recommended by experienced and competent class counsel." *In re Payment Card*, 330 F.R.D. at 40. Here, Class Counsel, which has extensive experience in class actions, prepared the distribution plan with the assistance of their damages expert, Robert Mills, who also has significant experience in plans of allocation in COI class actions. Ard Decl. ¶¶ 3, 29. Under the plan of allocation, Class Members will be distributed the Net Settlement Fund in proportion to their share of the overall COI contract damages, illustration-claim penalties, and GBL § 349 statutory penalties through March 31, 2023. Ard Ex. 5 (Plan of Allocation). As noted elsewhere, courts routinely approve of a pro-rata distribution as "straightforward and equitable." *Phoenix COI*, 2015 WL 10847814, at *12 (collecting cases). This factor favors approval.

d. The Terms of Any Proposed Award of Attorney's Fees

The Court also considers the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Under the Settlement, Class Counsel will apply for an award of attorney's fees not to exceed 33 1/3% of the value of all benefits provided by the Settlement, capped at 33 1/3% of the Settlement Fund—this cap is significant because the Settlement Fund itself is far less than the overall gross benefits provided by the Settlement given the substantial non-monetary relief also secured. Ard Decl. ¶ 30. Class Counsel will not receive any funds until the Court has granted its fee request. *Id*. The Settlement is not conditioned on the Court's approval of Class Counsel's Fees and Expenses request. Settlement Agreement, § 7.7.

Awards of this amount have been deemed reasonable and typical in comparable class actions. *See Puddu*, 2021 WL 1910656, at *6 (finding that "33.3% is within the range of fee awards typically awarded" and collecting cases); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 668

(S.D.N.Y. 2015) ("[I]n numerous common fund cases, fees have been awarded that represent one-third of the settlement fund."); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit"). Class Counsel's fee request does not weigh against preliminary approval and will be briefed more fulsomely at final approval.

e. Any Agreement Required to Be Identified Under Rule 23(e)(3)

Rules 23(e)(2)(C)(iv) and 23(e)(3) require that any agreement "made in connection with the proposal" be identified. Plaintiffs and AXA have entered into one such agreement that will be provided to the Court upon request that provides for the right of AXA to terminate the Settlement if a confidential percentage of the Substituted Illustration Class Members opt-out of the Settlement, following the notice period. Settlement Agreement, § 9.2. This factor is neutral.

3. The Plan of Allocation Treats Class Members Equitably

The final Rule 23(e)(2) factor requires the Court to assess whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). As noted, the proposed plan of allocation equitably treats class members by distributing damages on a *pro rata* basis using each Class Members' share of the total damages and penalties. Courts have repeatedly approved of *pro rata* allocation plans. *See, e.g.*, *Phoenix COI*, 2015 WL 10847814, at *12 ("This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable.").

4. The Proposed Settlement Satisfies Other *Grinnell* Factors

A court must also consider the third *Grinnell* factor, "[t]he stage of the proceedings and the amount of discovery completed." *Grinnell*, 495 F.2d at 463. The Court assesses whether Plaintiffs "have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, 2006 WL 903236,

at *10 (S.D.N.Y. Apr. 6, 2006). That is easily satisfied here. Fact and expert discovery is complete, in the course of which Plaintiffs took and defended nearly 40 depositions and Class Counsel and their experts carefully analyzed the actuarial models and assumptions underpinning AXA's COI increase. Ard Decl. ¶¶ 9-14. The central merits issues for the Contract and Illustration Classes have been fully litigated in the course of briefing on multiple motions to dismiss, for reconsideration, class certification, decertification, summary judgment, and *Daubert* exclusion. The bottom line is: Plaintiffs had an extensive record—both from discovery and from the disclosure of AXA's contentions and theories in briefing dispositive motions and class certification—against which to measure the adequacy of the Settlement. This factor supports approval.

The Court also considers "the ability of the defendants to withstand a greater judgment." *Grinnell Corp.*, 495 F.2d at 463. Here, even if AXA could withstand a greater judgment, this does not undermine the fairness of the Settlement. *See, e.g.*, *Phoenix COI*, 2015 WL 10847814, at *9 (noting that defendant's ability to pay more "does not, standing alone, indicate the settlement is unreasonable or inadequate" (citation omitted)).

Courts may also look to the scope of the release. *See Payment Card*, 330 F.R.D. at 42 n.41. The release, discussed above, Settlement Agreement §§ 1.22, 1.50, are appropriate. *See Wal-Mart Stores*, 396 F.3d at 107 ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.").

The overwhelming majority of the relevant factors under Rule 23(e)(2) and *Grinnell* strongly support approval. This Court should find that it is likely to approve the Settlement.

B. <u>The Proposed Settlement Satisfies Other Relevant Factors</u>

Rule 23(e)(1)(B)(ii) conditions preliminary approval and the direction of notice on a showing that the Court will likely be able to "certify the class for purposes of judgment on the

proposal." "If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted." Fed. R. Civ. P. 23, Advisory Note 2018, Subdivision (e)(1); *accord* 4 Newberg on Class Actions § 13:18 ("If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes."). Here, there is no change to the composition of the class as a result of the Settlement. *See* Settlement Agreement, § 1.5. The recent substitutions to the Illustration Class—entitlement holders who own or owned Illustration Class policies held by securities intermediaries—will be given the opportunity to opt-out of the Illustration Class. Dkt. 667, 672.

C. The Proposed Form and Manner of Notice Is Appropriate

Rule 23(e)(1)(B) requires that notice be directed "in a reasonable manner to all class members who would be bound by the proposal." Plaintiffs request that (i) the Court approve the notice to the Class, *see* Exhibits B-D to the Intrepido-Bowden Declaration, (ii) appoint JND as Settlement Administrator, (iii) approve of distribution of the notices via First Class Mail , and (iv) approve of the proposed 45-day opt-out period.

To satisfy Rule 23, the notice must satisfy two requirements. First, "[c]ourts in this Circuit have explained that a Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally and informs the Class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." *Charron*, 874 F. Supp. 2d at 191 (cleaned up); *accord Wal-Mart Stores, Inc.*, 396 F.3d at 114. Second, the manner of sending notice 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 Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

First, the form of notice here satisfies due process because it informs Class members of the terms of the settlement and the options open to them in plain language. *See Charron*, 874 F. Supp. 2d at 191 (form of notice is "adequate if it may be understood by the average class member"). The notices, which are attached as Exhibits B-D to the Intrepido-Bowden Declaration, communicate in plain language the essential elements of the Settlement and the options available to Class Members in connection with the Settlement, including specific information regarding the date, time, and place of final approval. *Id.* The notices are in line with those previously approved by the Court. *See* Dkt. 434, 443, 447, 675, 676.

Second, the manner of sending notice, which relies on direct mailing to individual Class Members using AXA's address database and contact information maintained by relevant securities intermediaries, is the best notice practicable here. Direct notice will be sent by first-class mail to all Class Members using their last known address. Intrepido-Bowden Decl. ¶¶ 34-35. Sending notice via first class mail is appropriate. *See In re Doria/Memon Disc. Stores Wage & Hour Litig.*, 2017 WL 4541434, at *9 (S.D.N.Y. Oct. 10, 2017) ("[D]elivery by first class mail is proper."); *U.S. v. New York*, 2014 WL 1028982, at *5 (E.D.N.Y. Mar. 17, 2014) ("simple and direct notice" mailed directly to 3,876 class members "who were identified by Defendants" was 'the best notice practicable under the circumstances'" (quoting *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008)). This is a particularly effective method because in-force policyholders are expected to maintain their current addresses with AXA. A number of members of the Illustration Class are registered owners whose addresses are maintained by AXA. For the Substituted Illustration Class Members, Plaintiffs will send notice to the addresses on file with the securities intermediary that served as the registered owner of the relevant policy or policies as of

October 1, 2015, pursuant to the manner of notice the Court already approved.[5] Dkt. 672, 676. The Settlement Administrator will also research and attempt re-delivery of any Notices returned as undeliverable. Intrepido-Bowden Decl. ¶¶ 34-35.

Third, this Court should appoint JND as Settlement Administrator, which has already been serving as notice administrator in this action for more than two years, and has vast experience in this space. *See, e.g.*, *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 2020 WL 7389330, at *5 (S.D.N.Y. Dec. 16, 2020) (appointing JND as claims administrator and noting that its principals "have more than 75 years-worth of combined class action legal administration experience" and have "handled some of the largest recent settlement administration issues").

Finally, the opt-out period of 45 calendar days for Substituted Illustration Class Members is reasonable, as is the objection period for all Class members. *See, e.g.*, *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *13 (S.D.N.Y. Dec. 23, 2009) (approving 30-day opt-out period in complex securities fraud class action).[6]

The Court should therefore approve the proposed form and manner of notice as described in paragraphs 18-23 and 34-41 and Exhibits B-D of the Intrepido-Bowden Declaration.

D. The Proposed Distribution Plan is Reasonable

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). Courts recognize that

[5] In the event that identity contact information for a particular Substituted Illustration Class Member cannot be identified within one year plus 30 days after the initial round of checks are mailed, then the Illustration Class Settlement Amount for that Class member will revert to the fund and be redistributed to the Classes *pro rata*.

[6] This is not one of the "rare" cases in which a second opt-out period for the Contract Class or for other members of the Illustration Class is appropriate. *See* Principles of the Law of Aggregate Litigation § 3.11, Reporters' Notes, *cmt. a*; *see also, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 270-71 (2d Cir. 2006) (no abuse of discretion in denying second-opt out period, which neither due process nor Rule 23(e) requires); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MDL 2058 (PKC), 2012 WL 13070626, at *5 (S.D.N.Y. Dec. 4, 2012) (denying second opt-out period "[i]n light of the extensive notice program undertaken in connection with class certification and the ample opportunity . . . to request exclusion from the Class at that time").

"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." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997). As discussed above, the distribution plan is fair and reasonable, and should be preliminarily approved.

E. Proposed Schedule

Plaintiffs propose the following schedule:

EVENT	DAYS FROM PRELIMINARY APPROVAL
Deadline to send notice to Class Members	21 days
Deadline to file motion for award of attorneys' fees, expenses and service awards	52 days
Opt-Out and Objection Deadline	66 days
Deadline for file Final Approval motion	80 days
Deadline to file any reply brief in support of any motion	101 days
Final Approval Hearing	108 days

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (i) preliminarily approve the proposed Settlement; (ii) approve the proposed form and manner of notice to the Classes; and (iii) schedule a date and time for a hearing to consider final approval of the Settlement and related matters.

Dated: June 15, 2023

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Class Counsel

CERTIFICATE OF SERVICE

I certify that on June 15, 2023, a true and correct copy of this document properly was served on counsel of record by email.

/s/ Steven G. Sklaver