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)

NOTICE OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARD

PLEASE TAKE NOTICE that Class Counsel for Plaintiffs Brach Family Foundation, Inc. and Mary J. McDonough, as Trustee of the Currie Children Trust, as individuals and on behalf of the certified Classes in this Action, move this Court before the Honorable Jesse M. Furman for an order an order for attorneys' fees, reimbursement of litigation expenses, and a service award for each of the Class Representatives.

In support of the motion, Class Counsel will rely upon the accompanying memorandum of law, the declarations attached thereto, and other written or oral argument as may be requested or permitted by the Court.

Dated: August 14, 2023

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Class Counsel

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MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARD

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TABLE OF DEFINED TERMS

Term	Definition
Agreement	Joint Stipulation and Settlement Agreement, Dkt. 701-2
APL	A defunct computer programming language developed in the 1960s
Ard Decl.	Declaration of Seth Ard
AUL II	Athena Universal Life II
AXA	AXA Equitable Life Insurance Company
BFF	Brach Family Foundation, Inc.
COI	Cost of insurance
COI Increase	AXA's COI Increase on policies with issues ages of 70 or above and face amounts of $1 million or above announced in October 2015
Contract Class	The nationwide breach-of-contract class, as defined in Dkt. 403
Currie Trust	Currie Children Trust, through its trustee
Illustration Class	The nationwide Section 4226 class, defined as amended in Dkt. 667
MG-ALFA	Milliman, Inc. actuarial modeling software that AXA used for the COI Increase
New York Illustration Sub-Class	The New York General Business Law § 349 sub-class, as defined in Dkt. 403
NYDFS	New York Department of Financial Services
Opt-Out Plaintiffs or Opt-Outs	Plaintiffs in the related actions pending before the Court, as identified in Dkt. 403
Rouse Decl.	Declaration of James Rouse
Section 4226	New York Insurance Law § 4226
SG or Class Counsel	Susman Godfrey L.L.P.
STOLI	Stranger-owned life insurance
TAC	Third Amended Complaint, Dkt. 188

INTRODUCTION

After seven years of hard-fought litigation—after prevailing on two motions to dismiss, a request for MDL consolidation, class certification, a Rule 23(f) petition, numerous discovery disputes, summary judgment, *Daubert* motions, and decertification—Class Counsel settled this highly-complex case for **$475 million** in settlement benefits. That is comprised of **$307.5 million** in cash, which is **77 percent** of all COI overcharges collected by AXA through March 31, 2023, plus another **$167.5 million** in non-cash benefits, as valued by a life insurance expert, including a guarantee for seven years not to increase COI rate scales. Rouse Decl. ¶ 12 & Ex. A (Report) at 16. Class Counsel respectfully applies for an award of attorneys' fees of $101,076,853, which is **21.5%** of the settlement benefits (or using a less-accepted and more conservative methodology, one-third of the cash component of the settlement in isolation), net of expenses. This figure is consistent with the range approved in other similar COI cases. *See, e.g.*, *Rogowski v. State Farm Life Ins. Co.*, 2023 WL 5125113, at *5 (W.D. Mo. Apr. 18, 2023) ("*State Farm COI*") (approving fee award of 1/3 of $325 million cash fund); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *10–11, *13, *24 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*") (approving fee award of 1/3 of the $40.5 million cash portion of the settlement); *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:8–10 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI I*") (approving fee of 30% of $91.25 million cash fund in case that settled *before* class certification).

This Settlement is outstanding by any measure, including under the "critical element" courts consider in awarding fees: the result obtained. *See Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002). The Settlement Fund easily bests what Judge McMahon called "one of the most remunerative settlements this court has ever been asked to approve" in a prior COI overcharge case where the cash fund equaled 68.5% of the overcharges. *Phoenix COI*, 2015 WL 10847814, at *10-11. There, Judge McMahon approved a fee award equal to 1/3 of the cash

portion of the settlement. *Id.* at *13, *24. In a COI case against John Hancock, Judge Gardephe remarked that a settlement reached before a ruling on class certification providing for 42% of the COI overcharges was "quite extraordinary" and awarded a fee of 30% of the cash fund. *See Hancock COI I*, Dkt. 164, at 20:8-10. Payment will be sent directly to class members, without any need to fill out claim forms, with no reversion to AXA. The average cash payment *per policy* is over $213,000 if all amounts requested herein are approved. Ard Decl. ¶ 38. This is far more remunerative than the less than $300 per policy average after fees in *State Farm COI*. 2023 WL 5125113, at *2, *5 ($325 million recovery, less $107.25 million in fees, across 760,000 policies).

This settlement is all the more extraordinary due to the substantial prospective relief it affords to class members, which would not have been achievable even had the Class prevailed at trial. In *Phoenix COI*, the Court adopted an expert analysis valuing similar types of non-monetary relief at $94.3 million, and included that amount in the "gross settlement value." *Phoenix COI*, 2015 WL 10847814, at *15 ("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."). Here, similar expert analysis concludes that the non-monetary relief in this case is worth $167.5 million and includes a guarantee by AXA not to impose a new, more expensive COI rate scale for ***seven years***, notwithstanding a worldwide pandemic that some insurance companies claim caused their costs to skyrocket and may lead to COI increases.[1]

Three examples of Class Counsel's vigorous prosecution of this case over the better part of a decade capture how SG was able to achieve this outstanding result for the Class, and how risky and complex the case was. *First*, SG's relentless approach to discovery–including 32 letters with the Court on discovery issues, with over 900 pages describing discovery disputes–uncovered

[1] AXA's expert, Timothy Pfeifer, has argued elsewhere that COVID has led to deterioration in mortality expectations. *E.g.*, *Meek v. Kansas City Life Ins. Co.*,19-cv-472 (W.D. Mo.), Dkt. 90-2 (Pfeifer Decl.) ¶ 54 (Oct. 21, 2021).

key documents that would not have otherwise been uncovered, and case-breaking admissions. One of the hottest documents was an email describing AXA's decision to alter its mortality assumptions for the group impacted by the COI increase because, in the words of an AXA actuary describing the motivations of the architect of the COI increase (Dominique Baede), that was the group of policies that Mr. Baede "wants to hit." Dkt. 492-21. This document—which was so hot that Mr. Baede lapsed into silence for several minutes when questioned about it by Class Counsel at his deposition—was not even produced in AXA's initial document production nor captured by AXA's search terms. The document came to light only after Class Counsel pressed for broader search terms and additional documents. Ard Decl. ¶ 7.

Class Counsel did not stop there. SG succeeded in compelling AXA to produce the complicated modeling used to devise its mortality assumptions, and then worked with its experts to prove that the altered assumptions, when corrected for in the models, had a massive impact on the COI increase. *Id*. ¶¶ 7, 12. This evidence featured heavily in the decision denying AXA's summary judgment motion. *See* Dkt. 596 at 28 ("Class Plaintiffs' modeling expert, James Rouse, constructed a 'Corrected ELAS 12' set of assumptions" and "found that removing these manipulations significantly decreased the resulting mortality assumptions for that group … generating greater profit from AUL II"). Non-party discovery by Class Counsel also proved enormously valuable, turning up key documents not produced by AXA. For example, Plaintiffs' subpoena to a reinsurer brought to light an AXA executive's phone call admitting that the COI increase was designed to "***target minimally funded UL*** at higher issue ages and larger amounts," something that AXA vigorously denied in the litigation. Dkt. 495 at 83-84; Ard Decl. ¶ 8.

Second, after an extensive discovery battle, Class Counsel secured access to Milliman's MG-ALFA actuarial software, which was used by AXA to model the COI increase and was

essential to allow Class Counsel and its experts to dig under the hood of AXA's COI increase and explain why it was improper. Ard Decl. ¶ 8. Because the decades-old actuarial models AXA used to price AUL II policies were all in a defunct computer programming language called APL, Plaintiffs' experts undertook the laborious task of learning APL and, with the aid of counsel, discovered a major error in the mortality assumptions AXA used. *See* Dkt 457-44 (Rouse Rept.) ¶¶ 52-69; Ard Decl. ¶ 12. This error was so significant that AXA had to confess to NYDFS that it made a critical error in analyzing the COI increase. Ard Decl. ¶ 12. AXA's attempt to conceal this confession to the NYDFS was uncovered by Class Counsel and led to this Court sanctioning AXA for its discovery misconduct. Dkt. 596 at 76-77.

Third, Class Counsel succeeded in advancing novel legal theories that maximized the Settlement. On the breach of contract claim, Class Counsel developed extensive evidence that the mortality assumptions used by AXA were not "reasonable," as the contract requires, even though AXA used those same mortality assumptions in its financial statements and AXA's outside auditor, PwC, concluded that AXA's mortality assumptions were reasonable, Dkt. 637-2 ¶ 22. That was an inherently risky and difficult claim to prove. Further, to Class Counsel's knowledge, this case is the first in history to obtain class certification of a Section 4226 claim. SG brought this claim shortly after this Court dismissed another Section 4226 claim for lack of Article III standing—an argument AXA repeatedly pressed in this ligation. *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424 (S.D.N.Y. 2015) (JMF), *aff'd*, 680 F. App'x 41 (2d Cir. 2017). These illustration-based claims unlocked additional settlement value because they threatened AXA with the prospect of paying Section 4226 penalties on top of returning COI overcharges. The claim was so important to AXA that AXA's counsel declined the Court's invitation to mediate while its request to reconsider the denial of AXA's motion to dismiss the Section 4226 claim remained pending. Dkt.

198 at 35:2-15. After the claim was certified, AXA hired one of the preeminent lawyers in the country—Seth Waxman from WilmerHale—to appeal that ruling to the Second Circuit, unsuccessfully. *See In re AXA Equitable Life Ins. Co. COI Litig.*, 2d Cir. No. 20-0248, Dkt. 3, 14.

All told, Class Counsel invested in this case over $22 million in time and money on a fully contingent basis, representing over 22,000 hours of work, with the real possibility of getting nothing in return. *See* Ard Decl. ¶¶ 42-43. Among other things, Class Counsel:

- Reviewed over 750,000 pages of documents and data sets and spreadsheets;
- Secured access to the proprietary APL and MG-ALFA actuarial software and untangled AXA's intricate financial modeling underlying the COI increase;
- Took and defended 28 highly technical depositions;
- Served 71 requests for production, 58 interrogatories, and 311 requests for admission;
- Responded to 53 requests for production, 45 interrogatories, and 66 requests for admission;
- Engaged in myriad meet and confers in connection with the parties' discovery requests;
- Issued numerous subpoenas to relevant third parties, including AXA's actuarial and financial advisors, yielding thousands of pages of valuable documents;
- Assisted in the preparation of eight detailed expert reports (including five rebuttal reports) totaling 488 pages supported by 5,350 pages of exhibits and appendices;
- Prepared class certification briefing for which the parties' filings totaled over 140 pages of briefing and over 11,000 pages of exhibits;
- Prepared summary judgment and *Daubert* briefing for which the parties filings totaled over 550 pages and nearly 8,000 pages of exhibits;
- Prepared deposition designations and exchanged trial witness lists;
- Prepared for and conducted a full-day mock trial with a nationally-renowned mock trial consultant and three panels of mock jurors; and
- Participated in four separate mediations with AXA.

Ard Decl. ¶¶ 6-13, 21-23, 26-27, 29.

This phenomenal effort was required due to the high risks posed by this litigation. Unlike many cases with large recoveries, Class Counsel did not have the luxury of piggybacking on a governmental investigation, whistleblower, or news exposé. To the contrary, NYDFS–which the insurance industry has criticized as being too "aggressive" in regulating New York insurance

companies [2]–concluded the COI increase was "**justified**" after investigating it. Dkt. 19-5. Sixteen other state regulators also reviewed the increase and they all concluded they had no objection to it. Dkt. 638-77 (Hudson Rpt.) ¶ 86. And one of Plaintiffs' main theories of breach was that AXA's ELAS 12 mortality assumptions, which AXA used in financial reports across its business, were falsely manipulated to suppress its true mortality assumptions. Proof of that theory requires meticulous, hard work. The strength of Plaintiffs' proof, in the face of these risks, is demonstrated by the strength of the settlement.

Factual developments during the case imposed further risk. AXA repeatedly argued that its post-increase mortality experience corroborated the assumptions AXA used to justify the COI increase, a defense that AXA promised to feature heavily at trial. *See* Dkt. 463 at 3, 12, 27-28. As to one of Plaintiffs' theories of liability, the Court said "AXA has the stronger of the competing interpretations" of the term "given class." Dkt. 596 at 19-20. In pressing its arguments, AXA was vigorously represented by highly-regarded litigation counsel from Milbank and WilmerHale. *Cf. In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2020 WL 7481292, at *3 (S.D.N.Y. Dec. 18, 2020) (fact that "Class Counsel faced worthy adversaries of high caliber" is "relevant to evaluating the quality of Class Counsel's work").

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 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 the jury

[2] *See, e.g.,* Erica Orden, "N.Y. Gov. Andrew Cuomo Nominates Former Aide as Banking Regulator," *WSJ*, Jan. 21, 2016 ("Throughout DFS's existence, the Cuomo administration has faced pressure from lobbyists for Wall Street and the insurance industry to back off its aggressive oversight…"), *available at* https://www.wsj.com/articles/n-y-gov-andrew-cuomo-nominates-former-aide-as-banking-regulator-1453393914; Dkt. 638-77 (Hudson Rpt.) ¶ 87.

returned a verdict of only $5 million, which was reduced even further to approximately $900,000 in post-trial proceedings. *See* Ard Ex. 1 (*Meek* Tr. at 69:9-16; Ard Ex. 3 (*Meek* verdict form); Ard Ex. 4 (*Meek* Dkt. 329 (post-verdict Order); Ard. Decl. ¶ 31. *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). In comparison, the 77% of COI overcharges achieved here is outstanding.

The Court recognized these ongoing risks in its order denying summary judgment, encouraging the parties to "settle this case without the need for an expensive and risky trial." *See* Dkt. 596 at 85. This settlement was reached after four mediations conducted by the Hon. Layn R. Phillips (Ret.) and David M. Murphy, two highly experienced mediators. Ard Decl. ¶¶ 29-30. Mr. Murphy, who led the last and ultimately successful mediation in May 2023, calls the settlement an "outstanding result." Dkt. 703 (Murphy Decl.) at ¶ 9.

Class Counsel achieved this outstanding result by risking everything and pushing this class action to the brink of trial: the parties settled only after the Court set a firm trial date for this Fall, and after they had exchanged deposition designations and trial witness lists. *See Phoenix COI*, 2015 WL 10847814, at *21 ("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.").

The requested awards, including reimbursement of $4,136,203.53 in expenses, $133,236.75 in expenses incurred by the Settlement Administrator, and a $100,000 service award for each of the two Class Representatives, are warranted by the enormous recovery achieved for the Class through the efforts of Class Counsel, and the enormous risks taken and overcome in litigation that lasted for years brought entirely on a contingency fee basis.

BACKGROUND

I. Class Counsel Investigated the COI Increase and Promptly Filed Detailed Complaints

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. SG, which is highly experienced in representing classes of policyowners seeking recovery of COI overcharges against insurers, Ard Decl. ¶¶ 3-4 & Ex. 1, performed the initial factual and legal investigation, and on February 1, 2016, filed this putative class action on behalf of BFF. On March 16, 2018, Plaintiffs filed the Third Amended Complaint, adding the Currie Trust as a plaintiff. Dkt. 188. On August, 13, 2020, the Court certified the Contract Class and Illustration Classes, appointed SG as Class Counsel, and appointed BFF and the Currie Trust as class representatives. Dkt. 403.

II. Class Counsel Engaged in Extensive Fact and Expert Discovery

Fact discovery lasted over three years. SG took and defended 28 highly technical fact depositions, some of them lasting two days. Ard Decl. ¶¶ 6, 9. SG issued 71 RFPs, 58 interrogatories, and 311 RFAs, and AXA issued 53 RFPs, 45 interrogatories, and 66 RFAs. AXA did not turn over many key documents in the case without a fight. *Id*. ¶¶ 6-7. SG engaged in rounds of meet and confers, including extended negotiations over search terms, custodians, and other issues. *Id*. ¶ 6. The parties filed 32 letters with the Court pertaining to discovery issues, with over 900 pages of attachments that laboriously detailed all the parties' competing positions. *Id*. ¶ 7.

AXA's document productions included the actuarial models for AUL II's original pricing and COI rates. *Id*. ¶¶ 7-8. These models were buried within MG-ALFA and APL. After issuing a subpoena and moving to compel, SG secured access to AXA's consultant's MG-ALFA actuarial software. Plaintiffs' experts also learned APL in order to decode AXA's original pricing models. *Id*. ¶¶ 7-8, 12. The result was that Class Plaintiffs uncovered critical errors in, and quantified the magnitude of, AXA's unreasonable assumptions underlying the COI increase. *Id*. ¶ 12.

Unsurprisingly, expert discovery in this highly technical case was a herculean task. Plaintiffs designated three opening experts: actuarial and modeling experts James Rouse and Jeremy Brown and damages expert Robert Mills. *Id*. ¶ 11. In response, AXA designated actuarial expert Timothy Pfeifer, regulatory experts Mary Jo Hudson and Howard Mills, and economist Glenn Hubbard. *Id*. In rebuttal, Plaintiffs produced reports from Rouse, Brown and Mills, as well as regulatory rebuttal experts Deborah Senn and Jeffrey Angelo. *Id*. All nine experts were deposed. Collectively, the parties produced 12 expert reports that totaled 893 pages, with over 5,633 pages of exhibits and appendices. *Id*. Class Counsel also retained several consulting experts, who provided invaluable assistance. *Id*. ¶¶ 11, 15. Plaintiffs' experts spent over 3,400 hours conducting their essential work in this case, with oversight and input from Class Counsel. *Id*., ¶ 11.

III. Class Counsel Overcame AXA's Hard-Fought Efforts at the Motion to Dismiss, Class-Certification, and Summary-Judgment Stages

Success in this case required Plaintiffs to prevail on extensive motion practice. From the jump, the Court ruled on two separate Rule 12(b)(6) motions and, later, a motion for reconsideration. Dkts. 63, 135, 261. Class Counsel filed 70 pages of briefing in support of class certification, supported by 68 exhibits totaling thousands of additional pages. Ard Decl. ¶ 17. AXA opposed Plaintiffs' motion, filing a 39-page opposition brief and 12-page sur-reply, supported by 252 exhibits. *Id.* At the Court's request, the parties also submitted supplemental briefing on claim-splitting issues. *Id*. On August 13, 2020, after over 140 pages of briefing (and over 11,000 pages of exhibits), the Court granted Plaintiffs' motion. Dkt. 403; Ard Decl. ¶ 18. The Illustration Class definition was amended, Dkt. 447. Class Counsel put together a comprehensive proposed notice plan, which the Court approved on October 2, 2020, over AXA's objections. *Id.* at 4–5.

The parties next briefed summary judgment and *Daubert*. Ard Decl. ¶¶ 21-22. Class Counsel were required to coordinate with multiple Opt-Out Plaintiffs to brief the *Daubert* motions

and took the lead on the key substantive issues. *Id*. ¶ 22. Collectively, Class Counsel filed 336 pages of briefing supported by 165 exhibits. *Id*. ¶¶ 21-22. AXA affirmatively sought summary judgment on all of Plaintiffs' claims and sought to exclude Plaintiffs' experts, filing 221 pages of briefing supported by 209 exhibits. *Id*. The ACLI (American Council of Life Insurers) submitted an amicus brief in support of AXA. Dkt. 474-1. After over 550 pages of briefing (and nearly 8,000 pages of exhibits), the Court, in an 86-page opinion, largely denied AXA's motion for summary judgment and motions to exclude Plaintiffs' experts. Dkt. 596; Ard Decl. ¶ 23. Shortly afterward, AXA moved for partial reconsideration of the summary judgment order and decertification of the Illustration Classes. The Court granted AXA's reconsideration motion, Dkt. 632, but on January 17, 2023, SG defeated AXA's motion to decertify, Dkt. 667. Ard Decl. ¶¶ 23-24.

IV. Class Counsel Vigorously Litigated the Case to an Impending Trial

Class Counsel made clear to AXA that Class Counsel was ready to try this case. On February 15, 2023, the Court informed the parties that this matter was set for trial starting October 30, 2023. *See* Dkt. 672. The parties exchanged deposition designations and witness lists, and were on the cusp of exchanging exhibit lists, when the Class reached this settlement with AXA. Dkt. 676 (schedule for trial and pre-trial filings). Class Counsel also conducted a mock trial. *See* Ard Decl. ¶ 26. The mock trial required weeks of preparation, including the creation of extensive multimedia presentations. *See id.* Class Counsel utilized the information it learned during the mock trial as part of settlement assessments and trial preparation. *See id.*

SG informed AXA that it would lead the consolidated trial. AXA faced the risk that its case against the Opt-Outs would be substantially weakened if Class Plaintiffs shared their actuarial and financial experts, who presented key theories that the other Plaintiffs' experts did not. Dkt. 683. The proof is in the pudding: the Opt-Out plaintiffs took the extraordinary step of asking this Court to *compel* Class Counsel's experts to serve as experts for the Opt-Outs, even though the Opt-Outs

had nothing to do with structuring or overseeing their work. *Id.* (Opt-Outs requesting "that the Court direct that [class experts] Brown and Rouse remain available as experts for the Opt-Out Plaintiffs, even if the Class Action settles."). AXA, knowing the strength of the Class expert analysis, required in the Settlement that Class Counsel not share its experts with the Opt-Outs. Dkt. 701-2 at 18. The threat of SG driving the trial presentation, and Class Plaintiffs' superior experts leading the technical presentations, substantially increased the settlement for the Class.

V. Class Counsel Negotiates the "Outstanding" Settlement

Over a period of nearly four years, the parties have exchanged numerous settlement offers and counter-offers, and formally mediated four separate times. *See* Ard Decl. ¶¶ 29-30. After the most recent mediation session on May 7, 2023, the parties continued to negotiate with the assistance of the mediator, and, a little over one week later, the parties accepted a mediator's proposal, and the long form settlement agreement was fully executed on June 12, 2023. *See* Ard Decl. ¶ 29. The mediator, Mr. Murphy, declares that both he and Judge Phillips (Ret.) agree that the proposed Settlement is an "outstanding result" for Class Members. *See* Dkt. 703 (Murphy Decl.) at ¶¶ 8-9. For the Class, the Settlement awards three main benefits.

1. **CASH**: A cash Settlement Fund of up to **$307,500,000**, which is ***77%* of all COI overcharges** collected from the Class Policies through March 31, 2023. *See* Ard Decl. ¶¶ 30 –31. The cash fund decreases by an agreed formula if any Substituted Illustration Class Member opts-out. As of August 11, 2023, there were no opt-outs. *See id.* ¶ 41.

2. **COI RATE INCREASE FREEZE**: A total and complete freeze on any COI rate schedule increase until May 16, 2030. Thus, even if AXA suffers from a future change in cost factors that would otherwise permit a COI rate increase—including any alleged surge in mortality due to the COVID-19 pandemic—AXA will not increase COI rate schedules.

3. **VALIDITY CONFIRMATION AND STOLI WAIVER**: AXA has agreed not to challenge the validity and enforceability of any Class member policies on STOLI grounds or misrepresentations in the application for such policies.

Ard Decl. ¶ 32; Dkt. 701-2. An eminently qualified expert, with extensive experience in the life insurance industry and with longevity-based products, has opined that this non-monetary relief is

worth $167.5 million to the Class, with the vast majority of that amount resulting from the COI freeze, *see* Rouse Decl. ¶ 12, Ex. A (Report). The COI freeze is particularly valuable because insurance companies have claimed that a huge spike in mortality due to the COVID-19 pandemic justifies a new COI increase due to mortality costs. *See, e.g*, Henry Montag, "Life Insurance During the Pandemic," July 14, 2020, available at *https://www.wealthmanagement.com/insurance/life-insurance-during-pandemic* (COVID-19 "will result in many insurers using this pandemic as a valid reason to increase their cost of insurance (COI), which will result in some insurers charging a higher premium than another, for a similar condition."). AXA's promise not to challenge the validity of any policies on STOLI grounds is also a valuable benefit, given that AXA successfully argued in this litigation that many policies have STOLI "red flags," Dkt. 403 at 20.

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 purposes of the doctrine are to provide "just compensation for class counsel," and to "encourage skilled counsel to represent" the class and "discourage future alleged misconduct of a similar nature." *See In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp.3d 394, 416 (S.D.N.Y. 2018).

B. The Requested Fee is Reasonable under the Preferred Percentage Method

1. The Percentage Approach is Favored

Under the percentage method, the "court sets some percentage of the recovery as a fee." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts routinely find that the percentage of the fee method is the preferred means to determine a fee because it "directly aligns

the interests of the class and its counsel." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 121 (2d Cir. 2005) (cleaned up); *Pantelyat v. Bank of Am., N.A.*, 2019 WL 402854, at *8 (S.D.N.Y. Jan. 31, 2019) (noting the "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" (cleaned up)). The percentage-of-the-fund approach recognizes that the quality of counsel's services is measured best by the results achieved and is most consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) (describing how this results-based method "better aligns the incentives of plaintiffs' counsel with those of the class members" and "accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel.").

Class Counsel's work, performed entirely on a contingent basis, enabled the Class to recover ***77% of the alleged overcharges*** in cash alone, a result that exceeds a COI settlement that was deemed "one of the most remunerative settlements this court has ever been asked to approve" (*Phoenix COI*, 68.5%) and another that was called "quite extraordinary" (*Hancock COI I*, 42%). *See also Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *1 (S.D.N.Y. Nov. 29, 2018) (noting "by counsel's calculation," counsel recovered "between 35% and 73% of their expected trial demand"). To best incentivize similarly outstanding and efficient results, the Court should apply the percentage approach.

2. A Fee of 21.5% of Settlement Benefits, Net of Expenses, is Reasonable

Here, Class Counsel is seeking a fee of $101,076,853, which is 21.5% of settlement benefits, or one-third of the cash Fund in isolation, net of expenses. The total settlement value, including nonmonetary and monetary benefits, is $475 million. *See* Ard Decl. ¶ 34. The cash Fund available to Class Members is $307.5 million. Plaintiffs' financial COI increase modeling expert

(Mr. Rouse)—who has deep expertise in longevity markets, and is fluent in AXA's COI increase and the record in this case, having served as one of Plaintiffs' merits experts—values the non-monetary relief at approximately $167.5 million. *See* Rouse Decl. ¶¶ 2-4, 12, Ex. A (Report) at 16. The vast majority of that benefit—$158.1 million—derives from the 7-year COI Rate Increase Freeze*, see id.* ¶¶ 7, 12, Ex. A (Report) at 13-16. Given AXA's assertion that there were alternative COI increases it might have imposed, or that it could have imposed even *larger* COI increases,[3] the 7-year COI Rate Increase Freeze negotiated by SG provides substantial benefits to the Class.

In calculating the overall settlement value, courts include the value of both the monetary and non-monetary benefits. *See* Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges 35 (3d ed. 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"* (emphasis added)).[4] In COI litigation, that includes the value of what was achieved here: the COI Rate Increase Freeze and the Validity Confirmation. *See Phoenix COI*, 2015 WL 10847814, at *15 & nn.7-8 ("In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of the both the monetary and non-monetary benefits conferred on the Class" (collecting authorities)). While the Court may

[3] *See* Dkt. 457-36 (Pfeifer Rpt.) ¶ 221 (AXA "based its COI Adjustment on only changes in mortality and investment income assumptions" but "could have chosen to reflect differences in premium funding and lapse rate assumptions as well . . . with a much larger resulting increase in COI rates"); Dkt. 463 at 31; Dkt. 551 at 14, 16-18, 23-28.

[4] *See also Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (district court properly determined settlement was fair based in part on valuation of "nonmonetary" benefits, principally a "price freeze"); *Sheppard v. Consol. Edison Co. of N.Y.*, 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) (approving fee award measured as a percentage of the "total settlement," including $6.745 million in monetary relief and "an estimated $5 million in non-monetary, injunctive relief"); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 478 (D.N.J. 2008) ("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."); *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (percentage of "benefit should be based on both the monetary and the non-monetary value of the settlement").

award fees as a percentage of the *gross* settlement benefit, SG has calculated its requested award *net* of expenses, consistent with this Court's fee award in *Alaska Elec.*, 2018 WL 6250657, at *3.

Courts in the Second Circuit and beyond regularly approve fee awards using percentages that are substantially higher than the percentage requested here, including in settlements larger on a gross basis than this one and with recoveries that were nowhere close to as remunerative as the 77% of overcharges secured in cash here, and that lack nonmonetary benefits. *See Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *10 (S.D.N.Y. Sept. 29, 2022) (awarding 1/3 of $165 million cash settlement fund as "reasonable within this circuit"); *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."); *In re Mun. Derivatives Antitrust Litig.*, 2016 WL 11543257, at *1 (S.D.N.Y. July 8, 2016) (awarding 32.83% of $101 million cash settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% of a $510 million cash settlement fund); *In re U.S. Foodservice, Inc. Pricing Litig.*, 2014 WL 12862264, at *3 (D. Conn. Dec. 9, 2014) (awarding 33.3% of $297 million cash settlement fund).[5]

Other COI-related cases in this District confirm the reasonableness of the fee request. *See Phoenix COI*, 2015 WL 10847814, at *13 (considering monetary and nonmonetary benefits, and

[5] *See also In re Pfizer Inc. Sec. Litig.*, No. 04-cv-09866 (LTS), Dkt. No. 727 at 2 (S.D.N.Y. Dec. 21, 2016) (awarding 28% of $486 million settlement); *In re Solodyn Antitrust Litig.*, No. 14-md-250, Dkt. 1180 (D. Mass. July 18, 2018) (awarding 33.3% of $72.5 million settlement); *In re CRT Antitrust Litig.*, 2016 WL 183285, at *3 (N.D. Cal. Jan. 14, 2016) (awarding 30% of $127.5 million settlement); *In re Apollo Group Inc. Sec. Litig.*, 2012 WL 1378677, at *9 (D. Ariz., Apr. 20, 2012) (awarding 33.33% of $145 million settlement fund). *See generally In re Gen. Motors LLC Ignition Switch Litig.*, 2020 WL 7481292, at *2 (citing with approval *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("The federal courts have established that a standard fee in complex class action cases . . . where plaintiffs['] counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater.")); *id.* (citing with approval T. Eisenberg, G. Miller & R. Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 950 tbl. 2 (2017) (study finding the mean and median percentage fees in class cases in the Southern District of New York from 2009 to 2013 were 27% and 31%, respectively)).

awarding "33–1/3% of the cash portion of the settlement"); *Hancock COI I*, Dkt. 146 ¶ 15, Dkt. 160 (approving fee of 30% of the cash fund, where settlement represented 42% of COI overcharges and no nonmonetary benefits); *Leonard, et al. v. John Hancock Life Ins. Co. of N.Y., et al.*, No. 18-CV-4994 (S.D.N.Y. May 17, 2022) ("*Hancock COI II*"), Dkt. 226 at 14-15 (approving fee representing 29.5% of cash fund and 19% of benefits, net of expenses ($27 million fee, on $93 million cash fund, and $143 million settlement benefit, less $1.5 million in expenses), even after opt-outs decreased settlement fund by about 25%); *Hanks v. Lincoln Life & Annuity Co. of N.Y*, 16-civ-6399 (PKC) (S.D.N.Y. June 29, 2022), Dkt. 306 at 4, 14 (approving fee representing 22% of cash fund, where the NYDFS had already found the insurer's COI increase to be unlawful, which was stopped in New York but then imposed in the rest of the country). It also compares favorably to COI-overcharge cases in other districts involving a similar cash component, but significantly less per-policy recovery. *E.g.*, *State Farm COI*, 2023 WL 5125113, at *2 (awarding 1/3 of $325 million on 760,000 policies, with average payout of less than $300 per policy).

The requested fee is also reasonable under a sliding-scale approach, which this Court used to determine that "a fee award of 26%—just above the range [of 15%-25%]—would be reasonable" in a $486 million settlement. *Alaska Elec.*, 2018 WL 6250657, at *3. The 21.5% fee requested here fits well within that scale, especially when the scale is adjusted upward given results in other COI litigation. Further, even if the requested fee is measured as a percentage of the cash fund alone (contrary to the authority cited above from this District), the fee is still appropriate, accounting for the non-monetary benefits as one of the exceptional features of this case militating in favor of a fee award above or at the high end of the "sliding-scale"—other such features including the "extraordinary complexity of this case and the sheer amount of work that counsel did in obtaining substantial relief on behalf of the class." *Alaska Elec.*, 2018 WL 6250657, at *3.

The requested fee is less than what Class Counsel could obtain on the open market. "[M]arket rates, where available, are the ideal proxy for . . . compensation." *Goldberger*, 209 F.3d at 52; *see also McDaniel v. Cty. Of Schenectady*, 595 F.3d 411, 422 (2d Circ. 2010) (focus should be "on mimicking a market"); *In re Lloyd's Am. Tr. Fund Litig.*, 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[.]"). Class Counsel regularly takes high-stakes non-class commercial cases on a contingent fee basis (e.g., patent, legal malpractice, antitrust, etc.), and it typically negotiates contingent fee arrangements in such cases, where the firm advances expenses, starting at 40% of the gross sum recovered, with increases to 45% and 50% based on the time of settlement and trial. *See* Ard Decl. ¶ 40. "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." *Phoenix COI*, 2015 WL 10847814, at *17 (quotation marks omitted); *see also Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623 (S.D.N.Y. 2012) (approving 1/3 fee request partly because clients "typically pay one-third of their recoveries under private retainer agreements").

C. A Lodestar "Crosscheck" Confirms Class Counsel's Request is Reasonable

When courts award a percentage of the fee, they may perform a lodestar "cross-check" to determine whether the proposed fee is reasonable. *See Goldberger*, 209 F.3d at 50. Using the percentage method ensures that the cross-check does not serve as a perverse "incentive for counsel to prolong litigation and maximize billable hours to arrive at a lodestar that does not operate as a cap on a percentage award." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 729 (2d Cir. 2023) (Jacobs, J., concurring). "Under 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); *In re Telik, Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008)

("[C]ounsel may be entitled to a multiplier of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved."). "[P]ositive multipliers are often awarded in cases within the Second Circuit involving large class recoveries." *In re Gen. Motors LLC Ignition Switch Litig.*, 2020 WL 7481292, at *3 (citing, *inter alia*, *Phoenix COI*, in which Judge McMahon calculated a "crosscheck" multiplier of 4.87, which she concluded was "well within the range of crosscheck multipliers awarded in this circuit," 2015 WL 10847814, at *18).

In this entirely contingent action, Class Counsel spent 22,392.70 hours representing a lodestar of $17,868,215, and advanced $ 4,136,203.53 in expenses. *See* Ard Decl. ¶¶ 42-43, 48.[6] Class Counsel's hourly rates are reasonable. The rates for Class Counsel and its staff who billed significant amounts of time to this case are lower than peer law firms litigating matters of similar magnitude. In a survey of AmLaw 50 law firms performed by PwC Product Sales, LLC and issued in June 2022, the median standard billing rate for equity partners was $1,374 and for associates was $895. *See id.* ¶¶ 45-46. Here, four of the six SG partners (all of whom are based in New York or Los Angeles) working on this matter have billing rates of $800—below the 2022 median standard billing rate for *associates*.[7] All of them bill at rates below the 2022 median rate for equity partners; the billing rates of all the associates who have worked on this case are also below the 2022 median standard billing rate for associates. *See id.* Courts routinely find SG's rates reasonable. *See, e.g.*, *Hancock COI I*, Dkt. 164 at 19:6–13 (accepting SG's rates as reasonable); *Phoenix COI*, 2015 WL 10847814, at *18 (finding SG's rates "reasonable" and "comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude").

[6] Lodestar is calculated at current hourly rates. *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" (cleaned up)); *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").

[7] All four of those partners—Mark Musico, Glenn Bridgman, Rohit Nath, and Halley Josephs—were associates when this case began, and have continued working on the matter since their respective promotions to partner. Their current rates are still under the median standard billing rate for associates. Ard Decl. ¶¶ 42, 45.

The requested fee award is equal to a lodestar multiplier of 5.66. *See* Ard Decl. ¶ 47. SG litigated this immensely complicated case efficiently, and expended *every* effort, and spared *no* cost, to obtain the highest possible settlement value. A 5.66 multiplier is well within the range of crosscheck multipliers approved in other COI cases obtaining outstanding results—which this settlement surpasses. *See State Farm COI*, 2023 WL 5125113, at *5 & n.8 (approving fee award of 1/3 of $325 million, with lodestar multiplier of 5.75); *Phoenix COI*, 2015 WL 10847814, at *18 (noting that courts in this Circuit "regularly award lodestar multipliers from 2 to 6 times lodestar," and approving 4.87 multiplier) (cited with approval in *In re Gen. Motors LLC Ignition Switch Litig.*, 2020 WL 7481292, at *3); *Hancock COI I*, Dkt. 164 at 19:14–20:11 (approving multiplier of 6.92 in light of "extraordinary" result).[8] The cross-check is even more reasonable considering that "after final approval there will be significant additional tasks relating to the Settlement, lowering the lodestar multiplier even further." *Pearlstein*, 2022 WL 4554858, at *10.

D. The *Goldberger* Factors Support Class Counsel's Fee Request

The "'*Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal-Mart*, 396 F.3d at 121. Those 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.

209 F.3d at 50. Each of these factors confirms that the requested fee is reasonable.

[8] *See also Pantelyat*, 2019 WL 402854, at *10 (stating that "[c]ourts regularly award lodestar multiples of up to eight times lodestar" and finding that a multiplier of 4.89 "falls within the realm of reasonableness"). The same is true in non-COI cases in this District, and nationwide. *See Sukhnandan v. Royal Health Care of Long Island LLC*, 2014 WL 3778173, at *14 (S.D.N.Y. July 31, 2014) ("courts award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re Telik*, 576 F. Supp. 2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court."); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (awarding $253 million in fees, in a case that settled before class certification, with a lodestar "multiple of just over 6"); *Osberg v. Foot Locker, Inc.*, No. 07-cv-1358-AT, Dkt. 423 (S.D.N.Y. June 8, 2018) (awarding 1/3 of $290 million settlement fund, with 4.8 multiplier).

1. 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 22,000 hours prosecuting this case over seven years, and that figure will increase as Class Counsel prepares for final approval proceedings and administers the Settlement. *See* Ard Decl. ¶¶ 6-27, 42-43.

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. To call this litigation complex would be an understatement. The technical details of AXA's mortality and financial modeling required a mountain of lawyers and experts to gather, study, and reverse engineer. AXA has also aggressively challenged liability, damages, and class certification, and the Court issued detailed opinions in response. *See, e.g.,* Dkts. 403, 596, 667.

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

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,* 576 F. Supp. 2d at 592 ("Courts have repeatedly recognized that 'the risk of the litigation' is a pivotal factor") (citation omitted). Risk can vary based on many factors, including the novelty and complexity of the claims, and the existence or stage of a relevant government action. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147 (S.D.N.Y. 2010).

The risks Class Counsel faced here were high. Policyowners lose COI cases on the pleadings, *see, e.g., Slam Dunk I, LLC v. Connecticut General Life Ins. Co.*, 853 F. App'x 451 (11th Cir. 2021), class certification, *see, e.g., Taylor v. Midland Nat'l Life Ins.*, 2019 WL 7500238 (S.D. Iowa May 3, 2019), summary judgment, *see e.g., Norem v. Lincoln Ben. Life. Co.* 737 F. 3d 1145 (7th Cir. 2013), and recently lost 95% of damages at trial, *Meek v. Kansas City Life Insurance*

Co., No. 19-CV-472 (W.D. Mo.). Trial is especially risky where it is, as here, a "battle of the experts". *See State of Chas. Pfizer & Co.*, 314 F. Supp. At 743-44 ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited[.]"), *aff'd*, 798 F.2d 35 (2d Cir. 1986). 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. The Court recognized the significant risks, urging the parties to "try to settle this case without the need for an expensive and risky trial." Dkt. 596 at 85.

Damages were also fraught with risk. AXA intended to present evidence that damages should be reduced by hundreds of millions to account for a 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, the class sought $18 million in damages but recovered only $900,000. *See* Ard. Decl. ¶ 31 & Exs. 2-4. And trial would not have been the end of the road. If Plaintiffs succeeded at trial, this case would likely be tied up in years of post-trial briefing and appeals.

Class Counsel undertook enormous risk in taking on this case—over $4 million in advanced expenses and over 22,000 hours in attorney time—all of which could have resulted in a substantial loss. Courts in the Southern District and the Second Circuit have recognized that this type of contingent risk is an "important factor" in evaluating the reasonableness of a fee. *City of Providence vs Aeropostale*, *Inc.*, 2014 WL 1883494, at *14 (S.D.N.Y. May 9, 2014); *Sukhnandan*, 2014 WL 3778173, at *11 (describing such risk as "the principal, though not exclusive, factor").

The risk was also high because Class Counsel sought large damages against a deep-pocketed insurance company, which hired some of the country's best-known law firms to defend

it. *See In re Abbott Labs. Sec. Litig.*, 1995 WL 792083, at *10 (N.D. Ill. July 3, 1995) (describing risk of litigating class action on contingency given "the formidable and nearly limitless resources of the opposition's nationally prominent law firms, and the amount of economic and personnel investment required"). The risk to SG was compounded because it spent more than seven years litigating this case. The delay in payment weighs strongly in favor of the requested fee. *See In re Domestic Drywall Antitrust Litig.*, 2018 WL 3439454, at *20 ("A significant factor in awarding the full one-third [33-1/3%] requested is the delay in payment."). The only certainty from the outset of this litigation was that there would be no fee or expense award, and an enormous write-off, if the case were lost.

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

"[T]he quality of representation is best measured by results[.]" *Goldberger*, 209 F.3d at 55. The "result obtained for the Class" is sometimes referred to as "[t]he critical element in determining the appropriate fee to be awarded class counsel out of a common fund." *Maley*, 186 F. Supp. 2d at 373 (internal quotations omitted); *see also Loc. 1180, Commc'ns Workers of Am., AFL-CIO v. City of N.Y.*, 392 F. Supp. 3d 361, 378 (S.D.N.Y. 2019) (identifying "degree of success" as the "most critical factor") (cleaned up)). The results here speak for themselves—after seven years of hard-fought litigation, SG was able to negotiate a Settlement with a cash component alone covering ***77% of the overcharges*** through March 31, 2023, as well as nonmonetary benefits with substantial additional value of $167.5 million. *See In re Bisys Sec. Litig.*, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (one way to measure result is to compare the "extent of possible recovery with the amount of actual verdict or settlement" (citation omitted)).

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

The fifth *Goldberger* factor, which addresses "the requested fee in relation to the settlement," also strongly supports approval. "[T]he 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, the proposed award is well within the range of fees found to be reasonable and awarded by courts in this Circuit.

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

The final *Goldberger* factor, which addresses "public policy considerations," supports approval of the requested fee. Public policy strongly favors incentivizing skilled private attorneys to undertake this type of litigation. *See, e.g.*, *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 . . . it is necessary to provide appropriate financial incentives.").

E. The Reaction of the Class Supports the Requested Fee

The Settlement Notice informed Class Members that Class Counsel would move the Court for an award of attorneys' fees up to 1/3 of the Settlement Fund and that Class Members could object to this request. *See* Dkt. 702 at 63. As of August 11, 2023, no Class Member has objected to Class Counsel's fee. Ard Decl. ¶ 36. The lack of objections, at least to date, weighs in favor of the requested award. *See Pearlstein*, 2022 WL 4554858, at *3 (citing small number of objections).

II. Class Counsel's Reasonable and Necessary Expenses Should Be Reimbursed

Class Counsel also requests reimbursement of $4,136,203.53 for out-of-pocket expenses reasonably and necessarily incurred in prosecuting this action, and $133,236.75 in expenses incurred by the Settlement Administrator. Ard Decl. ¶¶ 48-49. "[C]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2018 WL 3863445, at *1 (S.D.N.Y. Aug. 14, 2018).

The expenses are described in the papers filed in support of this application. *See* Ard Decl. ¶ 48. These expenses were reasonable and necessary, and have been spent 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[,] [] include[ing] fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with the litigation." *See In re Gen. Motors LLC Ignition Switch Litig.*, 2020 WL 7481292, at *2 (reimbursing such costs). The fact that Class Counsel was willing to spend its own money (using *no* outside litigation funding), where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary.

Class Counsel also requests that the Court approve the continued payment of Settlement Administration Expenses, as the Court ordered at preliminary approval. Dkt. 705 ¶ 5. The Settlement Administrator has incurred $133,236.75 through July 31, 2023, and will incur additional expenses as Settlement payments are distributed; this includes $93,871.59 in connection with the 2021 class notice, and $39,365.16 in expenses in connection with settlement administration, including the 2023 supplemental class notice. *See* Ard Decl. ¶ 49.

III. Service Awards for the Class Representatives are Appropriate

Class Counsel seeks a service award of $100,000 for each Class Representative, who devoted significant time working with Class Counsel, gathered hundreds of documents, spent many hours working with counsel to respond to paper discovery, prepared over multiple days for their depositions, and have stayed actively involved throughout this case. *See* Ard Decl. ¶ 10. Courts "consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation." *Anwar v. Fairfield Greenwich Ltd.*, 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012). The requested awards are in line with those awarded in other complex class actions,[9] and the two $100,000 requested service awards are a "minuscule portion" of total settlement value. *See Alaska Elec.*, 2018 WL 6250657, at *4.

[9] *See, e.g., Alaska Elec.*, 2018 WL 6250657, at *4 (granting $100,000 each to two class representatives and $50,000 to six others); *Pearlstein*, 2022 WL 4554858, at *11 (awarding $100,000 each to two class representatives).

The Second Circuit's recent decision in *Fikes*, 62 F.4th 704 (2d Cir. 2023), does not affect the Court's ability to grant service awards, as it has done in recent cases like *Alaska Electrical*. *See* Dkt. 705 at 8 (ordering Plaintiffs to address *Fikes* in this motion). *First*, and most critically, *Fikes* recognized that regardless of whether the 141-year-old case *Trustees v. Greenough*, 105 U.S. 527, 537 (1881), permits service awards, the Second Circuit is bound by its precedents confirming the continued availability of service awards in this Circuit. *See Hyland v. Navient Corp.*, 48 F.4th 110, 123-24 (2d Cir. 2022) (relying on *Melito v. Experian Mktg Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019), to reject argument that a case "decided decades before the adoption of Rule 23 . . . stands broadly for the proposition that a class representative cannot claim reimbursement from a common-fund settlement for his or her own service") (cleaned up). The Second Circuit declined to rehear *Fikes en banc*, No. 20-339, Dkt. 520 (Apr. 25, 2023), and has not otherwise revisited *Melito* and *Hyland*, which remain "precedents that we must follow." 62 F.4th at 721. *Second*, the Supreme Court has repeatedly denied petitions for certiorari raising the exact same issue, in this Term and in prior Terms, including the petition seeking review of this Circuit's *Melito* decision.[10] *Third*, the Supreme Court has recently recognized the availability of class action service awards. *E.g.*, *China Agritech v. Resh*, 138 S. Ct. 1800, 1810–11 & n.7 (2018).

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that this Court award (1) its requested fees in the amount of $101,076,853 plus a *pro rata* share of the interest earned on the Settlement Fund, (2) reimbursement of costs and expenses in the amount of $4,136,203.53, (3) expenses continuing to be incurred by the Settlement Administrator, including $133,236.75 to date, and (4) a $100,000 service award each for Plaintiff BFF and Plaintiff Currie Trust.

[10] *See Johnson v. Dickenson*, No. 22-389, *cert. denied*, 2023 WL 2959369 (Apr. 17, 2023); *Carson v. Hyland*, No. 22-634, *cert. denied*, 2023 WL 2959375 (Apr. 17, 2023); *Bowes v. Melito*, No. 19-504, *cert. denied*, 140 S. Ct. 677 (2019).

Dated: August 14, 2023

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CERTIFICATE OF SERVICE

I certify that on August 14, 2023, a true and correct copy of this document properly was served on counsel of record by ECF.

/s/ Mark Musico