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 FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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TABLE OF DEFINED TERMS

Term	Definition
"Settlement" or "Agreement"	Joint Stipulation and Settlement Agreement, Dkt. 701-2
APL	"A Programming Langugage," the name of 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
Intrepido-Bowden Decl.	Declaration of Gina Intrepido-Bowden Regarding Settlement Administration
MG-ALFA	Milliman, Inc. actuarial modeling software that AXA used for the COI Increase
Murphy Decl.	Declaration of David Murphy in Support of Motion for Preliminary Approval (Dkt. 703)
New York Illustration Sub-Class	The New York General Business Law § 349 sub-class, defined as amended in Dkt. 667
NYDFS	New York Department of Financial Services
Rouse Decl.	Declaration of James Rouse (Dkt. 714)
Section 4226	New York Insurance Law § 4226
SG or Class Counsel	Susman Godfrey L.L.P.
STOLI	Stranger-owned life insurance

INTRODUCTION

After more than seven years of relentless litigation, the Settlement provides a magnificent result for the owners of the 945 policies in the Classes. The total settlement value is $475 million. The $307.5 million cash fund considered alone accounts for 77 percent of the COI overcharges AXA collected from the Class Policies through March 31, 2023. The non-monetary benefits—a STOLI waiver and AXA's promise not to impose another COI rate hike on Class Policies for another seven years, even in the face of a worldwide pandemic—deliver another $167.5 million in value to the Classes.

The Settlement is a superb result under any metric and from any perspective. The Settlement Fund far exceeds what Judge McMahon approved in *Phoenix COI*, which she called "one of the most remunerative settlements this court has ever been asked to approve," where the cash fund was $40.8 million and equated to 68.5% of the overcharges. *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *10–11 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*"). Payment here will be sent directly to class members, without any need to fill out claim forms, with no reversion to AXA. And—with an average cash payment of $213,000 *per policy*, after the requested fees, expenses, and incentive awards—this settlement is well in line (and better) than other major COI settlements approved by courts. *See, e.g.*, *Rogowski v. State Farm Life Ins. Co.*, 2023 WL 5125113, at *2, *4-5 (W.D. Mo. Apr. 18, 2023) ("*State Farm COI*") ($217.5 million settlement, net of fees and expenses, across 760,000 policies, averaging less than $300 per policy); *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 "quite extraordinary" COI settlement providing for 42% of the alleged overcharges).

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 Classes 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 of the facts specific to this case concludes that the non-monetary relief is worth $167.5 million. Rouse Decl. ¶¶ 7-12. This 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]

No objections and no opt-outs after the Settlement was announced. After a highly effective notice program, among the owners of the 945 policies in the Classes, ***not one*** Class Member objected to the Settlement or Class Counsel's fee request. In addition, ***not one*** Substituted Illustration Class Member chose to opt out of the Settlement. This uniformly positive reaction from the highly sophisticated class members confirms the strength of this Settlement.

After the Court granted preliminary approval, the appointed Settlement Administrator mailed the Settlement Notice to the Settlement Class Members, using the addresses that AXA keeps in its files used for correspondence about the policies, supplemented with addresses of the entitlement holders obtained from subpoenas to securities intermediaries. Intrepido-Bowden Decl. ¶¶ 6-9. The Settlement Notice, among other things, described the monetary and non-monetary relief and releases, disclosed that Class Counsel may seek fees up to one-third of the cash fund considered in isolation, explained that Class Members have the right to file and serve any objections to the Settlement by August 28, 2023, and directed Class Members to the toll-free

[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).

number and class action website for any additional questions and updates. Intrepido-Bowden Ex. A. Substituted Illustration Class Members also received a Special Notice informing them of their right to opt out of the Illustration Class, and the deadline to do so. *Id*. The deadline to object to the Settlement or opt out passed on August 28, 2023, two weeks after Class Counsel filed its Motion for Attorneys' Fees (Dkts. 711-14). Dkt. 705 (Prelim. Approval Order) ¶ 18.

The uniformly positive reaction by the Classes is powerful evidence that the Settlement, Plan of Distribution, and Fee, Expense, and Service Award motions should be granted and approved as fair, adequate, and reasonable. *See, e.g., Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362, 374 (S.D.N.Y. 2002) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. . . . [T]his overwhelmingly positive response by the Class attests to the approval of the Class with respect to the Settlement and the fee and expense application." (cleaned up)); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *4 (S.D.N.Y. Sept. 23, 2019) ("[T]he Class's lack of objection should be taken to mean that the Class consents to Class Counsel's request and finds it reasonable.").

The resoundingly positive reaction of the Classes is especially significant here, because the Classes include numerous sophisticated investors and others with both the means and incentives to object or opt-out of any settlement that they did not consider fair, reasonable, or adequate. More than two-thirds of Class Members, by AXA's count, are sophisticated investors—including a litany of investment managers with billions in assets under management. *See, e.g.*, Dkt. 457-11 (AXA's Expert Rept. of Glenn Hubbard) at ¶ 109-10 ("[A]s of March 8, 2016, approximately 68 percent of the Contract Class Policies . . . were owned by entities that AXA Equitable classified as life settlement companies. . . . Life settlement investors are generally financially sophisticated,

particularly with respect to UL insurance products."); Dkt. 364 (AXA Cert. Opp.) at 2 (the classes "consist[s] mostly of sophisticated trusts, banks, and corporations who engage in life insurance arbitrage . . . These sophisticated proposed class members often used third-party consultants and advisors to determine which Policies to buy, how much to pay, and in what manner to fund and maintain the Policies.").[2] Class Members also include major corporations (*e.g.*, a Fortune 500 food and beverage company, an international automotive parts distributor, and a privately-held manufacturer) and high-net worth individuals (*e.g.*, owners of large businesses, such as an MLB and NBA franchise). Ard Decl. ¶ 50. Many of these large and sophisticated Class Members had millions of dollars at stake in this litigation, and will receive substantial sums under the Settlement.

"Courts have reasoned that favorable responses by sophisticated Class members is persuasive, since those class members are capable, independent of the assistance of Class Counsel, of evaluating the reasonableness of all aspects of a class action settlement." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *13 n.1 (D.N.J. Nov. 9, 2005) (citing cases); *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *6 (S.D.N.Y. July 21, 2020) ("It is significant that no institutional investors . . . have objected to the Settlement. Institutional investors are often sophisticated and possess the incentive and ability to object. Accordingly, the absence of objections by these sophisticated class members is further evidence of the fairness of the Settlement."). Judge McMahon in *Phoenix COI* likewise agreed: "When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they

[2] *See also* Dkt. 463 (AXA's MSJ) at 16 ("Most of the Policies' Registered Owners are and were at the time of the COI Adjustment **sophisticated investors** who . . . perceived an arbitrage opportunity . . . . At least **67% of the Registered Owners in the Policy-Based Claims Class** and at least **85% of the Registered Owners in the Illustration-Based Claims Class** are investors"); Dkt. 551 (AXA MSJ Reply) at 43 ("most of the policyholders affected by the COI Adjustment are **investors (primarily financial institutions)**, not elderly individuals"); Dkt. 364 (AXA Cert. Opp.) at 10 ("They [investor class members] are comprised **mostly of entities and persons of wealth and sophistication**, including Wells Fargo and a diverse array of other **sophisticated trusts, banks, corporations, and individuals**—speculators who buy and sell Policies through a variety of unique and sophisticated means—usually with intervening advice from third-party consultants."). Unless otherwise specified, all emphasis thoughout this memorandum is added.

find unreasonable, the lack of objections 'indicates the appropriateness of the fee request.'" *Phoenix COI.*, 2015 WL 10847814, at *23 (cleaned up). This universal endorsement is unsurprising given the strength of the result.

Settlement Is Outstanding In Light of Substantial Risks It Resolved. With this Settlement, the Classes get paid now and avoid what this Court called "an expensive and risky trial," Dkt. 596 at 85. Establishing liability and damages was anything but guaranteed. The trial in this case would largely turn on a battle of the experts, which is always uncertain. *Phoenix COI*, 2015 WL 10847814, at *9 (citing *In re NASDAQ Market–Makers Antitrust Litig*., 187 F.R.D. 465, 476 (S.D.N.Y.1998): "'[d]amages at trial would inevitably involve a battle of the experts' and noting that it is 'difficult to predict with any certainty which testimony would be credited"). The risks did not end there. At trial, AXA would argue that NYDFS concluded the COI Increase was "unobjectionable" and "justified," that its independent auditor PricewaterhouseCoopers concluded that the key disputed mortality assumption (ELAS 12) was "within the range of reasonable assumptions," and that the massive spike in mortality caused by COVID-19 corroborated the reasonableness of AXA's mortality predictions underlying the COI Increase. Dkt. 463 at 1, 26. And even if liability were established, convincing a jury to award hundreds of millions in damages presented yet another hurdle. Case in point: in a recent COI class action trial, the jury returned a verdict of only ***28 percent*** of the alleged COI overcharges, an amount the court later reduced to less than ***6 percent***. Ard Decl. ¶ 31 & Ex. 2 (*Meek* Tr.) at 69:9-16; Ard Ex. 3 (*Meek* verdict form); Ard Ex. 4 (*Meek* Dkt. 329; post-verdict Order). And even if Plaintiffs prevailed at the first phase of trial, they would still face a lengthy and uncertain future. This uncertainty would include a second phase of trial on causation and remedies for the illustration-based claims, which would undoubtedly trigger another motion for decertification. *Phoenix COI*, 2015 WL 10847814, at *9

("The prospect of a battle at trial and establishing recovery for all Class members without decertification adds substantial risk to Plaintiffs' claims."). This would also include a lengthy appellate process, where AXA will contest issues of contract interpretation, the first ever certification of a Section 4226 class, and the numerous other dispositive and *Daubert* motions that AXA filed but were denied by this Court. In light of those risks and delays, this Settlement refunding ***77 percent*** of the alleged COI overcharges AXA imposed is all the more outstanding.

Counsel's Efforts and Skill Generated the Best Possible Result for the Classes. Plaintiffs were able to achieve this extraordinary result only through tenacious, high-quality work over the better part of a decade. During fact and expert discovery, Plaintiffs obtained and reviewed hundreds of thousands of documents, spanning nearly a million pages; took and defended nearly forty depositions; served 26 subpoenas; and took apart AXA's underlying actuarial models for AUL II, which required Plaintiffs to file a motion to compel against third party consultant Milliman, and also required Plaintiffs' experts to learn an antiquated programming language called APL. All of this persistence paid off: Plaintiffs uncovered key evidence and admissions on liability issues, including the smoking-gun email admitting that the Classes were targeted for a rate hike because they were "the group that [COI Increase architect] Dominique [Baede] wants to hit," and key liability theories discovered deep in the weeds of AXA's actuarial modeling that this Court cited in denying summary judgment. Ard Decl. ¶¶ 7-15. Plaintiffs also achieved this result through continued success in the litigation, on motions where failure would have signaled an end to the litigation: 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. ¶¶ 16-24. And

by waiting until the eve of trial to settle, after the Court denied AXA's motion for decertification, Plaintiffs' counsel put everything on the line to get the best result for the class. *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.")

In parallel with these efforts, and demonstrating that Plaintiffs were never satisfied to agree to repeated offers that were lower than the best possible result, Plaintiffs engaged in negotiations spanning over four years and four formal mediation sessions—under the supervision of two experienced mediators, Judge Layn Phillips (Ret.) and David Murphy at Phillips ADR. As Judge Phillips and Mr. Murphy have confirmed, these negotiations were "at arm's length," with each party acting "carefully, deliberately and in good faith to advance the best interests of their clients." Murphy Decl. ¶ 8. The Settlement achieved, according to Judge Phillips and Mr. Murphy, was an "outstanding result" for the Classes. *Id.* For all these reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

BACKGROUND

I. The COI Increase

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 filed this case on behalf of Plaintiff BFF on February 1, 2016. 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. The Class Action Litigation

Plaintiffs and Class Counsel have prosecuted this case for almost a decade, through motions to dismiss, class certification, fact and expert discovery, motions for reconsideration, a motion for partial decertification, a motion for summary judgment, and *Daubert* motions.

Fact discovery alone lasted over three years. Plaintiffs and their experts examined over 750,000 pages of documents, including thousands of spreadsheets, actuarial models and assumptions, and tens of thousands of pages of communications among AXA's current and former actuaries. In total, Plaintiffs issued 71 RFPs, 58 interrogatories, and 311 RFAs. Plaintiffs in turn responded to 53 RFPs, 45 interrogatories, and 66 RFAs. Ard Decl. ¶¶ 6-7, 10. Plaintiffs also took and defended 28 technical fact depositions, some of them lasting two days. Ard Decl. ¶ 9.

Securing and reviewing the critical documents in this case was an enormous undertaking. Because of the complexity and importance of the extensive discovery issues in this case, Class Counsel proposed an innovative procedure (Dkt. 181), which the Court adopted, under which the parties provided monthly status updates that exhaustively summarized all the percolating discovery discussions and disputes. Ard Decl. ¶ 7. This procedure amounted to a huge undertaking: the parties filed an astounding 32 letters with the Court pertaining to discovery issues, and attached *900 pages* of lawyer-drafted discussion that laboriously detailed the parties' positions and the status of meet and confer efforts. *Id*. This effort proved hugely successful: the parties were able to resolve the vast majority of their disputes, without asking for judicial intervention, and Plaintiffs obtained key documents cited by this Court on summary judgment through this process. The success of the monthly status report procedure was evident almost immediately: The parties filed their first monthly status letter in April 2018, where Plaintiffs addressed AXA's delays in producing documents. Dkt. 214. Just two months later, and more than two years after the lawsuit was filed, AXA produced the smoking-gun "Dominique wants to hit" email. Ard Decl. ¶ 7.

Reviewing AXA's highly-technical document production was an even greater challenge. The actuarial models underlying the original pricing of AUL II and the COI Increase were buried in MG-ALFA, a proprietary Milliman software, and APL, an ancient programming language. Ard Decl. ¶¶ 7-8. After successfully moving to compel on a subpoena, Plaintiffs secured access to the MG-ALFA models. Plaintiffs' experts also learned APL in order to decode AXA's original pricing models. *Id*. ¶¶ 7-8, 12. The outcome was that Plaintiffs uncovered critical errors in AXA's assumptions underlying the COI increase. *Id*. ¶ 12. The Court later denied AXA's motion for summary judgment on Plaintiffs' claim that these errors rendered AXA's mortality assumptions underlying the COI increase unreasonable. *See* Dkt. 596 at 31-32

The superb result was also driven by a tremendous amount of expert work. Plaintiffs' experts spent over 3,400 hours on this case, with detailed oversight from Class Counsel, and collectively, the parties produced 12 expert reports that totaled 893 pages, with over 5,633 pages of exhibits and appendices. Ard Decl. ¶¶ 11, 15. 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 experts Deborah Senn and Jeffrey Angelo. *Id*. All nine experts were deposed. Class Counsel also retained several consulting experts, who provided invaluable assistance. *Id*., ¶ 15.

The excellent result was also maximized by Plaintiffs' repeated successes in important motion practice. At the outset, the Court denied two separate Rule 12(b)(6) motions and a motion for reconsideration. Dkts. 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. In 2021,

the parties briefed summary judgment and *Daubert*, with over 500 pages of briefing and nearly 8,000 pages of exhibits. Ard Decl., ¶ 23. In an 86-page order, the Court largely denied AXA's motion for summary judgment. Dkt. 596. The Court also denied AXA's motions to exclude Plaintiffs' experts. Dkt. 596. Plaintiffs, however, were successful in precluding AXA and its experts from discussing certain critical communications between AXA and NYDFS related to the COI Increase. Dkt. 596 at 76-77. Shortly after the Court denied AXA's motion for summary judgment, 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 later denied AXA's motion to decertify the Illustration Classes. Dkt. 667.

III. The Classes and Notice and Opt-Out Period After Class Certification

On August 13, 2020, the Court granted Plaintiffs' motion and certified the Contract Class, Illustration Class, and New York Illustration Subclass. Dkt. 403; Dkt 447 (as amended). After the Classes were certified, the Court appointed JND as notice administrator and approved the form and manner of notice consisting of 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 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. Dkt. 702 (Intrepido-Bowden Decl.) ¶ 14. The 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 litigation optout period. *Id.* ¶ 16.

In denying AXA's motion for decertification discussed above, the Court modified the Illustration Class and the New York Subclass to substitute entitlement holders of Illustration Class policies for securities intermediaries, Dkt. 667 at 7. After the Illustration Classes were modified,

Plaintiffs served subpoenas on registered-owner securities intermediaries for identity and contact information of relevant entitlement holders to mail the Special Notice. Ard Decl. ¶ 25.

IV. Settlement Negotiations and the Settlement Agreement

Over a period of nearly four years, the parties exchanged numerous settlement offers and counter-offers, and attended four formal mediation sessions under the supervision of Judge Phillips and Mr. Murphy. *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, accepted a mediator's proposal. The long form Settlement Agreement was fully executed on June 12, 2023. *See* Ard Decl. ¶ 29. Both Mr. Murphy and Judge Phillips agree that the proposed Settlement is an "outstanding result" for Class Members. *See* Murphy Decl. at ¶¶ 8-9.

A. Monetary and Nonmonetary Relief for Class Members

The Settlement awards relief worth **$475 million** to the Classes, with three main benefits:

1. **CASH**: A cash Settlement Fund of **$307,500,000**, which is ***77% of all COI overcharges*** collected from the Class Policies through March 31, 2023. *See* Ard Decl. ¶¶ 30 –31.

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. James Rouse—who is the co-founder and chief investment officer of Demeter Capital, has more than two decades of experience in the life insurance industry, and offered opinions in this case on which the Court relied in denying summary judgment (*e.g.,* Dkt. 596 at 28)—has opined that the Settlement's non-monetary relief is worth $167.5 million to the Class, with the COI freeze valued at $158 million and the validity confirmation and STOLI waiver valued at $9.5 million. *See* Rouse Decl. ¶ 12 & Ex. A. The COI freeze is particularly valuable

because insurance companies have claimed that a huge spike in mortality due to the COVID-19 pandemic justifies new COI increases. *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 (Cert. Order) at 20.

B. Release

Once the Settlement becomes final, the Releasing Parties will release the Released Parties from "all Claims that were or could have been asserted in the Action, including any claims previously reserved for absent class members, that arise out of the identical factual predicate of the allegations in the Action concerning the Policies, COI Rate Increase, or illustrations concerning the Policies." Dkt. 701-2 § 1.50. The Classes will not, however, release any "new Claims that were not and could not have been asserted against AXA Equitable in the Action arising out of any new COI rate schedule increase by AXA Equitable that occurs after May 16, 2023 (the date the parties agreed to settlement terms)." *Id.* § 1.22.

C. Preliminary Approval and Class Notice

The Court preliminarily approved the Settlement on June 22, 2023, concluding that "it will likely be able to approve the Settlement under Rule 23(e)(2)." Dkt. 705. The appointed Settlement Administrator, JND, sent notice of the Settlement to Class Members on July 13, 2023. Intrepido-Bowden Decl. ¶ 6. Pursuant to the preliminary approval order, JND also sent special notice to Substituted Illustration Class Members—who had not previously been sent class notice or been given the opportunity to opt out—notifying them of their right to opt out of the Illustration Class.

Id. The deadline to file objections to the Settlement and for Substituted Illustration Class Members to opt out was August 28, 2023. No objections to the Settlement were lodged by August 28, 2023 (or through today). Nor did any Substituted Illustration Class Member opt out of the Illustration Classes. Intrepido-Bowden Decl. ¶¶ 17-20.

D. Awards, Costs, and Fees

Class Counsel filed its motion for fees, expenses, and a service award on August 14, 2023. *See* Dkts. 711-15. Class Counsel sought 21.5% of the total value of the Settlement net of expenses (or using a more conservative and less-accepted measure, 1/3 of the net Cash Fund), the amount of incurred litigation expenses, and a $100,000 service award for each of the Currie Trust and BFF. *Id*. No Class Member filed an objection or otherwise objected to the motion, either by the objection deadline or thereafter. Intrepido-Bowden Decl. ¶¶ 19-20.

V. Distribution Plan

The proposed plan of distribution, as set forth in the notice papers and which is described in the Ard Declaration, distributes proceeds directly to Class Members on a *pro rata* basis without the need for a claim form. Ard Decl. ¶¶ 37-38; Dkt. 701-5 (Plan of Alloc.). Under this methodology, each class member's *pro rata* share is calculated by dividing the sum total of damages for that Class Member by the sum total of damages for the Classes, as calculated under the Mills' methodology through March 31, 2023. *Id.* The resulting percentage will be used to calculate each Class Member's share of the Net Settlement Fund. *Id.*

Proceeds will be mailed directly to class members. *Id.* For members of the Contract Class, checks will be mailed directly to the address of the registered owner that AXA maintains on file as of the date the Settlement is approved. Ard Decl. ¶ 37; Dkt. 701-5 (Plan of Alloc.) ¶ 4. For Illustration Class Members, checks will be sent to the owner (either registered owner or, as applicable, entitlement holder) of the relevant policy as of October 1, 2015, as reflected in AXA's

records or, for entitlement holders, the records of securities intermediaries. Ard Decl. ¶ 37; Dkt. 701-5 (Plan of Alloc.) ¶¶ 5-6(a). Within one year plus 30 days after the date the Settlement Administrator mails the proceeds, to the extent feasible and practical, any funds remaining in the Settlement Fund shall be re-distributed on a *pro rata* basis to Class Members who previously cashed their checks. *See* Dkt. 701-5 (Plan of Allocation) ¶ 7.

ARGUMENT

I. Legal Standard

Federal courts strongly favor and encourage settlements, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116–17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context." (cleaned up)). The approval of class action settlements is governed by Rule 23(e)(2), which was recently revised in 2018. Rule 23(e)(2) provides:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> > (A) the class representatives and class counsel have adequately represented the class;
> >
> > (B) the proposal was negotiated at arm's length;
> >
> > (C) the relief provided for the class is adequate, taking into account: (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); and
> >
> > (D) the proposal treats class members equitably relative to each other.

As the Second Circuit recently explained in *Moses v. New York Times Co.*, -- F.4th ---, 2023 WL 5281138, at *4 (2d Cir. Aug. 17, 2023), "[t]he first two factors are procedural in nature and the latter two guide the substantive review of a proposed settlement." *Id.* at *4.

Before the 2018 Amendments, courts in this Circuit evaluated the fairness and reasonableness of class action settlements with respect to the nine factors set forth in *City of Detroit v. Grinnell Corp.*, which largely overlap with the factors codified in Rule 23(e)(2). 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), abrogated on other grounds by *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). The 2018 revision was not intended "to displace" any of the *Grinnell* factors, "but rather to focus the court and the lawyers on the core concerns of procedure and substance.'" *Moses*, -- F.4th --, 2023 WL 5281138 at *4. Thus, the *Grinnell* factors, set forth below, are still relevant to the evaluation of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (cleaned up). In granting preliminary approval, the Court already held that "it will likely be able to approve the Settlement under Rule 23(e)(2)." Dkt. 705 ¶ 2.[3]

II. The Proposed Settlement Is Procedurally Fair

A. Rule 23(e)(2)(A): Adequacy of Plaintiffs and Class Counsel

Rule 23(e)(2)(A) supports final approval. "Determination of adequacy typically entails inquiry as to 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., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (cleaned up). The Court has already recognized that Plaintiffs BFF and the Currie Trust and Class Counsel have and will adequately represent members of the Classes. *See* Dkt. 403 at 14 ("the Court

[3] Because the Classes were previously certified (Dkt. 403, 667), the Court does not need to recertify a class. Dkt. 705 ¶¶ 12-13.

is satisfied that all class members are adequately represented"); *id.* at 16, 29-30, 36. Because Plaintiffs share an overriding common interest with all other Class Members in maximizing the recovery, Plaintiffs' interests are aligned with the Classes. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004). Plaintiffs and Class Counsel have continued to vigorously and competently litigate this case. Ard Decl. ¶¶ 6-31.

B. Rule 23(e)(2)(B): Arms'-Length Negotiation

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." While this factor is not dispositive and does not attach a presumption of fairness, "the arms-length quality of negotiations remains a factor in favor of approving the settlement (one whose absence would count significantly against approval)." *Moses*, -- F.4th --, 2023 WL 5281138 at *5.

Here, the Settlement was arm's-length, and is the product of a hard-fought negotiation process that spanned four years. *See* 4 Newberg and Rubenstein on Class Actions § 13:50 ("there appears to be no better evidence of [an arm's-length] process than the presence of a neutral third party mediator"); *cf. Moses*, -- F.4th --, 2023 WL 5281138 at *5 (noting "district court's careful consideration of settlement's procedural fairness," including the use of "a neutral mediator"). The parties held four all-day mediation sessions under the supervision of two of the most respected and neutral mediators in the country. Even then, the case did not settle until *after* the last mediation. *See* Ard Decl. ¶¶ 29-30; Murphy Decl. ¶ 6. Judge Phillips and Mr. Murphy described the mediation process as "at arm's length," with both parties negotiating "carefully, deliberately, and in good faith to advance the best interests of their clients." Murphy Decl. ¶ 8. Rule 23(e)(2)(B) therefore supports final approval of the Settlement.

III. The Proposed Settlement Is Substantively Fair

Rule 23(e)(2) "requires courts to expressly consider two core factors when reviewing the substantive fairness of a settlement: the adequacy of the relief provided to a class and the equitable

treatment of the class members." *Moses*, -- F.4th --, 2023 WL 5281138, at *5. Under both factors, the Settlement is substantively fair, reasonable, and adequate.

A. Rule 23(e)(2)(C): Adequacy of Relief Provided to the Class

Rule 23(e)(2)(C) requires that "the relief provided for the class is adequate, taking into account" four subfactors: "(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 district court's analysis of these factors requires "review [of] both the terms of the settlement and any fee award encompassed in a settlement agreement in tandem." *Moses*, -- F.4th --, 2023 WL 5281138, at *6 (citations and quotation marks omitted)).

As set forth below, each of the four Rule 23(e)(2)(C) subfactors—and related *Grinnell* factors—weighs sharply in favor of approving the Settlement.

(i) Rule 23(e)(2)(C)(i) Subfactor: Costs, risks, and delay

To assess adequacy under Rule 23(e)(2)(C)(i), "courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." Fed. R. Civ. P. 23, 2018 Advisory Note, Paras. (C) and (D). This inquiry overlaps with several *Grinnell* factors, each discussed in turn (*Grinnell* Factor 1; Factors 4-5; and Factors 8-9). ***First***, the "complexity, expense and likely duration of the litigation," *see Grinnell*, 495 F.2d 448 at 463 (Factor 1), supports final approval. Judge McMahon found *Phoenix COI* "indisputably complex," and her reasoning is instructive here:

> The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards, the original and revised pricing assumptions used by Phoenix for the PAUL insurance products at issue, and what it means to "recoup past losses" or "discriminate unfairly" within a "class" of insured. These complex claims were bitterly fought, as Defendants

> developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuarial issues for the key questions. The court has issued opinions of great length of complexity in connection with motions to dismiss and for summary judgment.

2015 WL 10847814, at *6. This case, if anything, has been far more complicated than *Phoenix COI*. As in *Phoenix COI*, the Court here has issued detailed, complex opinions in response to the parties' motions to dismiss, class certification, and summary judgment, and trial would have featured dueling actuarial experts testifying about actuarial standards, insurance principles, and technical actuarial assumptions, documents, and data. Unlike *Phoenix COI*, this case involved a lot more money and the first-of-its-kind certified nationwide class alleging violations of Section 4226. A trial on the illustration claims would have involved resolving novel questions of law, examining conduct dating back nearly 20 years, and dueling experts on a whole different set actuarial practice standards. *See* Dkt. 596 at 43-49. Even if Plaintiffs prevailed at trial on the contract claim, the illustrations claims, or both, this case would likely be tied up in years of post-trial briefing and appellate practice resolving numerous legal issues. *See Phoenix COI,* 2015 WL 10847814, *6 ("[P]ost-verdict and appellate litigation would likely have lasted for years.").

Second, the *Grinnell* factors of "the risks of establishing liability" and "the risks of establishing damages," 495 F.2d at 463 (Factors 4–5), also support final approval. These factors do "not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Glob. Crossing*, 225 F.R.D. at 459.

The Court is intimately familiar with the risks of this case. The Court's order denying summary judgment instructed the parties that "the Court is firmly of the view that the parties should try and settle this case without the need for **an expensive and risky trial**." Dkt. 596 at 85. Indeed, in denying summary judgment, the Court recognized that, as to Plaintiffs' "given class" theory,

"AXA has the stronger of the two competing interpretations of the term." Dkt. 596 at 20. Plaintiffs at trial would have faced a litany of risks in establishing liability on their other theories and claims as well. At trial, AXA would have tried to tell the jury—as it told the Court repeatedly throughout this case—that NYDFS reviewed the COI Increase and concluded, in writing, that it was "justified," and that another *16 other state regulators* reviewed the COI Increase and determined they had no objection. Dkt. 19-5; Dkt. 638-77 ¶ 86. Further, one of Plaintiffs' central theories of liability was that AXA's ELAS 12 mortality assumptions were unreasonable, but AXA argued that its independent auditor, PricewaterhouseCoopers, determined those same assumptions were within the "range of reasonable assumptions." Dkt. 463 at 26. These and many other issues would have been decided by a "battle of the experts" at trial—a battle that is inherently risky. *See 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).

Even if Plaintiffs established liability, Plaintiffs faced still further risk on damages. AXA intended to present evidence that damages should have been reduced by hundreds of millions of dollars. Dkt. 596 at 36-37. The risk of a significantly lower-than-expected recovery in COI cases is not hypothetical, as the result in the recent *Meek* class trial—where Plaintiffs obtained less than 6% of the damages they sought—demonstrates. Ard Decl. ¶ 31. Against these substantial risks, recovering 77 percent of COI overcharges and $475 million in total value is an incredible success. *See Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[T]he litigation risks attendant to these possibilities weighed heavily in favor of the fairness of a settlement under which plaintiffs achieved substantial benefits[.]").

Finally, the 8th and 9th *Grinnell* factors—"the range of reasonableness of the settlement

fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," *see* 495 F.2d at 463—strongly support final approval. The Settlement's $475 million in monetary and nonmonetary relief—in the form of a cash fund, seven-year COI rate freeze, and validity confirmation and STOLI waiver—provides a tremendous recovery. *See* Ard Decl. ¶¶ 31-39. The cash fund alone, totaling $307,500,000, is equal to 77% of past COI overcharges. And it represents multiples of potential damages under AXA's damages alternatives, which would have reduced or wiped out entirely the recovery for Class Members. *See* Dkt. 457-11 at ¶¶ 200-27. Further, the nonmonetary relief—valued at $167.5 million—adds significant value that would have been unavailable even if Plaintiffs prevailed at trial. *See* Ard Decl. ¶ 34; Rouse Decl. ¶ 12.

This settlement is far above the threshold for reasonableness, particularly in light of the significant litigation risks discussed above. In *Phoenix COI*, Judge McMahon held that a cash award of 68.5% of past damages was "one of the most remunerative settlements this court has ever been asked to approve," *see* 2015 WL 10847814, at *11, and, in other types of cases, courts routinely approve settlements with far lower-percentage awards. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (settlement 10.5% 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) (cleaned up). And Class Counsel's support of the settlement, *see* Ard Decl. ¶¶ 3, 39, is given considerable weight because Class Counsel is 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." (cleaned up)), particularly when the settlement occurs on the eve of trial, after years of litigation, and the strength of the claims have been tested with the Court through summary judgment, *Daubert* motions, and mock juries.

(ii) Rule 23(e)(2)(C)(ii) Subfactor: Effectiveness of any proposed method of distributing relief to the class

The second Rule 23 subfactor looks to "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). Plaintiffs' proposed plan of allocation provides for an equitable *pro rata* distribution of proceeds without any claim form or process. Ard Decl. ¶ 37; Dkt. 701-5 (Plan of Allocation). This distribution plan was preliminarily approved by the Court. *See* Dkt. 705. "This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable." *Phoenix COI*, 2015 WL 10847814, at *12 (collecting cases); *see also In re Lloyd's Am. Tr. Fund Litig.*, 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("[*P*]*ro rata* allocations . . . are not only reasonable and rational, but appear to be the fairest method of allocating the settlement benefits.").

(iii) Rule 23(e)(2)(C)(iii) Subfactor: Proposed award of attorneys' fees

The third subfactor requires the Court to consider "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). This review serves as "a backstop that prevents unscrupulous counsel from quickly settling a class's claims to cut a check." *See Moses*, -- F.4th --, 2023 WL 5281138, at *6 (cleaned up). Here, Class Counsel seeks 21.5% of the total settlement benefits, net of expenses, after a seven-year litigation campaign—far from a "quick" settlement "to cut a check." Ard Decl. ¶¶ 6-31. The reasonableness of this request was explained in detail in Class Counsel's Motion for Attorneys' Fees, filed on August 14, 2023. *See* Dkts. 711-15. If Class Counsel's requested fees, expenses, and incentive awards are granted,

that would result in an *average* payment exceeding $213,000 per policy, an incredible sum. Ard Decl. ¶ 38. The Settlement is clearly "substantive[ly] fair[]" when "the terms of the settlement and [the requested] fee award" are reviewed "in tandem." *Moses*, -- F.4th --, 2023 WL 5281138, at *6 (cleaned up).

The Classes' reaction to the Settlement and proposed fees further confirms their adequacy. Though the Classes are replete with highly sophisticated members, ***no Class Member*** objected to Plaintiffs' requested fee award or opted out of the Illustration Class after the Settlement was announced. The absence of objections is "powerful evidence that the requested fee is fair and reasonable." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008). That principle applies with higher force "where, as here, the Class[es] contain many large and sophisticated investors." *Phoenix COI*, Dkt. 318 (approving class settlement).

There can be no dispute that the Classes were overflowing with sophisticated parties with strong incentives to object if they believed the requested fees to be excessive. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("[S]uch a low level of objection is a rare phenomenon. . . . [A] significant number of investors in the class were sophisticated institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive.") (cleaned up)). As AXA put it, most Class Members are persons and entities of "wealth and sophistication," with the means to use "third-party consultants and advisors to determine which Policies to buy, how much to pay, and in what manner to fund and maintain the Policies." Dkt. 364 at 2-3, 10; *infra* p. 4 & n.2. These Class Members include institutional investors, banks, private equity firms, billionaires, other high-net worth individuals and families, and several major corporations. Dkt. 463 at 16; *see* Ard Decl. ¶ 50. That this group—a cross-section of some of the most sophisticated, well-heeled investors, companies, and individuals in the

world—elected not to object is powerful evidence that the Settlement and proposed fee, viewed in tandem, are reasonable. *In re Signet*, 2020 WL 4196468, at *6.

(iv) Rule 23 vis-à-vis (2)(C)(iv) Subfactor: Agreements required to be identified under Rule 23(e)(3)

The final subfactor, Rule 23(e)(2)(C)(iv), takes into account "any agreement required to be identified under Rule 23(e)(3)." Plaintiffs and AXA had entered into a Side Letter that provided for the right of AXA to terminate the Settlement if a confidential percentage of the Substituted Illustration Class Members opted-out of the Settlement, Dkt. 706; given that no Substituted Illustration Class Members opted-out, that Side Letter is moot. This factor is neutral.

B. Rule 23(e)(2)(D): The Proposal Treats All Class Members Equitably

The final Rule 23(e)(2) factor, which requires the Court to consider whether "the proposal treats class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2)(D), also supports final approval. Here, the proposed plan of allocation equitably distributes the recovery on a *pro rata* basis using Class Members' shares of the total damages. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) ("This plan of allocation has an obvious rational basis, appears to treat the class members equitably, faced no objections from class members, and has the benefit of simplicity."). The releases are also equitable, as they treat all Class Members equally and do not affect the apportionment of damages.

Under this factor, the Court must also consider any requested incentive award for the named plaintiffs to "ensure that proposed incentive awards are reasonable and promote equity between class representatives and absent class members." *Moses*, -- F.4th ---, 2023 WL 5281138, at *6-7, *13-15 (confirming that "district courts are permitted to grant incentive awards"). The requested $100,000 awards for each of the two Class Representatives are equitable and reasonable in light of the burdens the Class Representatives have endured, the services they have provided to

the Class throughout this litigation, and the fact that those awards represent a "miniscule portion" of the total settlement value, smaller than the average award class members will receive. *See Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018); Dkt. 711 (Fee Motion) at 24-25; *see also Moses*, -- F.4th --, 2023 WL 5281138, at *13-15 (holding that "the Supreme Court appears to have left *Greenough* . . . in the rear view," in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018)). The fact that not a single highly sophisticated member of the class objected to the incentive awards is also a strong indicator that they are fair. *In re Signet*, 2020 WL 4196468, at *6.

IV. The Remaining *Grinnell* Factors Support Final Approval

The remaining *Grinnell* factors overwhelmingly support final approval. The second factor—"[t]he reaction of the class to the settlement," *see* 495 F.2d at 463—"is perhaps the most significant factor to be weighted in considering [the Settlement's] adequacy." *See Jander v. Ret. Plans Comm. of IBM*, 2021 WL 3115709, at *3 (S.D.N.Y. July 22, 2021). Here, the Settlement Administrator provided notice, resulting in 94% of Class Member addresses being successfully reached by direct mail. *See* Section II.C, *supra*; *Fishman v. Tiger Nat. Gas Inc.*, 2019 WL 2548665, at *1 (N.D. Cal. June 20, 2019) (granting final approval where "94 percent of the class received notice by mail"). There were zero objections and no additional opt outs. *Supra* pp. 2-4. This "absence of objections by the class is extraordinarily positive and weighs in favor of settlement." *Jander*, 2021 WL 3115709, at *3 (cleaned up); *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 161 (S.D.N.Y. 2011) ("No class members have objected to the Settlement, and very few have opted out. The reaction of the class to date supports approval of the Settlement.").

The 3rd *Grinnell* factor—"the stage of the proceedings and the amount of discovery completed," *see* 495 F.2d at 463—addresses "whether the 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). This case was settled after an extraordinary amount of discovery, summary judgment, *Daubert* motions, and the exchange of pretrial disclosures. *See* Ard Decl. ¶¶ 6–28. Plaintiffs and Class Counsel therefore had an extensive understanding of the strengths and weaknesses of the case at the time of Settlement. *See, e.g.*, *Phoenix COI*, 2015 WL 10847814, at *7–8 ("Class Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of the strengths and weaknesses of the Class's claims . . . .").

The 6th *Grinnell* factor is "the risks of maintaining the class action through the trial." *See* 495 F.2d at 463. "The risk of maintaining a class through trial is present in any class action." *Guippone v. BH S&B Holdings LLC*, 2016 WL 5811888, at *7 (S.D.N.Y. Sept. 23, 2016). Here, AXA fought certification of the Illustration Class at every turn, opposing class certification, followed up with a Rule 23(f) petition, and later a motion for decertification. Ard Decl. ¶¶ 17-18, 20, 24. There is little doubt that AXA likely would have sought decertification of the Illustration Class on the eve of, during, or after trial, and AXA reserved the right to do the same with respect to the Contract Class. Dkt. 364 (AXA's Cert. Opp.) at 39 n.37.

The final *Grinnell* factor—"the ability of the defendants to withstand a greater judgment," 495 F.2d at 463—is neutral. Although AXA could potentially withstand a greater judgment, "[t]his factor, standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). A $307.5 million cash payment, plus $167.5 million in other relief, is a substantial figure for any company. "The mere fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Phoenix COI*, 2015 WL 10847814, at *9 (citations and quotation marks omitted).

Dated: September 11, 2023

/s/ Mark Musico
Seth Ard
Mark Musico
Susman Godfrey L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Tel: 212-336-8330
Fax: 212-336-8340
sard@susmangodfrey.com
mmusico@susmangodfrey.com

Steven G. Sklaver (*pro hac vice*)
Glenn Bridgman (*pro hac vice*)
Rohit Nath (*pro hac vice*)
Halley Josephs
Susman Godfrey L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150
ssklaver@susmangodfrey.com
gbridgman@susmangodfrey.com
rnath@susmangodfrey.com
hjosephs@susmangodfrey.com

Class Counsel

CERTIFICATE OF SERVICE

I certify that on September 11, 2023, a true and correct copy of this document properly was served on counsel of record by email.

/s/ Mark Musico