UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHT HOLDING I LLC, and JAMES KENNEY, on behalf of themselves and all others similarly situated, Plaintiffs, v. PHL VARIABLE INSURANCE COMPANY, Defendant.	)	Case No. 1:18-cv-03444 (MKV)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL AND CLASS CERTIFICATION

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I. INTRODUCTION

After five-and-a-half years of hard-fought litigation, the Settlement provides an excellent result for the owners of the nearly 5,000 Class Policies. The total settlement value is approximately $42.2 million. The $17.4 million cash fund considered alone accounts for 66% of all damages that could have been recovered at trial. The non-monetary benefits—a COI Rate Increase Freeze and a Validity Guarantee—deliver another $24.8 million in value to the Class.

The Settlement is a superb result under any metric and from any perspective. The Settlement Fund compares favorably with what Judge McMahon approved in an earlier COI class action involving Defendant PHL Variable Insurance Company ("PHL") and its affiliate. Judge McMahon called the settlement in that case, where the cash fund equated to 68.5% of the historical overcharges, "one of the most remunerative settlements this court has ever been asked to approve." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *10–11 (S.D.N.Y. Sept. 9, 2015). As in *Fleisher*, the cash payments here will be sent directly to Class members, without any need to fill out claim forms, and with no reversion to PHL. *Id.* at *1.

This settlement is also extraordinary due to the substantial prospective relief it affords to Class members, which would not have been achievable even if the Class had prevailed at trial. That prospective relief includes a guarantee by PHL not to impose a new, more expensive COI rate scale for two years—notwithstanding a worldwide pandemic that some insurance companies claim caused their costs to skyrocket and may lead to COI increases[1]—and a prohibition on challenging the validity of the Class policies. According to a valuation by the same firm that valued

[1] PHL's former expert, Timothy Pfeifer, has argued elsewhere that COVID has led to deterioration in mortality expectations. *E.g.*, *Meek v. Kan. City Life Ins. Co.*, No. 19-00472-cv (W.D. Mo.), Dkt. 90-2 (Pfeifer Decl.) ¶ 54 (filed Oct. 12, 2021).

non-monetary benefits in *Fleisher* (which valuation Judge McMahon adopted), this relief is worth an additional $24.8 million to the Class.

The reaction of the Class has been overwhelmingly positive. Members of the Class include institutional investors, who monitor their policies closely, *see* Dkt. 219-5 ¶¶ 116–20; Dkt. 219-4 ¶¶ 26, 104, 146, 157–59, have their own counsel, and have been active in pursuing individual COI litigation, *see, e.g.*, *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, No. 12 Civ. 6811 (CM) (S.D.N.Y.); *Lima LS PLC v. PHL Variable Ins. Co.*, No. 3:12-cv-1122 (WWE) (D. Conn.). After a highly effective notice program, which successfully delivered 4,967 Settlement Notices for the 4,976 policies in the Class, ***not one Class member objected to the Settlement or Class Counsel's fee request***. Among those who received a Notice, only 11 registered owners, all represented by the same counsel, chose to opt out. They did so likely to pursue individual litigation that attacks both the 2017 COI Increase at issue in this case and the 2021 COI Increase. The latter increase could not be litigated in this action and is not part of this release.[2]

The positive reaction by the Class is powerful evidence that the Settlement, Plan of Distribution, and Fee, Expense, and Service Award motion should be approved as fair, adequate, and reasonable. *See, e.g.*, *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (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." (cleaned up)); *id.* at 374 ("[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."); *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

[2] *See* Dkt. 178 (denying leave to add allegations challenging the 2021 COI Increase). The 2021 COI Increase is currently the subject of a separate class action pending in the District of Connecticut. *See Kenney v. PHL Variable Ins. Co.*, No. 3:22-cv-00552-OAW (D. Conn.).

be taken to mean that the Class consents to Class Counsel's request and finds it reasonable."). This is particularly true where, as here, the Class is largely comprised of sophisticated institutional investors who have the incentive and ability to object. *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."); *In re Remeron Direct Purchaser Antitrust Litig.,* 2005 WL 3008808, at *13 n.1 (D.N.J. Nov. 9, 2005) ("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.") (citing case)); *see also Fleisher*, 2015 WL 10847814, at *23 ("When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the fee request.'" (cleaned up)).

The Settlement is also outstanding when measured against the substantial risks it resolved. The Class gets paid 66% of all alleged damages now, in cash, along with considerable non-monetary benefits, and avoids the substantial risks and delays of ongoing litigation. 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. *Fleisher*, 2015 WL 10847814, at *9. The risks did not end there. Unlike the COI increase at issue in *Fleisher*, which multiple regulators deemed unlawful, no state regulator challenged PHL's 2017 COI Increase. And PHL intended to argue at trial that its 2017 COI Increase was properly designed and backed by Milliman, which PHL described as "one of the world's largest and most respected actuarial firms." Dkt. 276-21 at 2.

Even if Plaintiff prevailed on liability, he faced still further uncertainty on damages. PHL intended to present evidence that damages should be reduced by tens of millions of dollars to account for an alternative COI increase that PHL could have imposed. Dkt. 276-56 at 3. PHL also sought to exclude Plaintiff's damages expert for opining that COI overcharges are an appropriate measure for damages. *Id.* Because these damages disputes turned on a battle of the experts, they were inherently risky. *Fleisher*, 2015 WL 10847814, at *9 (citing *In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y.1998) as "observing that '[d]amages at trial would inevitably involve a battle of the experts' and noting that it is 'difficult to predict with any certainty which testimony would be credited'").

This risk of a lower-than-expected recovery is real. In a recent COI class trial in *Meek v. Kan. City Life Insurance Co.*, No. 19-00472-cv (W.D. Mo.), the class sought $18 million in damages, but the jury returned a verdict of only $5 million, which was reduced even further to approximately $900,000 in post-trial proceedings. Dkt. 283-2 (Meek Tr. at 69:9–16; Dkt 283-3 (Meek verdict form); Dkt. 283-4 (*Meek* Dkt. 329 (post-verdict Order)). Considering those risks, this Settlement refunding 66% of all alleged COI overcharges, plus an additional $24.8 million in benefits that could not be obtained at trial, is even more outstanding.

Plaintiff was able to achieve this extraordinary result only through tenacious, high-quality work over five-and-a-half years. Because PHL disclosed virtually no information to policyholders about the 2017 COI Increase, Class Counsel had to investigate its impact and purported actuarial justifications independently. After defeating a motion to dismiss, Class Counsel and their experts immediately went to work obtaining and analyzing tens of thousands of PHL's and third parties' documents.

A key discovery fight quickly emerged: PHL's actuarial consultant, Milliman, which modeled the 2017 COI Increase for PHL, refused to produce the MG-ALFA software necessary to use and analyze the actuarial models. After lengthy meet-and-confer negotiations failed, Plaintiff moved to compel Milliman to provide Plaintiff access to its MG-ALFA software. Dkt. 106. To support the motion to compel, Class Counsel submitted two expert declarations and multiple exhibits explaining the importance of the MG-ALFA software and models. Dkts. 108–10. In response, Milliman claimed that its MG-ALFA software was too confidential, expensive, and commercially sensitive to provide to Plaintiff. Dkt. 118. After full briefing, the Court sided with Plaintiff, ordering Milliman to provide full access to its MG-ALFA software. Dkt. 138.

That victory proved critical, as those MG-ALFA models formed the foundation of many of the expert opinions of Plaintiff's actuarial expert, Howard Zail. Dkts. 204-4, 204-30. For example, Mr. Zail relied on MG-ALFA to find that PHL's 2017 COI Increase unlawfully recouped prior losses in numerous ways. *E.g.*, Dkt. 204-4 ¶¶ 276, 309.

Class Counsel later had to move to compel Milliman ***again***—this time challenging its (and PHL's) attempt to withhold as privileged numerous highly relevant documents related to the 2017 COI Increase. Plaintiff prevailed on that motion as well, with the Court holding that none of PHL's communications with Milliman were privileged and requiring them to be produced. Dkt. 178. As a result, PHL and Milliman produced some of the most impactful documents in the litigation, which featured prominently in Plaintiff's expert reports and several depositions. *E.g.*, Dkt. 204-4 ¶ 129, 168–70.

The work that followed was a huge undertaking, including 25 highly technical depositions, five expert reports, full class certification briefing, partial summary judgment briefing, and two mediations. During fact discovery, Plaintiff's counsel and his experts analyzed over 375,000 pages

of documents and over 1,000 spreadsheets containing actuarial tables, mortality studies, and COI rate analyses. Ard Decl. 1 (Dkt. 263) ¶ 9. Plaintiff also issued 10 subpoenas to relevant third parties, including PHL's actuarial and financial advisors. *Id*. This tenacious work ultimately resulted in the Settlement that the Court preliminarily approved on August 9, 2023. Plaintiff's expert reports alone totaled 308 pages, supported by exhibits and appendices exceeding 5,200 pages and including complex MG-ALFA models and detailed spreadsheets. Given all that discovery and analysis, Plaintiff was acutely aware of the merits and risks of his claims and fought hard (and ultimately successfully) for the best outcome for the Class.

In parallel with these efforts, Plaintiff engaged in negotiations spanning years and participated in two formal mediation sessions. The parties' mediations and intervening negotiations were conducted with the assistance of Professor Eric D. Green. Professor Green confirmed that the parties' negotiations were "at arm's length," involving "exceptional and professional legal work on both sides." Mar. 7, 2023 Declaration of Eric D. Green (Dkt. 264) ¶¶ 6, 12. According to Professor Green, the resulting Settlement "is an excellent result for the putative class that reflects the strenuous negotiations between highly professional counsel." *Id.* ¶ 12.

For all these reasons, Plaintiff respectfully requests that the Court grant final approval of the Settlement, certify the Settlement Class, and approve the Notice and plan of distribution.

II. BACKGROUND

A. Plaintiff Challenges the 2017 COI Increase

In August 2017, PHL sent policyholders a form letter stating that their COI rates would increase. Dkt. 58 ¶ 4. The resulting increase (the "2017 COI Increase") affected nearly 5,000 Phoenix Accumulator Universal Life ("PAUL") and Phoenix Estate Legacy ("PEL") universal life ("UL") policies (the "Class Policies"). Mar. 7, 2023 Declaration of Seth Ard (Dkt. 263) ("Ard

Decl. 1") ¶ 15. Advance Trust & Life Escrow Services, LTA, as securities intermediary for Life Partners Position Holder Trust ("ATLES"), along with Plaintiff James Kenney ("Kenney" or "Plaintiff"), prosecuted this case.[3] Kenney and each Class member owned at least one Class Policy issued by PHL. Each Class Policy requires that PHL determine "any change in rates . . . prospectively" and prohibits it from "recoup[ing] prior losses." Dkt. 203 at 3–4 (citations omitted). Each Class Policy further contains a "Uniformity Provision" that prohibits PHL from discriminating unfairly within a class or implementing a non-uniform change in COI rates for insureds in the same class. *Id.* Each Class Policy requires that COI rates be based on enumerated factors. *Id.*

This action was originally commenced on April 19, 2018. Dkt. 1. PHL responded to the complaint by filing a motion to dismiss. Dkt. 31. After conducting jurisdictional discovery, Plaintiff successfully defeated that motion in March 2019. Dkt. 60. On May 1, 2019, the Court appointed Susman Godfrey L.L.P. as Interim Class Counsel under Rule 23(g) based on the firm's experience and "knowledge of the law governing [COI] actions." Dkt. 92 at 7–8.

B. Plaintiff Engages in Four Years of Contested Discovery

Plaintiff engaged in over four years of hard-fought discovery. During fact discovery, Plaintiff's counsel and his experts analyzed over 375,000 pages of documents, which included complex actuarial models, policy-level data reflecting the historical credits and deductions to the account value of all Class members' policies, and over 1,000 spreadsheets containing actuarial tables, mortality studies, and COI rate analyses. Ard Decl. 1 (Dkt. 263) ¶ 9. Plaintiff also issued

[3] ATLES transferred its ownership interests in its policies to PHT Holding I LLC ("PHT"). Dkt. 257 ¶ 3. The parties thereafter jointly moved to substitute ATLES with PHT as a plaintiff and class representative. Dkt. 257. About one month later—before the Court ruled on the substitution motion—the parties stipulated to ATLES's voluntary dismissal of its claims without prejudice. Dkt. 260. The Court thereafter granted the joint motion for substitution. Dkt. 272. But, since ATLES was no longer a party by that point, the substitution was moot. Kenney continues to prosecute this case, and the Court approved only him to "serve as representative of the Class for purposes of the Settlement." Dkt. 271 ¶ 8.

10 subpoenas to relevant third parties, including PHL's parent companies, consultants, and actuarial and financial advisors. *Id.*

One of those subpoenas, to PHL's actuarial consultant Milliman, was for a copy of the proprietary MG-ALFA actuarial software that PHL and Milliman used to model the 2017 COI Increase. Milliman refused to produce the software, which required Plaintiff to file a motion to compel. Dkt. 106. Plaintiff's motion to compel was supported by multiple expert declarations explaining the importance of this software and of examining Milliman's COI increase modelling in its native format. Dkts. 107–10. Plaintiff prevailed on that motion, Dkt. 138, and those MG-ALFA models turned out to be critical to many of Plaintiff's liability theories, Ard Decl. 1 (Dkt. 263) ¶ 10.

Plaintiff also took and defended a total of 19 highly technical fact and Rule 30(b)(6) depositions of both PHL and Milliman. Oct. 9, 2023 Declaration of Seth Ard (Dkt. 283) ("Ard Decl. 2") ¶ 6. All those depositions were taken virtually due to COVID-19 and therefore required numerous hours of additional coordination. Ard Decl. 1 (Dkt. 263) ¶ 11.

The parties then engaged in approximately seven months of expert discovery. Plaintiff designated three experts: actuarial expert Howard Zail, regulatory-practices expert Jeffrey Angelo, and damages expert Robert Mills. PHL designated three experts: Darryl Wagner for actuarial issues, Maria T. Vullo for regulatory practices, and Professor Craig Merrill for damages. Collectively, the Parties produced eight expert reports, totaling 530 pages. Ard Decl. 2 (Dkt. 283) ¶ 16. Plaintiff's expert reports were supported by exhibits and appendices exceeding 5,200 pages and including complex MG-ALFA models and detailed spreadsheets. *Id.*

On September 2, 2022, Plaintiff moved for class certification. Dkts. 200–06. PHL opposed and filed two pre-motion letters seeking to exclude Plaintiff's experts and move for summary

judgment. Dkts. 209, 230–36. Plaintiff filed letter briefs and his Rule 56.1 Counter Statement in response, Dkts. 238–44, and reply in support of class certification, Dkts. 224–27. At the time the parties entered the Settlement, class certification was fully briefed, all fact and expert discovery concluded, and the parties' letter briefs regarding *Daubert* motions and summary judgment were pending. Dkt. 237.

C. The Class's Damages in this Action Stopped Accruing in 2021

PHL and Milliman originally projected that the 2017 COI Increase would be in place for the life of the policies. Dkt. 204-3, at 8, 10 (PHL_AT_010905, PHL_AT_010907). In November 2020, however, PHL sent a notice to policyholders announcing a new COI increase (the "2021 COI Increase"). Ard Decl. 1 (Dkt 263) ¶ 17. Plaintiff sought leave to add allegations challenging the 2021 COI Increase, but the Court denied that request. Dkts. 177–78. Plaintiff subsequently filed a separate case in the United States District Court of the District of Connecticut challenging the 2021 COI Increase. *Kenney v. PHL Variable Ins. Co.*, No. 3:22-cv-00552-OAW (D. Conn.) (the "Connecticut Action"). The proposed Settlement expressly carves out, and does ***not*** release, any claims alleged in the Connecticut Action.

The primary effect of the 2021 COI Increase on this case is that the COI damages resulting from the 2017 COI Increase ***ended*** in 2021. Damages here (exclusive of prejudgment interest) became ***fixed*** at $26,382,143, regardless of the time to trial. Nov. 7, 2023 Declaration of Robert Mills ("Mills Decl. 2") ¶ 5.

D. Settlement Negotiations

The Settlement was reached after multiple rounds of arms-length negotiations between the parties with the assistance of the experienced mediator Professor Eric D. Green of Resolutions LLC. The parties attended two in-person mediations in Boston, Massachusetts on January 20, 2022

and November 8, 2022. Green Decl. (Dkt. 264) ¶¶ 7–8; Ard Decl. 1 (Dkt. 263) ¶ 6. Following the second mediation, the parties continued to negotiate and reached a memorandum of understanding for a settlement. Green Decl. (Dkt. 264) ¶ 8; Ard Decl. 1 (Dkt. 263) ¶ 6. The parties promptly informed the Court on November 15, 2022. Dkt. 237. The parties then negotiated a long-form settlement agreement over the course of three months. Ard Decl. 1 (Dkt. 263) ¶ 6.

At all times and on both sides, highly qualified and experienced counsel conducted the negotiations. Ard Decl. 1 (Dkt. 263) ¶¶ 6–8; Green Decl. (Dkt. 264) ¶ 9. Class Counsel analyzed all the contested legal and factual issues to thoroughly evaluate PHL's contentions, advocated in the settlement negotiation process for a fair and reasonable settlement that serves the best interests of the Class, and made fair and reasonable settlement demands. Ard Decl. 1 (Dkt. 263) ¶¶ 7–8; Green Decl. (Dkt. 264) ¶¶ 7–9. The negotiations leading to the Settlement were contested, not collusive, and consisted of "vigorous, arms-length debate." Green Decl. (Dkt. 264) ¶¶ 7–8; Ard Decl. 1 (Dkt. 263) ¶ 7. And the result is one Professor Green believes is "excellent" for the Class. Green Decl. (Dkt. 264) ¶ 12.

E. The Settlement Agreement

1. The Settlement Class

The Settlement Class is "all owners of PAUL and PEL policies issued by PHL whose policies experienced an increase to the COI rate scales between (i) November 5, 2017 and (ii) the monthly deduction immediately preceding the policy's first policy anniversary date falling on or after January 1, 2021." Settlement Agreement (Dkt. 263-2) ¶ 7. Excluded from the definition are Class Counsel and their employees; PHL, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing; and the Court, the Court's staff, and their immediate families. *Id.* Also excluded from the Settlement Class are policies owned

by Conestoga Trust and Conestoga Trust Services, LLC which are subject to separate, pending litigation against PHL, as well as certain policies whose owners previously reached settlements with PHL. *Id.* ¶ 18. The 64 policies that timely and validly opted out—held by just 11 registered owners—are also excluded. Nov. 7, 2023 Declaration of Gina M. Intrepido-Bowden ¶¶ 12–14.

2. Consideration

The Settlement provides the following primary benefits for the Class:

Cash. A $17,403,363 million Final Settlement Fund. Settlement Agreement (Dkt. 263-2) ¶ 22; Mills Decl. 2 ¶ 4. That amount accounts for a *pro rata* reduction resulting from comparing the total face amount of the 64 Opt-Out Policies with the total face amount of all Class Policies. Settlement Agreement (Dkt. 263-2) ¶ 52; Mills Decl. 2 ¶ 3–4. No part of the Final Settlement Fund will revert to PHL. Settlement Agreement (Dkt. 263-2) ¶ 56.

COI Rate Increase Freeze. In addition, for a period of two years after February 17, 2023, "PHL agrees that COI rate scales for the Class Policies will not be increased above the current rate scales for PAUL 1, PAUL 2, PAUL 2C, PAUL 3, PAUL 3A, PAUL 3B, PAUL 3C, PAUL4, PAUL 4A, PEL 2, PEL 3, and PEL3A . . . unless requested to do so by any Government Regulators." Settlement Agreement (Dkt. 263-2) ¶ 59. If during that period PHL reaches an agreement with any opt-outs to extend the COI increase moratorium for longer than two years after February 17, 2023, PHL will afford an equal extension to the freeze for the Class Policies as well. *Id.* ¶ 60. Plaintiff's expert James Rouse—who has extensive experience in the life-insurance industry and with longevity-based products—has opined that this COI Rate Increase Freeze is worth $16.8 million. Nov. 7, 2023 Declaration of James Rouse ¶ 12.

Validity Guarantee. "PHL agrees to not take any legal action (including asserting as an affirmative defense or counter-claim), or cause to take any legal action, that seeks to void, rescind,

cancel, have declared void, or seeks to deny coverage under or deny a death claim for any Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in applying for the policy." Settlement Agreement (Dkt. 263-2) ¶ 61. Mr. Rouse opines that the Validity Guarantee is worth approximately $8 million. Rouse Decl. ¶ 12.

3. Release

Once the Settlement becomes final, the Settlement Class and certain related parties (referred to as the "Releasing Parties" in the Agreement) will release PHL and certain related parties (referred to as the "Released Parties" in the Agreement) from "all Claims that were alleged or could have been alleged in the Action arising out of the same factual predicate relating to and/or arising out of the 2017 [COI Increase] as alleged in the Action." Settlement Agreement (Dkt. 263-2) ¶ 37. However, "claims related to (a) the 2021 [COI Increase] or (b) any future COI rate scale increases, or changes to any other policy charges and credits, imposed after December 31, 2020" are not released. *Id.* ¶ 17.

4. Awards, Costs, and Fees

Class Counsel filed its motion for fees, expenses, and a service award on October 9, 2023. Dkts. 279–86. Class Counsel sought $6,166,667, which is 14.6% of the Settlement benefits.[4] Dkt. 281 at 14. Class Counsel also sought the amount of incurred litigation expenses and a $25,000 service award for James Kenney. *Id.* at 23–24. No Class member filed an objection or otherwise objected to the motion as of November 2, 2023. Intrepido-Bowden Decl. ¶¶ 15–16.

[4] Class Counsel's Memorandum of Law supporting the Motion for Fees requested a fee that is "13.8% of the Settlement benefits." Dkt. 281 at 14. After accounting for opt-outs, the requested fee is now 14.6% of the Settlement benefits. Mills Decl. 2 ¶ 4.

F. The Notice and Opt-Out Period

On August 9, 2023, the Court granted Plaintiff's Motion for Preliminary Approval and Class Certification. Dkt. 271. The Court also appointed JND Legal Administration LLC as the Settlement Administrator and approved the form and manner of notice consisting of direct mail to all Class members, using the contact information for registered owners in PHL's records. *Id.* ¶¶ 9, 11–17. The Court also gave Class members 45 days after the notice date to submit opt-out notices. *Id.* ¶ 15. Pursuant to the Court's order, JND mailed the approved short-form notice to Class members and established the notice website on September 8, 2023. Intrepido-Bowden Decl. ¶¶ 3–6. Of the 4,976 Notices mailed, 4,967 or 99.8% were delivered, and only nine (approximately 0.2%) were undeliverable. *Id.* ¶ 5. The notices explained the procedure for opting out of the Class. *Id.* ¶ 12. The deadline to opt out was October 23, 2023. *Id.* JND received zero objections and only 64 of the policies (*i.e.*, 1.29%) opted out. *Id.* ¶¶ 13–16.

G. Plan of Allocation

The proposed plan of distribution was set forth in the notice papers (Dkt 266) and in the Plan of Allocation filed with the Court on March 7, 2023 (Dkt. 263-3). That plan calls for proceeds to be distributed directly to Class members on a *pro rata* basis without the need for a claim form. Ard. Decl. 1 (Dkt. 263) ¶ 26; Dkt. 263-3. Under this methodology, each Class member's *pro rata* share is calculated by dividing the damages for that Class member by the total of damages for the Class, as calculated by Mr. Mills. Dkt. 263-3. The resulting percentage is used to calculate each Class member's share of the Net Settlement Fund. *Id.*

That share of the proceeds is then mailed directly to each Class member at the address on file with PHL. Dkt. 263-3; Ard Decl. 1 (Dkt. 263) ¶ 20. Within one year plus 30 days after the date the Settlement Administrator mails the first checks, any funds remaining in the Net Settlement

Fund shall be redistributed on a *pro rata* basis to Class members who previously cashed their checks. Dkt. 263-3.

III. ARGUMENT

A. The Proposed Settlement Warrants Final Approval

1. Legal Standard

A class action settlement requires court approval. Fed. R. Civ. P. 23(e). "Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (cleaned up). The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116–17 (2d Cir. 2005) (cleaned up). The approval of class action settlements is governed by Rule 23(e)(2), which was 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.

Fed. R. Civ. P. 23(e)(2). As the Second Circuit recently explained in *Moses v. N.Y. Times Co.*, 79 F.4th 235, 242 (2d Cir. 2023), "[t]he first two factors are procedural in nature and the latter two guide the substantive review of a proposed settlement."

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*, 79 F.4th at 242 (internal quotation marks and citation omitted). Thus, the following *Grinnell* factors 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. 271 ¶ 2.

2. <u>The Settlement is Procedurally Fair</u>

The Court must first consider whether "the class representatives and class counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)–(B).

i) <u>Plaintiff and Class Counsel Have Adequately Represented the Class Throughout the Litigation</u>

In assessing adequacy of representation, the court focuses on "whether 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks and citation

omitted). Here, Plaintiff's interests are not antagonistic to the interest of other members of the Class. Plaintiff and the remainder of the Class suffered the same injury in the form of improper COI overcharges stemming from the 2017 COI Increase. Plaintiff and the remainder of the Class likewise "share the common goal of maximizing recovery" from PHL. *See In re Glob. Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004). The proposed Plan of Allocation relies on an objective formula tied to the overcharge damages imposed on each policy. Mar. 7, 2023 Declaration of Robert Mills (Dkt. 265) ("Mills Decl. 1") ¶ 5; Ard Decl. 1 (Dkt. 263) ¶ 26. It does not favor, or discriminate against, any Class member or group of Class members.

Class Counsel, Susman Godfrey, has litigated the claims against PHL diligently, including through the four-year discovery period detailed above. Susman Godfrey has been appointed Class Counsel in numerous COI cases, including in *Fleisher* and cases against John Hancock Life Insurance Company, AXA Equitable Life Insurance Company, Voya Retirement and Insurance Annuity Company, Genworth Life Insurance and Annuity Company, and Security Life of Denver Insurance Company. Ard Decl. 1 (Dkt. 263) ¶ 3. Class Counsel is highly experienced in contract and insurance litigation and, like Professor Green, views the Settlement as an extremely favorable result. *Id.* ¶¶ 3–4.

ii) The Parties Negotiated the Settlement at Arm's Length

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." Though this factor is not dispositive and does not attach a presumption of fairness, "the arms-length quality of the negotiations remain a factor in favor of approving the settlement (one whose absence would count significantly against approval)." *Moses*, 79 F.4th at 243.

Here, the parties were aided by Professor Green during mediation. Ard Decl. 1 (Dkt. 263) ¶ 5; Green Decl. (Dkt. 264) ¶¶ 7–9. This "help[ed] to ensure that the proceedings were free of collusion and undue pressure." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see*

also 4 Newberg & 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"). Likewise, the Settlement was negotiated at arm's length after over four years of significant discovery. Ard Decl. 1 (Dkt. 263) ¶ 7; Green Decl. (Dkt. 264) ¶¶ 7–9. These facts demonstrate procedural fairness. *See D'Amato*, 236 F.3d at 85–86.

3. The 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*, 79 F.4th at 244. Under both factors, the Settlement is substantively fair, reasonable, and adequate.

a) The Relief Provided to the Settlement Class is Adequate

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*, 79 F.4th at 244 (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.

b) Rule 23(e)(2)(C)(i): 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 to Paragraphs (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," *Grinnell*, 495 F.2d 448 at 463 (Factor 1), supports final approval. As in *Fleisher*, trial would have featured dueling actuarial experts testifying about actuarial standards, insurance principles, and technical actuarial assumptions, documents, and data. *Fleisher*, 2015 WL 10847814, at *6. Even if Plaintiff prevailed at trial, this case would likely be tied up in years of post-trial briefing and appellate practice. *See id.* ("[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.

Here, Plaintiff faced risk in establishing liability and damages before the jury. For instance, PHL put forward rebuttal experts that opined that the 2017 COI Increase was consistent with the terms of the policies and actuarial standards and that Plaintiff's damages calculations were flawed. Ard Decl. 1 (Dkt. 263) ¶ 18. Resolving Plaintiff's claims thus requires weighing "conflicting testimony by experts as to actuarial standards, the original and revised pricing assumptions used by [the insurer] for the [universal life] insurance products at issue, and what it means to 'recoup past losses' or 'discriminate unfairly' within a 'class' of insured." *See Fleisher*, 2015 WL 10847814, at *6 (finding similar COI case "indisputably complex"). It is far from clear how a jury would resolve these technical and unfamiliar issues. *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.").

Finally, the eighth and ninth *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," 495 F.2d at 463—strongly support final approval. Here, the cash recovery alone represents 66% of the damages that could be awarded at trial. Mills Decl. 2 ¶ 5. That amount vastly exceeds the typical settlement-to-damages ratio in this Circuit. *See, e.g.*, *Emeterio v. A&P Rest. Corp.*, 2022 WL 274007, at *8 (S.D.N.Y. Jan. 26, 2022) (holding that the "substantial amount of the settlement, which represents 25% of total damages sought, weighs strongly in favor of final approval"); *Fleisher*, 2015 WL 10847814, at *11 (stating 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"); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 219 (S.D.N.Y. 2015) (holding that a "recovery figure of 22.8% seems within the bounds of reasonableness"); *cf. In re Hi-Crush Partners L.P. Secs. Litig.*, 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014) ("[T]he median settlement for [class action] cases with investor losses of less than $20 million has been 17.1% of the investor losses."). That 66% settlement-to-damages ratio does not even include nonmonetary benefits of the Settlement, which Plaintiff's expert valued at an additional $24.8 million. Rouse Decl. ¶ 12. Those nonmonetary benefits could not have been achieved at trial, even with a full victory.

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 (Ard Decl. 1 (Dkt. 263) ¶¶ 4, 28) is given considerable weight because Class Counsel is closest to the facts and risks associated with the litigation. *See In re Hi-Crush Partners*, 2014 WL 7323417, at *5 ("[Lead Counsel's] opinion

is entitled to great weight." (cleaned up)).

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

"A distribution plan is fair and reasonable as long as it has a 'reasonable, rational basis.'" *Fleisher*, 2015 WL 10847814, at *12 (citation omitted). Plaintiff's proposed Plan of Allocation provides for an equitable *pro rata* distribution of proceeds without any claim form or process. Ard Decl. 1 (Dkt. 263) ¶¶ 20, 26; Dkt. 263-3. "This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable." *Fleisher*, 2015 WL 10847814, at *12 (collecting cases).

d) Rule 23(e)(2)(C)(iii): 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*, 79 F.4th at 244 (cleaned up). Here, Class Counsel seeks 14.6% of the total settlement benefits (for a lodestar multiplier of only 1.02), after a five-and-a-half-year litigation campaign—far from a "quick" settlement "to cut a check." Ard Decl. 2 (Dkt. 283) ¶¶ 6–18, 37. The reasonableness of this request was detailed in Class Counsel's Motion for Attorneys' Fees. Dkts. 279–86. The Settlement is "substantive[ly] fair[]" when "the terms of the settlement and [the requested] fee award" are reviewed "in tandem." *Moses*, 79 F.4th at 244 (cleaned up).

Class members' reaction to the Settlement and proposed fees further confirms their adequacy and reasonableness. Both the short- and long-form Notices stated that Class Counsel would seek fees "not to exceed 33 1/3% of the gross benefits provided by the Settlement." Dkt. 266 at 59, 71. Among those receiving the Notices were numerous highly sophisticated Class members, and ***no Class member*** objected to Plaintiff's requested fee award after the Settlement was announced. Intrepido-Bowden Decl. ¶¶ 15–16. 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 greater force "where, as here, the Class contains many large and sophisticated investors." *Fleisher*, 2015 WL 10847814, at *13 (approving class settlement); *see also 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)).

PHL highlighted that members of the Class are sophisticated. For example, PHL's actuarial expert, Mr. Wagner, opined that "[t]he PAUL policies at issue in the Litigation include considerable investor ownership." Dkt. 219-4 ¶ 26; *see also id.* ¶ 104 (noting the "significant investor ownership" of Class Policies); *id.* ¶ 146 (claiming a "proliferation of life settlement investor ownership"). Likewise, PHL's "insurance economist" expert, Mr. Merrill, argued that sophisticated investor Class members were so numerous as to change PHL's actuarial assumptions for the Class Policies. Dkt. 218-5 ¶¶ 116–20. According to Mr. Wagner, those "[i]nstitutional investors use sophisticated modeling techniques and analysis to 'optimize' their investment portfolios and maximize returns . . . ." Dkt. 219-4 ¶ 26. Such investors are focused on "profit maximization" and monitor their policies closely. *Id.* ¶¶ 157–59. That this group—a cross-section of institutional investors who closely monitor and optimize their policies—elected not to object is powerful evidence that the Settlement and proposed fee, viewed in tandem, are reasonable. *In re Signet Jewelers Ltd. Secs. Litig.*, 2020 WL 4196468, at *6 (S.D.N.Y. July 21, 2020).

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

The final factor considers "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(iv). Rule 23(e)(3) requires the "parties seeking approval" to "file a

statement identifying any agreement made in connection with the proposal." Plaintiff and PHL had an agreement that allowed PHL to terminate the Settlement if a confidential percentage of the Class opted out of the Settlement. Ard Decl. 1(Dkt. 263) ¶ 27. That confidential percentage was not reached, so the agreement is moot. Accordingly, this factor is neutral.

ii) 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.

Under this factor, the Court must also consider any requested incentive award for the named plaintiff to "ensure that proposed incentive awards are reasonable and promote equity between class representatives and absent class members." *See Moses*, 79 F.4th at 245, 253 (confirming that "district courts are permitted to grant incentive awards"). The requested $25,000 award for Mr. Kenney is equitable and reasonable considering the burdens he endured and the services he provided to the Class. Ard Decl. 2 (Dkt. 283) ¶¶ 19–21. That requested award represents a "minuscule portion" of the total settlement value. *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018). The fact that no Class member objected to the incentive award—which was disclosed in the Class notices, Dkt. 266 at 59, 71—is also a strong indicator that the award is fair. *In re Signet*, 2020 WL 4196468, at *6.

iii) 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," 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) (cleaned up). Here, the Settlement Administrator provided notice, resulting in 99.8% of Class Member addresses being successfully reached by direct mail. Section II.F, *supra*. No Class members objected. *Id.* 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 third *Grinnell* factor—"the stage of the proceedings and the amount of discovery completed," 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). In this years-long litigation, the parties completed fact and expert discovery, fully briefed class certification, and submitted letter briefing on summary judgment and *Daubert*. Section II.B, *supra*. This extensive discovery and briefing allowed Plaintiff and Class Counsel to develop a thorough appreciation of the strengths and weaknesses of Plaintiff's claims at the time of Settlement. *See, e.g.*, *Guippone v. BH S&B Holdings LLC*, 2016 WL 5811888, at *6 (S.D.N.Y. Sept. 23, 2016) (finding this factor satisfied where the parties had "engaged in substantial discovery").

The sixth *Grinnell* factor is "the risks of maintaining the class action through the trial." 495 F.2d at 463. "The risk of maintaining a class through trial is present in any class action." *Guippone*, 2016 WL 5811888, at *7. Here, PHL fought class certification and aimed to exclude the opinions of each of Plaintiff's experts and to obtain summary judgment. Thus, even before trial, Plaintiff

faced several obstacles and risks.

With respect to the seventh *Grinnell* factor, "the ability of the defendants to withstand a greater judgment," 495 F.3d at 463, PHL's credit has been downgraded multiple times. Ard Decl. 1 (Dkt. 263) ¶ 19. In addition, PHL is a private company without access to public markets, and it is a "closed block" insurer that no longer issues any new insurance products. *Id.*

B. The Court Should Certify the Settlement Class

The Court has already conditionally certified this Class. Dkt. 271. In accordance with the Settlement, Plaintiff respectfully requests that the Court finally certify the Settlement Class (as defined in the Settlement Agreement (Dkt. 263-2) and summarized in Section II.E.1 above) for settlement purposes. For the reasons set forth in connection with Plaintiff's motion for preliminary approval (Dkt. 262), the proposed Settlement Class satisfies the requirements for certification.

C. The Notice Program Satisfied Rule 23 and Due Process

Due process and the Federal Rules require that the class receive adequate notice of a settlement. *See Wal-Mart*, 396 F.3d at 114. The standard for the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id.* at 113 (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); Fed. R. Civ. P. 23(e)). As the Second Circuit has held, "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Id.* at 114 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)). The notice sent to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Fed. R. Civ. P. 23(c)(2)).

Here, the robust Notice Program easily satisfies the requirements of due process, Rule 23, and the notice standards articulated by the Second Circuit. Pursuant to the Court's order granting preliminary approval, the Settlement Administrator mailed the Court-approved Class Notice to the 4,976 records on the Settlement Class list. Intrepido-Bowden Decl. ¶ 3. As explained above, only nine of those were undeliverable. *Id.* ¶ 5. The Settlement Administrator conducted skip tracing for those nine returned notices. *Id.* ¶ 4. The Settlement Administrator also made the Notice publicly available on a website, and maintained a toll-free number and post office box where Class members could obtain information about the Settlement or send their exclusion requests. *Id.* ¶¶ 6–11.

The Notice communicated in plain language the essential elements of the Settlement and the options available to Class members in connection with the Settlement. The Notice describes the litigation, summarizes the Settlement's terms and benefits, describes the manner of allocating the cash payments among eligible Class members, quotes the releases verbatim, discloses the request for Court approval of attorneys' fees, expenses, and named plaintiff service award, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the Class. Dkt. 266 at 59–74. These features of the Notice all satisfy due process and show that the Federal Rules have been met. *See Wal-Mart*, 396 F.3d at 114 ("Notice is 'adequate if it may be understood by the average class member.'" (quoting 4 Newberg on Class Actions § 11.53, at 167)).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval to the Settlement, certify the Settlement Class, approve the Notice as compliant with Rule 23 of the Federal Rules of Civil Procedure and due process, and approve the plan of distribution as fair, reasonable, and adequate.

Dated: November 7, 2023

SUSMAN GODFREY LLP

/s/ Seth Ard

Seth Ard
Ryan Kirkpatrick
Komal Patel
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019-6023
Tel.: 212-336-8330
Fax: 212-336-8340
sard@susmangodfrey.com
rkirkpatrick@susmangodfrey.com
kpatel@susmangodfrey.com

Steven G. Sklaver (*pro hac vice*)
Krysta Kauble Pachman (*pro hac vice*)
Michael Adamson
SUSMAN GODFREY LLP
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150
ssklaver@susmangodfrey.com
kpachman@susmangodfrey.com
madamson@susmangodfrey.com

Class Counsel

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all parties through their counsel of record via the Court's CM/ECF system, on November 7, 2023.

/s/ Seth Ard
Seth Ard