UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY LEONARD, IN HIS CAPACITY AS TRUSTEE OF THE POPLAWSKI 2008 INSURANCE TRUST; PHYLLIS POPLAWSKI; PBR PARTNERS, BRIGHTON TRUSTEES, LLC, on behalf of and as trustee for COOK STREET MASTER TRUST III; BANK OF UTAH, solely as security intermediary for COOK STREET MASTER TRUST III; PEAK TRUST COMPANY, AK, on behalf of and as trustee for SUSAN L. CICIORA TRUST and STEWART WEST INDIES TRUST; and ADVANCE TRUST & LIFE ESCROW SERVICES, LTA, as securities intermediary for LIFE PARTNERS POSITION HOLDER TRUST, on behalf of themselves and all others similarly situated, Plaintiffs, vs. JOHN HANCOCK LIFE INSURANCE COMPANY OF NEW YORK and JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), Defendants.	Civil Action No. 18-cv-04994-AKH

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

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INTRODUCTION

This Court expressly recognized when preliminarily approving the Settlement that Class Counsel Susman Godfrey secured an "outstanding result" for the Class. Jan. 5, 2022 H'rg. Tr. at 11:6 (Ard Decl., Ex. 1). The Settlement, reached after three-and-a-half years of intensive and risky litigation, provides cash relief of $123,074,128.32 available to potential Class Members, equal to ***91.25%*** of all cost of insurance ("COI") overcharges that John Hancock collected through August 31, 2021. The cash will be sent by check directly to Class Members, who will not have to fill out claim forms, and no money will revert to Defendants.

The Settlement also provides significant prospective relief that would not even have been achievable had the Class prevailed at trial. That relief is worth an additional $67.76 million to the Class, and includes a guarantee by John Hancock *not* to impose a new, more expensive COI rate scale for at least five years even in the face of a worldwide pandemic (or any new variant to come) that some insurance companies claim has caused their costs to skyrocket. This hard-fought result was reached with the assistance of a highly respected mediator and former United States magistrate judge in the Southern District of New York, the Honorable James C. Francis (Ret.), who likewise called the Settlement an "excellent result." Dkt. 201-6 ¶ 8.

This Settlement is outstanding by any measure, not least under the "critical element" courts consider in awarding fees: the result obtained for the Class. *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002). The Settlement Fund equal to 91.25% of the COI overcharges easily bests what Judge McMahon called, in a prior COI overcharge case where the cash fund equaled 68.5% of the overcharges, "one of the most remunerative settlements this court has ever been asked to approve." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 WL 10847814, at *11, *13 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*"). There, Judge McMahon approved a fee award equal to 33-1/3% of the cash portion of the settlement considered in isolation

from other components of the settlement and a 4.87 multiplier, both higher figures than what is requested here. *Id.* at *18. And just three years ago, in another COI case against John Hancock, Judge Gardephe remarked that a settlement providing for 42% of the COI overcharges was "quite extraordinary." *37 Besen Parkway, LLC v. John Hancock Life Insurance Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:10 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI I*"). Because of how extraordinary that result was, Judge Gardephe approved a fee of 30% of the settlement benefits, equal to a lodestar multiplier of 6.92, also a multiplier far higher than what is requested here. *Id*.

Getting the settlement relief now that Susman Godfrey secured is particularly important given the advanced age of many insureds under the Class Policies. The age of insureds ranged from 70 to 100, with an average age of nearly 85 at the time of the COI increase. Absent this exceptional Settlement, many of the policies could have matured before Class Members ever saw a single dollar in relief. Instead, they are able to receive $123,074,128.32 in cash now, along with guaranteed protections against new rate increases for the next five years, as well as protections against John Hancock trying to undermine the Settlement by challenging the validity of individual policies following a maturity event and submission of a claim for the policies' death benefits.

The quality of the result obtained for the Class is even more exceptional considering the unique challenges of this litigation and the substantial contingency risk. The Court recognized in granting preliminary approval that the litigation was "intensive and expensive." Jan. 5, 2022 H'rg. Tr. at 11:7. It was. The case was by its nature highly technical and complex, requiring discovery and analysis of actuarial documents, data, and computer models dating back more than a decade. Just getting discovery itself was challenging, as Defendants took a narrow view of the case and aggressively objected to Plaintiffs' discovery requests, requiring extensive motion practice, discovery letter exchanges, and negotiation efforts.

John Hancock created one of the actuarial models central to the case on proprietary actuarial software called AXIS that requires a license and trained expertise to review. Plaintiffs pressed for and received the same AXIS models that John Hancock used in pricing the products and in analyzing the COI increase. Class Counsel then purchased a license (at a cost of nearly $50,000 per year) from a third-party to access the AXIS software, and then had its experts trained with attorney involvement and oversight on the AXIS system. This time-consuming, expensive, and relentless effort paid off, as many of the core theories developed by Class Counsel in this case hinged on the inputs, assumptions, sources, volatility, and analysis its experts found in that modeling. And John Hancock, which was vigorously represented by three highly-regarded law firms—litigation counsel from both Boies Schiller Flexner LLP and WilmerHale, and separate settlement counsel at Fried Frank—and numerous lawyers (*twenty* lawyers representing John Hancock surfaced and interacted with Class Counsel, with untold others working behind the scenes),[1] made the case even more challenging and onerous to litigate.

The contingency risk posed by this case was very high from the outset. While life insurance class actions pose numerous risks, this case was particularly challenging because before Class Counsel filed this case on behalf of Plaintiffs, the New York Department of Financial Services ("NYDFS")—whom insurers widely consider to be the strictest insurance regulator in the country—investigated John Hancock's COI increase and *allowed it to proceed*. So this is not a case that followed a well-known or high profile government investigation; to the contrary, this is

[1] Lawyers representing John Hancock in this class action litigation included: Mike Brown, Adam Cambier, Rob Donoghue, Andy O'Laughlin, Yavor Nechev, Ivan Panchenko, Timothy Perla, Charles Platt, Andrea Robinson, Erika Schutzman, Sierra Shear, and Robert Kingsley Smith of WilmerHale; Mateo de la Torre, Brian Donovan, Joseph Kroetsch, John LaSalle, Michael Taintor, Jack Wilson, and Alan Vickery of Boies Schiller Flexner LLP; and Motty Shulman of Fried, Frank, Harris, Shriver & Jacobson LLP.

a case where the carrier claims the government *did not object* to the COI increase at issue. Here, not only did the NYDFS allow the increase to proceed, it did so after scrutinizing it under a new series of NYDFS regulations, the "purpose" of which is "to establish standards for" any "readjustment of non-guaranteed elements," like COI rates. 11 NYCRR 48 (Insurance Regulation 210). While Plaintiffs contend that evidence relating to the NYDFS's conduct would be inadmissible at trial, the fact that the NYDFS allowed this COI increase to proceed after its review was reflective of the substantial risks that Class Counsel faced in even establishing liability. This outstanding result was achieved only because of the much more thorough and detailed work analyzing this COI increase performed by Class Counsel as compared to the NYDFS.

The challenges and risks Plaintiffs faced would not have abated as the case proceeded. On damages, Defendants would have contested the methodology and conclusions of Plaintiffs in quantifying the alleged overcharges and also the legal grounds for obtaining class certification. Plaintiffs also faced delays in even getting to trial as a result of the pandemic-caused backlog (for example, the follow-on related actions are set for trial in March 2023), and would have surely encountered post-trial challenges and appeals even if successful at trial. That would have potentially added several years of delay before the Class could enjoy the benefit of a verdict, if any, obtained in its favor. Notwithstanding these issues and many more, Class Counsel achieved a settlement value of ***$190.8 million*** that will provide Class Members with immediate, outstanding relief.

In the end, Susman Godfrey invested over $10 million in time and money into this case, on a fully contingent basis, with the real possibility of getting nothing in return. Susman Godfrey, among other things:

- Analyzed nearly one million pages of documents, including numerous actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all class members' policies, and thousands of spreadsheets;
- Took and defended 23 highly technical depositions, many of which took place over multiple days;
- Issued eight third-party subpoenas, including one to a foreign company in Canada that necessitated the issuance of a letter rogatory;
- Filed five motions to compel (four of which were granted or granted in substantial part); exchanged 13 more discovery dispute letters that the parties were able to resolve without Court intervention after extensive meet-and-confers;
- Successfully negotiated the production of numerous documents that initially were logged on John Hancock's 220-page privilege log;
- Drafted and filed an Amended Complaint and a Second Amended Complaint that, due to the discovery obtained, further developed detailed liability theories;
- Served 83 requests for production, 25 interrogatories, 298 requests for admission;
- Responded to Defendants' 174 requests for production, 152 interrogatories, and 1,124 requests for admission; and
- Attended an in-person mediation which was not successful, but tenaciously continued to negotiate afterwards with the help of Judge Francis (Ret.) to secure the outstanding result here.

For these reasons, Class Counsel respectfully moves this Court for an award of attorneys' fees in the amount of $34.4 million, plus a *pro rata share* of the interest earned on the Settlement Fund. That request represents 18% of the gross settlement benefit made available to potential Class Members, and a 3.84 lodestar multiplier (or using a less accepted and more conservative methodology, 28% of the total cash component of the Settlement viewed in isolation), a figure well within the range approved by this Court and other courts in this Circuit. *See, e.g.*, *In re Philip Servs. Corp. Sec. Litig.*, No. 98 CIV. 835 (AKH), 2007 WL 959299, at *1 (S.D.N.Y. Mar. 28, 2007) (Hellerstein, J.) (awarding 26% fee on $79.75 million settlement). Susman Godfrey also seeks reimbursement for $1,427,596.29 in litigation expenses, as well as incentive awards for the

named Plaintiffs to compensate them for their time and efforts in bringing this case to a successful resolution. The requested award is warranted by the outstanding results achieved for the Class through the efforts of Class Counsel, and the enormous risks taken and overcome in litigation brought entirely on a contingency fee basis.

BACKGROUND

I. Class Counsel Investigated the May 2018 COI Increase and Promptly Filed the Complaint

Plaintiffs' life insurance policies have provisions mandating how and when John Hancock can adjust COI rates. The policies state that any changes to COI rates "will be based on [John Hancock's] expectations of future mortality, persistency, investment earnings, expense experience, capital and reserve requirements, and tax assumptions." Second Am. Compl. (Dkt. 167) ¶ 2.[2] They further state that John Hancock reviews its COI rates either "from time to time" or "every 5 policy years," and prohibit changes that either "discriminate unfairly within any class of lives insured" or are not made "on a uniform basis for insureds of the same sex, issue age, and premium class." *Id.*

In May 2018, John Hancock announced that it was raising COI rates on about 1,500 such policies. Ard Decl. ¶ 6. Class Counsel immediately investigated the rate hike and whether it was made in compliance with the provisions described above. *Id.* ¶ 7. In consultation with industry experts, Class Counsel studied the language of the John Hancock policy forms, the trends in actuarial assumptions from the time the policies issued as detailed in John Hancock's filings with insurance regulators, and the information John Hancock provided about the increase to its

[2] Certain class policies use slightly different language, mandating that COI adjustments be "based on expectations of future investment earnings, persistency, mortality, expense and reinsurance costs and future tax, reserve, and capital requirements." Second Am. Compl. ¶ 2.

policyholders to assess whether the COI increase was permitted by the policies and other applicable laws. *Id.* As a result of that investigation—and without the assistance of *any* government investigation or other public disclosures—Class Counsel drafted and promptly filed the highly detailed Complaint on June 5, 2018. *Id.* The Complaint alleged several theories of liability, including that the increase was not based on the enumerated factors in the policies, were non-uniform and discriminatory, and that the increases were designed to recoup past losses rather than respond to future expectations. Compl. (Dkt. 1) ¶ 15. John Hancock did not move to dismiss the detailed and well-pleaded Complaint; it filed its answer on August 22, 2018. Dkt. 17.

II. Class Counsel Engaged In 3.5 Years of Hard-Fought Discovery, Amending the Complaint Twice and Further Developing Its Liability and Damages Theories

Class Counsel immediately and aggressively pushed the case forward in discovery. Within two months of John Hancock filing its answer, Plaintiffs served its first 34 document requests. Ard Decl. ¶ 10. All told, over the three-and-a-half years of discovery, Class Counsel served 83 requests for production, 25 interrogatories, and 298 requests for admission. *Id.* These discovery requests resulted in the production of approximately 1 million pages of documents, including extensive actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all class members' policies, and thousands of spreadsheets. *Id.* ¶¶ 10-11.

But obtaining discovery from John Hancock in this case was never easy, given John Hancock's narrow view of discovery and inclination to fight or wordsmith almost every step of the way. Class Counsel filed three motions to compel against John Hancock, two of which were granted or granted in substantial part. (Dkts. 81, 99, 149.) Through these motions, Class Counsel successfully obtained key discovery, including (i) custodial documents from high-level John Hancock employees, including communications reporting on conversations had with NYDFS regarding the COI increase (Dkt. 99); (ii) documents resulting from additional search terms run

through the custodial files of key fact witnesses (Dkt. 99), and (iii) settlement agreements with certain owners of policies reached *after* Class Counsel filed the class action complaint (Dkt. 81, Dkt. 93). Ard Decl. ¶ 13. And, per the Court's Individual Rule 2.E, the parties exchanged drafts of *thirteen* additional joint letters that were never filed with the Court after the parties were able to successfully resolve their discovery disputes—and Class Counsel was able to obtain the discovery needed—without Court intervention. *Id.* ¶ 14. Further, Class Counsel engaged in countless meet-and-confers with John Hancock concerning deficiencies in its productions, with, as required by the Court, lead counsel participating in each conference. *Id.* ¶ 13. Class Counsel also reviewed and scrubbed John Hancock's 220-page privilege log and engaged in extensive meet and confer negotiations with respect to John Hancock's asserted claims of privilege or work product. *Id.* ¶ 15. Class Counsel negotiated a solution under which, in accordance with Fed. R. Evid. 502(d), Hancock agreed to disclose information in documents over which it previously asserted privilege or work product. *Id.*

Class Counsel also expended time and resources to obtain critical, relevant discovery from third parties. Class Counsel issued eight subpoenas to third parties, including Hancock's reinsurers and the entities that conducted peer reviews of Hancock's COI increase pursuant to Canadian regulations. Ard Decl. ¶ 16. These subpoenas resulted in the production of thousands of additional pages of important documents and spreadsheets, many of which had not been produced by John Hancock. *Id.* For example, in response to a subpoena Class Plaintiffs served on one of Hancock's reinsurer, and after extensive negotiations regarding a privilege log they served, Class Counsel obtained call notes between the legal departments of Hancock and the reinsurer that contained what Class Counsel contends are key admissions regarding the reasons behind the COI increase, which were not produced elsewhere in the litigation. *Id.* Class Counsel also engaged in a lengthy

dispute to obtain a letter rogatory for discovery from John Hancock's parent company's auditor, Ernst & Young of Canada, which required the Court's intervention on multiple occasions, yielding key discovery regarding John Hancock's auditor's views of John Hancock's actuarial assumptions. *Id.* ¶ 17.

In discovery, Class Counsel took and defended 23 highly technical depositions. Representatives of six Plaintiffs were deposed. Ard Decl. ¶ 21. All these depositions were taken virtually during the COVID-19 pandemic, and, therefore, required numerous hours of additional coordination and preparation. *Id.* Many of these depositions took place over two days. *Id.* Class Counsel's depositions included depositions of key John Hancock employees, including its Head of US Legacy Business; the Chief Actuary for John Hancock's parent company; and the Head of Inforce Management for John Hancock's parent company, who formerly served as Chief Actuary for Canadian business and valuation actuary for U.S. insurance business. *Id.* ¶ 22.

These depositions often uncovered additional relevant document discovery that John Hancock had not previously produced. For example, during depositions Class Counsel learned that John Hancock had not produced documents from its internal folder concerning the construction of an important mortality table, the discovery of which resulted in the subsequent production of thousands of additional, highly relevant spreadsheets. Ard Decl. ¶ 22. In addition, Class Counsel prepared and served a 30(b)(6) deposition notice with 40 topics on multiple subparts. Class Counsel spent over 20 hours meeting and conferring with John Hancock over the scope of that deposition. Ard Decl. ¶ 24.

Discovery also necessitated significant work with top-notch actuarial, financial modeling, and damages experts that were identified and retained by Class Counsel. To help prove its case, Class Counsel reconstructed John Hancock's actuarial models. Ard Decl. ¶ 26. This required

spending hundreds of hours reviewing the documents and actuarial tables produced by John Hancock and third parties, discussing those documents with experts, and conferring with John Hancock about deficiencies in the productions it made. *Id.* Not only did this work require significant time and effort, but it was also expensive: Class Counsel had to purchase a third-party license (and spend nearly $50,000 per year) to access the proprietary software AXIS in order to review and reconstruct John Hancock's extremely complex actuarial models. Ard Decl. ¶ 12.

As a result of the information it obtained in discovery, Class Counsel filed an Amended Complaint that further developed its theories of liability, and a Second Amended Complaint as well. Dkt. 114 & 167. Among other significant amendments, the Amended Complaint further developed Plaintiffs' theories of liability, including the liability theory that alleged that Hancock had manipulated its "current" and "baseline" assumptions to justify the COI increase, allowing it to recoup past losses that it had recognized long ago, in violation of the policies' periodic review provisions. *Id.* ¶¶ 59, 62; Ard Decl ¶ 18. John Hancock again chose to answer the Amended Complaint and Second Amended Complaint. Dkt. 129 & 174.

III. Class Counsel Negotiated the "Outstanding" Settlement

After conducting all of the heavy work, analysis, investigations, negotiations, and depositions described above, as the fact discovery deadline approached, on August 26, 2021, Class Counsel met with counsel for Defendant to discuss settlement at an in-person mediation before Judge Francis. Ard Decl. ¶ 31. The parties prepared for the mediation and submitted detailed position papers in advance, but were unable to reach agreement at that in-person mediation. *Id.* However, the parties continued to negotiate, with Judge Francis's assistance, over the following eight weeks. *Id.* The parties exchanged numerous offers and counteroffers, submitted detailed briefing to the mediator, and participated in teleconferences and email discussions. *Id.* On October 18, 2021, the parties signed a memorandum of understanding for a settlement. *Id.* The parties

thereafter exchanged multiple drafts of a long-form settlement agreement, which took over two months to agree to with the assistance of Judge Francis, and on December 29, 2021, the parties fully executed a long-form settlement agreement. *Id.* Judge Francis submitted a declaration opining that the settlement was an "excellent result." Dkt. 201-6 ¶ 8. Plaintiffs moved for preliminary approval of the settlement on December 30, 2021. Dkt. 201.

On January 5, 2022, the Court held a conference on Plaintiffs' motion for preliminary approval. In granting Plaintiffs' motion, the Court explained:

> Well, I approve[], preliminarily, the settlement. I think it's an outstanding result. It follows years of intensive and expensive litigation. It's helpful to have a mediator. But in these cases, when you look at the mediation and you look at the substance of the result -- and clearly this is an outstanding result, and it was fought for and opposition was overcome, and it was clearly done at arm's length.

Jan. 5, 2022 H'rg. Tr. at 11:5-11. The Court entered its order preliminarily approving the Settlement five days later. Dkt. 203.

For the Class, the Settlement awards four main benefits:

1. **CASH**: A cash Settlement Fund of up to **$123,074,128.32.**

    - This non-reversionary cash fund is equal to ***91.25%*** of all COI overcharges collected by John Hancock from the Class Policies through August 31, 2021. "COI overcharge" refers to the amount a Settlement Class member paid in COI charges in excess of what she would have paid had Hancock not implemented the COI increase (the "Policy Settlement Amount"). The overcharge is a proper measure of damages because breach of contract damages can be measured by "an amount equal to the difference between the rate charged and the rate that would have been charged" in the absence of the breach. *Gonzales v. Agway Energy Servs., LLC,* No. 5:18-cv-235(MAD/ATB), 2018 WL 5118509, at *4 (N.D.N.Y. Oct. 22, 2018).

    - For any policy that opts out, the Settlement Fund decreases on a *pro rata* basis in proportion to the Policy Settlement Amount for each opting out policy. The proceeds of the settlement will *not* revert to John Hancock, and checks will be mailed directly to class members without having to fill out claim forms.

2. **COI RATE FREEZE**: A total and complete freeze on any COI increase for a period of five years following Final Approval of the Settlement. Thus, even if Hancock has a future change in expectations that would otherwise permit a COI rate increase under the terms of the policies, including as a result of any spike in mortality experience resulting from the COVID-19 pandemic, John Hancock will not increase COI rates for 5 years. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for a substantial period of time.

3. **COI RATE FREEZE MOST-FAVORED-NATION CLAUSE**: If John Hancock agrees to a COI rate freeze that is longer than five years with any owner of an opt-out or Excluded Policy, then John Hancock shall extend the duration of the Class Rate Increase Freeze so that it is as long as provided under that agreement.

4. **VALIDITY CONFIRMATION**: John Hancock has agreed never to challenge the validity and enforceability of any eligible policies owned by participating class members on the grounds of lack of an insurable interest or misrepresentations in the application for such policies.

An eminently qualified expert with extensive experience in the life insurance industry and with longevity-based products has opined that these non-monetary forms of relief are worth $67.76 million to the Class. McNally Decl. ¶ 11.

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); *see also In re Philip Servs. Corp. Sec. Litig.*, No. 98 CIV. 835 (AKH), 2007 WL 959299, at *1 (S.D.N.Y. Mar. 28, 2007) ("Where . . . an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class, as happens when a judgment is entered in a securities class action litigation, the attorney is entitled to the reasonable value of the services performed in creating that class recovery, as set by the court." (citation omitted)). The Court's authority to award attorneys' fees in class cases "stems from the fact that the class-action device

is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1803 (3d ed.) The purposes of the doctrine are to provide "just compensation for class counsel," to "encourage skilled counsel to represent" the class and "discourage future alleged misconduct of a similar nature"; and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 2018 WL 6168013, at *14 (S.D.N.Y. Nov. 26, 2018); *see also In re Philip Servs.*, 2007 WL 959299, at *1 (likening common fund recovery "to the traditional recovery in quantum meruit, the recovery customarily given to one who performs services benefiting another in circumstances where such services equitably should be compensated"); *Goldberger v. Integrated Res.*, 209 F.3d 43, 47 (2d Cir. 2000) ("The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost.").

B. The Requested Fee Is Reasonable Under the Percentage Method

1. The Percentage Approach Is Favored

Under the percentage method, the "court sets some percentage of the recovery as a fee." *Goldberger*, 209 F.3d at 47. Courts routinely find that the percentage of the fee method, under which counsel is awarded a percentage of the fund they created, 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); *see also Hayes v. Harmony Gold Mining Co., Ltd.*, 509 F. App'x 21, 24 (2d Cir. 2013) ("[T]he prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class.").

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) ("The percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work. . . . The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel.").[3] Class Counsel's work, performed entirely on a contingent basis, enabled the Class to recover ***91.25%*** of the alleged overcharges—a result that the Court has already recognized is "extraordinary." To best incentivize similarly outstanding and efficient results in the future, the Court should apply the percentage approach.

2. A Fee of $34.4 Million is Fair and Reasonable

Here, Class Counsel is seeking a fee of $34.4 million, which represents ***18% of the overall settlement benefits*** offered to potential Class Members, including monetary and non-monetary benefits. As set forth in the accompanying expert report, financial analysts with expertise in longevity markets who work with large institutional investors to acquire life settlements, value the nonmonetary relief made available to potential Class Members at $67.76 million. The overall cash fund available to potential Class Members is $123,074,128.32. The gross settlement value, combining the monetary and nonmonetary benefits, is $190,834,128.32, when the entire benefits made available to the Class are considered.[4]

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[3] *See also In re Lloyd's Am. Tr. Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) ("[T]he percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model . . . .").

[4] While the Final Settlement Fund will decrease proportionately to opt-outs, the relevant metric for determining a percentage award is the entire settlement value made available to potential class members ($190,834,128.32), or using a less accepted and more conservative methodology, the entire cash fund available to potential class members ($123,074,128.32). The Second Circuit has held that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel

In calculating the overall settlement value, Courts include the value of both the monetary and non-monetary benefits conferred on the Class, and in COI litigation, that includes the value of what was achieved here: the COI Rate Increase Freeze and the Validity Confirmation. *Phoenix COI*, 2015 WL 10847814 at *15 (S.D.N.Y Sept. 9, 2015) ("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." (citing cases)). Leading authorities confirm that, in calculating the overall settlement value, courts include the value of 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)).[5] Indeed, in *Phoenix COI*, the court included the value of nearly identical nonmonetary benefits that were included in that settlement for purposes of evaluating class counsel's fee request. 2015 WL 10847814, at *3, *10 (ascribing $61 million in value to a "COI freeze" provision and $33.3 million to a "policy validity and STOLI waiver"); *see also Velez v. Novartis Pharm. Corp.*, No. 04-CV-09194, 2010 WL 4877852, at *8, *18 (S.D.N.Y.

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at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). District courts in the Second Circuit agree that the entire-fund rule applies even if some portion of the unclaimed fund reverts to defendants. *See, e.g., In re Nigeria Charter Flights Litig.*, No. 04-CV-304, 2011 WL 7945548, at *5 (E.D.N.Y. Aug. 25, 2011) *report and recommendation adopted,* No. 04-CV-304, 2012 WL 1886352 (E.D.N.Y. May 23, 2012); *Aros v. United Rentals, Inc.*, No. 3:10-CV-73 (JCH), 2012 WL 3060470, at *5 (D. Conn. July 26, 2012); *Bozak v. FedEx Ground Package Sys*., Inc., No. 3:11-cv-00738-RNC, 2014 WL 3778211, at *6 (D. Conn. July 31, 2014).

[5] *See also* American Law Institute, Principles of the Law of Aggregate Litigation § 3.13 (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.")

Nov. 30, 2010) (approving settlement that was "21.8 percent of the total relief available through the settlement," which included "both nonmonetary and monetary relief valued at up to $175 million"); *Sheppard v. Consol. Edison Co. of New York*, No. 94-CV-0403(JG), 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) (approving fee petition where fee was measured as a percentage of the "total settlement," which included $6.745 million in monetary relief and "an estimated $5 million in non-monetary, injunctive relief).[6] Similarly here, the requested $34.4 million fee represents 18% of the total gross value of the Settlement, which is far below the mainstream of percentage awards in this Circuit.

"District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Sykes v. Harris*, No. 09-cv-8486 (DC), 2016 WL 3030156, at *17 (S.D.N.Y. May 24, 2016) (Chin, J.) (quoting *Velez v. Novartis Pharm. Corp*., 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010)); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-cv-4270 (PAC), 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.")

Unsurprisingly, courts in the Second Circuit and beyond regularly approve fee awards that represent substantially more than fee requested here, which is 18% of the total value of the Settlement—including in settlements larger on a gross basis than this one and with recoveries of the damages at issue that were not found to be outstanding. *See, e.g.*, *In re Mun. Derivatives Antitrust Litig*., 2016 WL 11543257, at *1 (S.D.N.Y. July 8, 2016) (awarding 32.67% of $101

[6] *See also McCoy v. Health Net, Inc*., 569 F. Supp. 2d 448 (D.N.J. 2008) (awarding fee of $69.7 million, which represents "28% of the $249 million value of the common fund plus the parties' lowest estimated value of the injunctive relief" of $28 million and noting: "The value of the injunctive relief here is a highly relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees."); *cf. Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (district court properly determined that settlement was fair based in part on its valuation of the "nonmonetary antitrust" benefits, principally a "price freeze").

million settlement); *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 Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% of $510 million settlement); *In re U.S. Foodservice, Inc. Pricing Litig.*, 2014 WL 12762264, at *3 (D. Conn. Dec. 9, 2014) (awarding 33.3% of $297 million settlement); *In re Domestic Drywall Antitrust Litig.*, No. 13-MD-2437, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding 33.3% of $190 million settlement); *In re Solodyn Antitrust Litig.*, No. 14-md-2503 (D. Mass. July 18, 2018), ECF 1180 (awarding 33.3% of $72.5 million settlement); *In re CRT Antitrust Litig.* (CRT I), 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% of $145 million settlement fund).

This Court likewise has approved similar fee awards to what is requested here, even for settlements that do not come close to the outstanding achievements secured by Class Counsel here. *See e.g.*, *Mustafin v. Greensky, Inc.*, No. 18 Civ. 11071 (AKH) (S.D.N.Y. Oct. 19–22, 2021) (Hellerstein, J.), Dkt. 213 at 18:22, Dkt. 211 ¶ 13 (awarding 22% fee on $27.5 million settlement that the Court characterized as a "good but not great" "result"); *In re Philip Servs. Corp. Sec. Litig.*, No. 98 CIV. 835 (AKH), 2007 WL 959299, at *1 (S.D.N.Y. Mar. 28, 2007) (Hellerstein, J.) (awarding 26% fee on $79.75 million settlement, and citing with approval *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 400 (S.D.N.Y.1999), where 27.5% fee was awarded on $116 million settlement). In fact, a court in this Circuit recently approved a fee representing ***30%*** of the total settlement value in another class action challenging John Hancock's practices with regard to COI rates, where the settlement represented only 42% of the alleged overcharges. *See Hancock COI I*, 15-cv-9924 (PGG), Dkt. 146 ¶ 15, Dkt. 160 (S.D.N.Y.).

The requested fee is also reasonable because it is less than what Class Counsel could obtain on the open market. Indeed, "market rates, where available, are the ideal proxy for . . . compensation." *Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 52 (2d Cir. 2000); *also Klein ex rel. SICOR, Inc. v. Salvi*, No. 02 Civ. 1862 (AKH), 2004 WL 596109, at *7 (S.D.N.Y. Mar. 30, 2004) ("[T]he district judge must emulate the position of a client and determine, from the perspective of a client, a reasonable method of compensation and an aggregate fee that would be reasonable in the circumstances," which perspective "must be based on market values."); *McDaniel v. County of Schenectady*, 595 F.3d 411, 422 (2d Circ. 2010) (explaining that focus should be "on mimicking a market"); *In re Lloyd's*, 2002 WL 31663577, at *26 (looking to "the manner in which private litigants compensate their attorneys in the marketplace contingency fee model"). Susman Godfrey regularly takes high-stakes non-class commercial cases on a contingent fee basis, and it typically negotiates contingent fee arrangements with individual non-class plaintiff clients for engagements where the firm advances expenses to be equal to 40% of the gross sum recovered, with percentage increases based on the time of settlement and trial. Ard Decl. ¶ 42. "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*, 2015 WL 10847814, at *17 (S.D.N.Y. Sept. 9, 2015) (quoting *Johnson*, 2010 WL 5818290, at *4; *see also Morris*, 859 F. Supp. 2d at 623 (approving one-third fee request partly because clients "typically pay one-third of their recoveries under private retainer agreements").

Finally, even if no specific monetary value were attributed to the prospective relief, the fee request would still be fair and reasonable under the percentage approach. "The substantial injunctive relief is a major factor in favor of the fee request, even if no specific monetary value is

assigned to it." *Phoenix*, 2015 WL 10847814, at *17.[7] As discussed above, even a $34.4 million award conservatively compared to just the cash component of the Settlement viewed in isolation of all other benefits conferred is 28% of that fund, prior to any pro rata opt-out reduction, and is well within the range approved by this district. A $34.4 million fee would be especially appropriate in this case because of the $67.76 million in *additional* value created by the injunctive relief, the tremendous risks of the litigation, and the fact that the case was litigated vigorously for three-and-a-half years.

C. The Requested Fee Is Reasonable Under Lodestar "Crosscheck"

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, the Second Circuit permits courts to "cross-check" the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paraprofessional by their current hourly rate, and totaling the amounts for all timekeepers. Additionally, "[u]nder the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "[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

[7] *See also, e.g.*, *In re Payment Card Interchange Fee Lit.*, 991 F. Supp. 2d 437, 446 (E.D.N.Y.2014) ("[A]lthough it is impossible to know with certainty the ultimate value of the injunctive relief, it may very likely exceed the value of the monetary relief in the long run. The injunctive relief is therefore a 'relevant circumstance,' to say the least." (citation omitted)); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524-25 (E.D.N.Y. 2003) *aff'd* 396 F.3d 96 (2d Cir. 2005) (awarding $220 million fee and explaining: "the Settlements are so large, particularly considering the injunctive relief, that even the exorbitant fee I award seems small in comparison … I agree that the substantial injunctive relief here should inform my decision on awarding fees, and it has"); *see also Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (where fee award was analogized to a common fund percentage award, fee was justified in part by "injunctive and other non-monetary relief").

result achieved for the class." *In re Telik, Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008).

In this entirely contingent action, Class Counsel spent nearly 15,000 hours, representing a lodestar of $8,956,015, and advanced $1,427,596.29 in expenses. *See* Ard Decl. ¶¶ 43-44, 47.[8] Class Counsel's hourly rates are reasonable. The rates for Class Counsel and its staff who billed significant amounts of time to this case (ranging from $325 to $1,200 per hour) are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude. *Id.* ¶¶ 43, 45; *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, No. 15 Civ. 9924 (PGG) (S.D.N.Y. Mar. 18, 2019), Dkt. 164 ("*Hancock COI I* Fairness Hearing Transcript") at 19:6–13 (accepting Susman Godfrey's rates as reasonable, including rates of Seth Ard and Steven Sklaver); *Phoenix COI*, 2015 WL 10847814, at *18 (finding Susman Godfrey's rates "reasonable" and "comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude"); *In re Auto. Parts Antitrust Litig.*, 2017 WL 3525415, at *4 (E.D. Mich. July 10, 2017) (finding Susman Godfrey's rates "justified" and "well in line with market"); *Mustafin v. Greensky, Inc*., No. 18 Civ. 11071 (AKH) (S.D.N.Y. Oct. 19, 2021) (Hellerstein, J.), Dkt. 213 at 16:24–17:13 (finding that partner rates ranging from $750 per hour to $1,125 per hour are not "high in relationship to current rates")

An award of $34.4 million is equal to a lodestar multiplier of 3.84, which is appropriate given the uniquely excellent results obtained in this case, and is well within the range of crosscheck

[8] 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'") (citation and internal quotations omitted); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates "should be applied in order to compensate for the delay in payment"); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig*., 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (citation omitted) (using current rates helps "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest" (quotation omitted)).

multipliers approved by courts in this Circuit. Recent COI class settlements in the Southern District bear out that reality. In *Hancock COI I*, for example, the multiplier approved by the Court was nearly double the lodestar requested here. *See Hancock COI I* Fairness Hearing Transcript at 19:14–20:11 (approving lodestar multiplier of 6.92 in light what Judge Gardephe described as a "quite extraordinary" result). And again, this settlement provides a significantly higher proportion of COI overcharges in cash than *Hancock COI I* (91.25% as compared to 42%), and also affords the Class with non-monetary relief valued at $67.76 million that was completely absent in *Hancock COI I*. The 4.87 lodestar multiplier approved in *Phoenix COI*—whose settlement provided for only 68.5% of overcharges, plus non-monetary relief—is also higher than the multiplier being requested here. *Phoenix COI*, 2015 WL 10847814, at *18 ("[C]lass counsel's aggregate lodestar yields a 'crosscheck' multiplier of 4.87. This is well within the range of crosscheck multipliers awarded in this circuit.")

Cases outside the COI context that use a lodestar crosscheck confirm that the fee award requested here is reasonable. *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (DLC), 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"); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, No. 1:08-cv-10783-LAP, 2016 WL 3369534, at *1 (S.D.N.Y. May 2, 2016) (awarding 21% fee representing a 3.9 multiplier); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347, 353 (S.D.N.Y. 2014) (awarding 25% of $45.9 million settlement, equating to multiplier of 5.2); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (awarding 33.3% of fund, and noting lodestar multiplier of 6.3 "falls within the range granted by courts"); *In re Deutsche Tele-kom AG Sec. Litig.*, No. 00-cv-9475 (NRB), 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (awarding 25% of $120 million

settlement; a 3.96 multiplier); *Davis*, 827 F. Supp. 2d at 185 (multiplier of 5.3 was "not atypical" in similar cases); *Cornwell v. Credit Suisse Grp.*, No. 1:08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 20, 2011) (4.7 multiplier); *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.").

The $34.4 million award requested here, cross-checked by a lodestar multiplier of 3.84, is reasonable and easily within (and below) the range of multipliers courts in this District award. More importantly, extraordinary results should be rewarded and the fee award requested here is amply justified in light of the extraordinary settlement Class Counsel achieved on behalf of the Class.

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; *see also In re Philip Servs.*, 2007 WL 959299, at *1. The *Goldberger* factors, which the Court weighs in its discretion, are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

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

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 nearly 15,000 hours prosecuting this case over three years. Class Counsel devoted substantial resources to litigating this case, which enabled Class Counsel to achieve this remarkable result. Among other things, Susman Godfrey:

- Analyzed approximately 1 million pages of documents, including actuarial tables, policy-level data reflecting the historical credits and deductions to the account value

of all class members' policies, and thousands of spreadsheets, and repeatedly pressed Hancock and third parties to remedy deficiencies in their productions;

- Served 83 requests for production, 25 interrogatories, and 298 requests for admission;
- Responded to Hancock's 174 requests for production, 152 interrogatories, and 1,124 requests for admission, and produced over 200,000 pages of documents;
- Issued eight subpoenas to third parties, including Hancock's reinsurers and entities that conducted peer reviews of Hancock's COI increase pursuant to Canadian regulations;
- Filed a motion for letter rogatory to secure discovery from Ernst & Young Canada, the auditor of Hancock's parent company, and obtaining an Order from the Court requiring EY Canada to provide discovery. After EY Canada refused to produce certain workpapers, Class Counsel moved again to obtain compliance with the Court's prior Order, which the Court granted;
- Filed three motions to compel against Hancock, two of which were granted or granted in substantial part, which resulted in obtaining key custodial documents;
- Exchanged, pursuant to the Court's Individual Rule 2.E, drafts of thirteen additional joint letters concerning other discovery disputes;
- Reviewed Hancock's 220-page privilege log and engaged in extensive meet and confer negotiations with respect to Hancock's asserted claims of privilege or work product, resulting in the partial or total production of 792 of the 875 documents challenged;
- Took and defended 23 depositions, many of which were highly technical and stretched over multiple days;
- Prepared and served a 30(b)(6) deposition notice with 40 topics on multiple subparts, and spent over 20 hours meeting and conferring over the scope of that deposition;
- Prepared extensive mediation briefing for and attended a full-day mediation conducted under the supervision of Judge Francis. After the parties failed to reach agreement at that mediation session, Class Counsel continued to negotiate with Hancock, with Judge Francis's assistance, to ultimately reach a memorandum of understanding eight weeks later, and a long-form settlement agreement after that.

See Ard Decl. ¶¶ 6-28. The time and labor will also increase as Class Counsel prepares for final-approval proceedings and administers the Settlement Agreement.

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. See, e.g., *Phoenix COI*, 2015 WL 10847814, at *6 ("The litigation was indisputably complex. The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards . . . .").

As just one example, Plaintiffs asserted that the COI increase was not based on the factors enumerated in the policies governing how and when COI charges can be adjusted. *See* Second Am. Compl. ¶ 12. The factors on which COI adjustments could be made, under the terms of the policies, included Hancock's "expectations of future mortality, persistency, investment earnings, expense experience, capital and reserve requirements, and tax assumptions." *Id.* ¶ 2. To prevail on that theory of liability, Class Counsel had to engage in discovery and develop expert analysis of sophisticated actuarial concepts, and also replicate John Hancock's process for developing, updating, and applying dozens of tables containing its internal "mortality" and "persistency" assumptions. With the assistance of its experts, Class Counsel had to scour John Hancock's documents for descriptions of how John Hancock calculated its internal expectations, identify the supporting tables that underlay these calculations, determine what adjustments, if any, needed to be applied to those tables, and confirm that Plaintiffs were accurately replicating the expectations that John Hancock used in its reserving and financial projections. This process had to be repeated for each year, and was further complicated by the fact that John Hancock used a proprietary software called AXIS to construct its actuarial models, a license for which Class Counsel had to obtain from a third-party at a cost of nearly $50,000 per year. By starting with first principles and examining John Hancock's models and internal documents from the ground up, Plaintiffs alleged that Hancock appeared to have manipulated the mortality assumptions upon which the COI

increase was predicated, as set forth in the Second Amended Complaint. Ard Decl. ¶ 12; Second Am. Compl. ¶ 13.

Plaintiffs also claimed that Hancock violated the provision requiring that COI rates be reviewed "at least once every 5 Policy Years" or "from time to time" by basing the COI increase not on changes since June 2013 (five years prior to the increase), or its last redetermination of non-guaranteed elements, but instead based on changes to expectations that had occurred long ago. This theory of breach was highly complex. It depended on John Hancock's adoption of a mortality table in 2011, known as "JH11," under which its mortality assumptions had significantly deteriorated since the time it priced the policies that are the subject of this litigation. Second Am. Compl. ¶ 59. In connection with the adoption of JH11, and also a worsening in John Hancock's "lapse" assumptions, John Hancock took a $404 million write down, and affirmatively chose not to increase its COI rates at that time. *Id.* In the Second Amended Complaint, Plaintiffs asserted that, while John Hancock claimed that the May 2018 COI Increase was a response to recent changes in its mortality expectations, in reality it was an improper attempt to recoup the losses it wrote off in 2011 in connection with JH11 (and additional losses that it wrote off in 2014). *Id.* ¶ 62. Prosecuting that theory involved analyzing large swaths of data, including tracking down, analyzing, and replicating changes to numerous sets of John Hancock's actuarial assumptions, including some that that occurred nearly a decade ago.

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 in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in class actions."). Risk can vary based on many factors, including the novelty

of the legal claims, the complexity of the subject matter, and the existence or stage of a relevant (or even parallel) government action. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147 (S.D.N.Y. 2010). The "litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55.

The risks Susman Godfrey faced here were high. As described above, the liability theories were complex and would have undoubtedly involved dueling expert opinions concerning sophisticated actuarial concepts. Moreover, Class Counsel did not have the benefit of government investigations, let alone indictments, consent decrees, or guilty pleas. Thus, this is not an instance where a plaintiff was merely following the lead of the government, "arriving on the scene after some enforcement or administrative agency has made the kill." *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992).

Perhaps most challenging of all was the fact that the NYDFS investigated the COI increase that Plaintiffs were challenging and, after engaging in with negotiations with John Hancock over the increase, ultimately *allowed it to proceed*. *See* Second Am. Compl. ¶ 64. Though Plaintiffs would have disputed the significance of NYDFS's non-objection—Plaintiffs contended that John Hancock misrepresented numerous factors to NYDFS, thus rendering NYDFS's review insignificant—this fact would have surely featured prominently in John Hancock's defenses, and it is indicative of the challenges faced in this litigation.

Class Counsel would have faced other risks, too. John Hancock stated that it would vigorously oppose class certification, which by no means would have been a certainty. Even getting to trial in a timely manner itself was a risk, in light of pandemic-generated backlogs in the federal courts. At trial, it would have been far from clear as to how a jury would resolve any disputed factual issues, especially where Plaintiffs would have faced a "battle of the experts" – a

battle in which no party is ever assured to prevail. *See State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re 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). And even if Susman Godfrey prevailed at every risky stage in this Court—class certification, summary judgment, and trial—the risk would have continued after that with the inevitable filing of decertification motions, post-verdict motions, and appeals. *See Phoenix COI*, 2015 WL 10847814, at *6 ("Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years.").

Susman Godfrey undertook enormous risk in taking on this case—over a million dollars in advanced expenses and nearly fifteen thousand hours in attorney time—all of which could have resulted in no compensation had the case been lost. 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. *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12-cv-4216 (RLE), 2014 WL 3778173, at *11 (S.D.N.Y. July 31, 2014) ("Contingency risk is the principal, though not exclusive, factor courts should consider in their determination of attorneys' fees."); *City of Providence vs Aeropostale*, *Inc.*, No. 11 Civ. 7132 (CM), 2014 WL 1883494, at *14 ("The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award . . . .").

The risk was also high because Susman Godfrey sought large damages against a deep-pocketed insurance company with essentially limitless resources, which hired three 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) (explaining that given "the formidable and nearly limitless resources of the opposition's nationally prominent law firms, and the amount of economic and personnel investment required to sustain the momentum of massive litigation, it is difficult to conceive of a more undesirable piece of litigation for any attorneys considering undertaking contingent fee litigation"). And the risk to Class Counsel was compounded because it spent more than three 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 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. And 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 v. Del Glob. Techs. Corp*., 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) (internal quotation marks omitted); *see also Loc. 1180, Commc'ns Workers of Am., AFL-CIO v. City of New Yor*k, 392 F. Supp. 3d 361, 378 (S.D.N.Y. 2019) ("[T]he most critical factor is the degree of success obtained by the plaintiff" (internal citation marks and alterations omitted)).

One way to measure the result is to compare the "extent of possible recovery with the amount of actual verdict or settlement." *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (citation omitted). The Court has already recognized that the Settlement—under which the Class will receive ***91.25%*** of all overcharges through August 31, 2021, plus meaningful non-monetary benefits—represents an "outstanding" result. Indeed, it is better than the settlement in *Phoenix COI*—for 68.5% of COI overcharges plus non-monetary

benefits—which Judge McMahon described as "one of the most remunerative settlements this court has ever been asked to approve," and entered a fee award found to be reasonable cross-checked against a lodestar multiplier of 4.87. 2015 WL at 10847814, at *11, *18. And it beats, by an even wider margin, the settlement in *Hancock COI I*, which Judge Gardephe described as "extraordinary" and for which he approved an award of 30% of the benefits conferred cross-checked for reasonableness against a 6.92 lodestar multiplier. *See also Feller v. Transamerica Life Ins. Co.,* 2019 WL 6605886, at *10 (C.D. Cal. Feb. 6, 2019) (approving settlement requiring refund of "almost 65%" of COI overcharges, and awarding fees requested equal to 25% of the $110 million settlement fund cross-checked for reasonableness to a 2.97 lodestar multiplier). The far better results in this Settlement speak for themselves.

Regarding the skills of Class Counsel, the Court previously appointed Susman Godfrey as Class Counsel because the firm met all the requirements of Rule 23(g).[9] (Dkt. 52.) Susman Godfrey has significant experience with insurance litigation and class actions, including COI class actions and settlements thereof. Ard Decl. ¶ 4. Susman Godfrey has represented numerous classes of policyowners seeking recovery of COI overcharges against insurers, including AXA Equitable Life Insurance Company, Voya Life Insurance Company, and Security Life of Denver Insurance Company. *Id.* The lawyers working for the Class have substantial experience prosecuting large-scale class actions and life settlement litigation. *Id.*

"The quality of opposing counsel is also important in evaluating the quality of plaintiffs'

[9] See *Morris*, 859 F. Supp. 2d at 621-22 (noting that Rule 23(g) requires the court to consider "the work counsel has done in identifying or investigating potential claims in the action, . . . counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, . . .counsel's knowledge of the applicable law, and . . .the resources counsel will commit to representing the class") (internal quotation marks omitted)).

counsels' work." *Seijas v. Republic of Argentina*, No. 04-cv-400 (TPG), 2017 WL 1511352, at *13 (S.D.N.Y. Apr. 27, 2017). John Hancock is represented by three firms with first-rate attorneys, who litigated this case vigorously, with well-deserved reputations for their advocacy in the defense of complex class actions. In sum, all of the customary metrics indicative of high quality of representation weigh in favor of the requested fee.

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

The fifth *Goldberger* factor, which addresses "the requested fee in relation to the settlement," also strongly supports approval of the requested fee. "[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 above, the proposed award is well within the range of fees found to be reasonable and awarded by courts, including this Court in settlements that pale in comparison to the extraordinary results achieved here.

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

Finally, the sixth *Goldberger* factor, which addresses "public policy considerations," supports approval of the requested fee. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of claimants who lack the financial incentive to obtain a recovery on their own behalf. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("[T]o attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("'To make certain that the public is represented by talented and experienced trial counsel, the remuneration

should be both fair and rewarding.'" (citation omitted)). Accordingly, public policy favors granting the fee application here.

II. Class Counsel's Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Settlement And Should Be Reimbursed

Class Counsel also requests reimbursement in the amount of $1,427,596.29 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this action. "[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.*, No. 11 MD 2262 (NRB), 2018 WL 3863445, at *1 (S.D.N.Y. Aug. 14, 2018) (citation omitted); *see, e.g., Penn. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 27 (S.D.N.Y. 2016) ("When the lion's share of expenses reflects the typical costs of complex litigation such as experts and consultants, trial consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses, courts should not depart from the common practice in this Circuit of granting expense requests." (quotation marks omitted)).

The expenses advanced in this litigation are described in the papers filed in support of this application. *See* Ard Decl. ¶ 47. These expenses were reasonable and necessary in this litigation, and have been expended for the direct benefit of the Class. *Id*. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as expert fees, mediation costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with the litigation. *See Phoenix COI*, 2015 WL 10847814, at *23 (reimbursing costs such as "fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with this litigation"). The fact that Class Counsel was willing to expend its own money (using *no* outside litigation funding or support), 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 payment of Settlement Administration Expenses pursuant to Section 7.4 of the Settlement Agreement. The Settlement Administrator has incurred $90,197.06 in such expenses through February 28, 2022, and will incur additional expenses as Settlement payments are distributed.[10] Declaration of Gina Intrepido-Bowden ¶ 15.

III. Incentive Awards For the Named Plaintiffs Are Appropriate

Class Counsel seeks an incentive award of $25,000 for each of the seven named plaintiffs. Courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks*, 2005 WL 2757792, at *10.[11]

The discovery obligations imposed on the Named Plaintiffs for whom Class Counsel seek incentive awards were significant. Representatives of six of the seven Named Plaintiffs were deposed. Ard Decl. ¶ 51. The Plaintiffs spent significant time preparing for those depositions—preparation which was not only substantive but included training on how to use the Zoom technology platform specifically for depositions. *Id.* Class Counsel worked with all of the Named

[10] The Preliminary Approval Order also provides that Settlement Administration Expenses may be paid from the Settlement Fund as they become due. Dkt. 203 ¶ 9. Class Counsel seeks the Court's approval to continue making those payments as they become due. Amounts through February 28, 2022 are set forth in the Intrepido-Bowden Declaration.

[11] *See also Anwar*, 2012 WL 1981505, at *3 ("Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation."); *Varljen v. H.J. Meyers & Co.*, 2000 WL 1683656, at *5 n.2 (S.D.N.Y. Nov. 8, 2000) (reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel").

Plaintiffs to respond to Hancock's 174 requests for production, 152 interrogatories, and 1,124 requests for admission. Ard Decl. ¶ 19. And all of the representatives were provided opportunities to review pleadings and motions, reviewed other court filings, communicated regularly with Class Counsel, and were continuously involved in the litigation and settlement process. See Ard Decl. ¶ 49.

The requested awards are in line with those awarded in other complex class actions. *See, e.g., In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) (approving $50,000 incentive award for each of two class representatives); *Bd. of Tr. of AFTRA Ret. Fund*, 2012 WL 2064907, at *3 ($50,000 incentive awards to three class representatives); *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK) ,2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) ($75,000 awards to five named plaintiffs and $25,000 to $60,000 awards to four class member witnesses); *Kifafi v. Hilton Hotels Ret. Plan.*, 999 F. Supp. 2d 88, 105 (D.D.C. 2013) ($50,000 incentive award to lead plaintiff). Here, the total requested awards represent a mere .09% of the total settlement value that John Hancock has agreed to make available. *See Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018) (awarding six $50,000 service awards and two $100,000 awards for named plaintiffs, recognizing that "in aggregate they amount to a minuscule portion of the settlement fund").

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that this Court approve an award of attorneys' fees in the amount of $34.4 million, plus a *pro rata* share of the interest earned on the Settlement Fund, reimbursement of costs and expenses in the amount of $1,427,596.29, and service awards for the named plaintiffs of $25,000 each.

Dated: March 11, 2022

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