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 PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS

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I. INTRODUCTION

After 3.5 years of hard-fought litigation, the Settlement gives the Class an "outstanding result," as this Court previously recognized at the preliminary approval hearing. Jan. 5, 2022 H'rg. Tr. at 11:6 (Dkt. 208-1). The cash fund equals 91.25% of all cost of insurance ("COI") overcharges that John Hancock Life Insurance Company of New York and John Hancock Life Insurance Company (U.S.A.) ("Defendants" or "John Hancock") collected from owners of Class Policies through August 31, 2021. Checks will be mailed directly to all Class Members with no need to submit claim forms. No funds will revert to John Hancock. The Settlement also provides significant non-monetary relief, which 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. Those non-monetary benefits would not even have been achievable had the Class prevailed at trial.

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 *10, *13 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*"). 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, with no quantified non-monetary relief, 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*"). The Court was indisputably correct when it called this Settlement "outstanding."

The Settlement is particularly exceptional considering the demands and risks associated with this litigation. The Court recognized in granting preliminary approval that the litigation was "intensive and expensive." Jan. 5, 2022 H'rg. Tr. at 11:7 (Dkt. 208-1). 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. For example, 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 in discovery 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.

Plaintiffs' work on this case was also extensive. On the discovery front, this included taking and defending 23 highly technical depositions; analyzing 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; issuing eight third-party subpoenas; filing five motions to compel (and exchanging 13 more discovery dispute letters); and successfully negotiating the production of numerous documents that initially were not produced and instead logged on John Hancock's 220-page privilege log. Plaintiffs also drafted and filed an Amended Complaint and a Second Amended Complaint that, due to the discovery obtained, further developed detailed liability theories. And Plaintiffs attended an in-person mediation which was initially not successful, but tenaciously continued to negotiate

afterwards with the help of Judge Francis (Ret.) to secure the Settlement, which Judge Francis calls an "excellent result." *See* Declaration of Hon. James C. Francis IV (Ret.) in Support of Plaintiffs' Motion for Preliminary Approval of Settlement ("Francis Decl.") (Dkt. 201-6) ¶ 8.

On the merits, the case presented several challenges. One unique challenge was that, before Class Counsel filed the case, 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*. And not only did NYDFS allow the increase to proceed, but 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. N.Y. Codes R. & Regs. Tit. 11 §§ 48.0-48.4 (Insurance Regulation 210). So this is not a case that followed a well-known or high profile government investigation; to the contrary, this is a case where the carrier claims the government did not object to the COI increase at issue. 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.

And 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 not set for trial until 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 the outstanding settlement described above. Accordingly, Plaintiffs respectfully request the Court grant final approval to the Settlement and certify the Settlement Class.

II. BACKGROUND

A. The Class Action Litigation

In May 2018, John Hancock announced that it was raising the cost of insurance ("COI") rates for certain Performance Universal Life ("PUL") policies held by policy owners throughout the country. *See* March 11, 2022 Declaration of Seth Ard ("Ard Decl.") (Dkt. 208) ¶ 6. Plaintiffs and Class Members own or have owned at least one PUL policy issued by John Hancock between 2003 and 2010. Dkt. 167 ¶ 34. Each PUL policy requires that the policy's COI charge be either (i) "based on our expectations of future mortality, persistency, investment earnings, expense experience, capital and reserve requirements, and tax assumptions" or (ii) "based on our expectations of future investment earnings, persistency, mortality, expense and reinsurance costs and future tax, reserve, and capital requirements." *Id.* ¶ 2. Plaintiffs filed this class action lawsuit in June 2018 contending that (i) the COI increase was not based on changes in the factors enumerated in the contract; (ii) the COI increase was non-uniform and discriminatory; and (iii) John Hancock improperly increased COI rates to recoup past losses rather than respond to future expectations. Dkt. 1 ¶¶ 31-62. On January 22, 2019, the Court appointed Susman Godfrey L.L.P. as Interim Class Counsel ("Class Counsel" or "Susman Godfrey") pursuant to Rule 23(g)(3). Dkt. 52.

During 3.5 years of discovery, Plaintiffs served 83 requests for production, 25 interrogatories, and 298 requests for admission. Ard Decl. (Dkt. 208) ¶ 10. As a result of these efforts, Plaintiffs obtained and analyzed nearly 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.* ¶ 11.

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. (Dkt. 208) ¶ 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 Federal Rule of Evidence 502(d), John Hancock agreed to disclose information in documents over which it previously asserted privilege or work product. *Id.*

Plaintiffs also spent time and resources to obtain critical, relevant discovery from third parties. Class Counsel issued eight subpoenas to third parties, including John Hancock's reinsurers

and the entities that conducted peer reviews of John Hancock's COI increase pursuant to Canadian regulations. *Id.* ¶ 16. Plaintiffs obtained thousands of pages of valuable documents from these subpoenas, many of which had not already been produced by John Hancock. *Id.* For example, in response to a subpoena Plaintiffs served on one of John Hancock's reinsurer, and after extensive negotiations regarding a privilege log served, Class Counsel obtained call notes between the legal departments of John Hancock and the reinsurer that contained what Plaintiffs contend are key admissions regarding the reasons behind the COI increase, which were not produced elsewhere in the litigation. *Id.*

As for depositions, Class Counsel took and defended 23 highly technical ones. Ard Decl. (Dkt. 208) ¶ 21. Representatives of six Plaintiffs were deposed. *Id.* 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 the important mortality table that was central to the COI increase, the discovery of which resulted in the subsequent production of thousands of additional, highly relevant spreadsheets. Ard Decl. (Dkt. 208) ¶ 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. *Id.* ¶ 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. (Dkt. 208) ¶ 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. *Id.* ¶ 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. Dkts. 114 & 167. Among other significant amendments, the Amended Complaint further developed Plaintiffs' theories of liability, including the liability theory that alleged that John 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. Dkt. 167 ¶¶ 59, 62; Ard Decl. (Dkt. 208) ¶ 18. John Hancock again chose to answer the Amended Complaint and Second Amended Complaint. Dkt. 129 & 174.

Under the Court's scheduling order, discovery closed on November 19, 2021, and Plaintiffs were required to file their opening expert reports on January 20, 2022. Dkt. 192.

B. Settlement Negotiations and Terms

The Settlement was reached only after the parties were able to assess the merits of their claims and defenses and the parties conducted extensive, arm's-length negotiations with the assistance of an experienced, highly respected mediator and former Magistrate Judge James ("Jay") Francis. *See* Francis Decl. (Dkt. 201-6) ¶ 8; Ard Decl. (Dkt. 208) ¶ 30. On August 26, 2021, the parties held an in-person mediation in front of Judge Francis after exchanging detailed mediation position statements and supplemental, updated discovery. Ard Decl. (Dkt. 208) ¶ 31. The parties were unable to reach agreement at that in-person mediation, but they continued to negotiate with the assistance of Judge Francis. *Id.* Nearly eight weeks after the in-person meeting, the parties reached a memorandum of understanding for a settlement and promptly informed the Court of the development. *Id.* The terms of the settlement were negotiated after the parties exchanged numerous offers and counteroffers, submitted detailed briefing to the mediator, and participated in teleconferences and email discussions. *Id.* By the time the settlement was reached, Class Counsel was well informed of material facts and the negotiations were hard-fought and non-collusive. *Id.* ¶ 32. A long-form settlement agreement was negotiated and agreed to thereafter, which the parties executed on December 29, 2021. *Id.* ¶ 31. A copy of this settlement agreement was previously submitted to the Court in support of preliminary approval. *See* Dkt. 201-4 (the "Settlement Agreement" or "Settlement").

Throughout the process, the settlement negotiations were conducted at arm's length by highly qualified and experienced counsel on both sides. Francis Decl. (Dkt. 201-6) ¶¶ 4, 8. Judge Francis believes the Settlement is the result of fair and reasonable bargaining between well-represented parties. *Id.* ¶ 4. Throughout mediation, Class Counsel and counsel for John Hancock demonstrated a thorough understanding of the strengths and weaknesses of their respective claims

and defenses. *Id.* ¶¶ 4, 6, 8. Armed with knowledge gained from 3.5 years of discovery, Class Counsel analyzed all of the contested legal and factual issues at issue to thoroughly evaluate John Hancock's contentions, advocated in the settlement negotiation process for a fair and reasonable settlement that serves the best interests of the Class, and made fair and reasonable settlement demands of John Hancock. Ard Decl. (Dkt. 208) ¶¶ 33, 39. Judge Francis calls the Settlement an "excellent result." Francis Decl. (Dkt. 201-6) ¶ 8. This Court expressly recognized during the preliminary approval hearing that the Settlement is an "outstanding result" for the Class and "was clearly done at arm's length." Jan. 5, 2022 H'rg. Tr. at 11:6-11 (Dkt. 208-1).

1. Monetary and Non-Monetary Relief to Class Members

For the Class, the Settlement awards four main benefits. *First*, the Settlement provides a cash Settlement Fund 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 John Hancock not implemented the COI increase (the "Policy Settlement Amount"). After accounting for opt-outs in proportion to the Policy Settlement Amount per policy, the Final Settlement Fund is $93,097,406.44. 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.

Second, the Settlement provides for a total and complete freeze on any COI increase for a period of five years following Final Approval of the Settlement (the "COI Rate Freeze"). Therefore, even if John 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.

Third, per the terms of the Settlement Agreement, 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 COI Rate Freeze so that it is as long as provided under that agreement.

Fourth, John Hancock has agreed not to challenge the validity and enforceability of any eligible policies owned by participating class members on the grounds of lack of an insurable interest or misrepresentations in the application for such policies.

An eminently qualified expert with extensive experience in the life insurance industry and with longevity-based products opined that the non-monetary forms of relief were highly valuable to the Class. *See* March 11, 2022 Declaration of Keith McNally ("McNally Decl.") (Dkt. 209) ¶ 11; Exhibit A to McNally Decl. (Dkt. 209-1). Accounting for opt-outs, using the same analysis, the non-monetary benefits are worth $50.48 million to the Class. Declaration of Seth Ard in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Certification of the Settlement Class ("Ard Final Approval Decl.") ¶ 9.

2. Release of COI-Related Claims Against Defendants

In exchange for the consideration provided, Plaintiffs and Class Members will release any and all claims that were or could have been asserted in the Action arising out of the facts alleged in the Action ("Released Claims") and shall not institute, maintain, assert, join, or participate in, either directly or indirectly, on their own behalf, on behalf of a class, or on behalf of any other person or entity, any action or proceeding of any kind against John Hancock asserting Released Claims. *See* Settlement Agreement §§ 1.40, 4.1-4.3 (Dkt. 201-4). The release excludes claims that could not have been asserted in this Action that arise out of any future COI increase. *Id.* §§ 1.15, 1.40.

C. Preliminary Approval and Notice to the Class

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 (Dkt. 208-1). Five days later, the Court entered its order preliminarily approving the Settlement Agreement, the proposed notice plan, and the proposed plan of distribution, and appointed Susman Godfrey as counsel to the Settlement Class. Dkt. 203. The Court also appointed Gina Intrepido-Bowden of JND Legal Administration LLC as the Settlement Administrator. *Id.* On January 7, 2022, the Settlement Administrator distributed the Class Action Fairness Act ("CAFA") Notice on the Attorney General of the United States and the state attorneys general as required by 28 U.S.C. § 1715(b). Intrepido-Bowden Decl. ¶¶ 7-8. On February 7, 2022, Settlement Administrator also established the Class Website (www.HancockCOISettlement.com) to enable Class Members to obtain all information about this case and the Settlement. *Id.* ¶ 19

Consistent with the preliminary approval order, and after receiving all the requisite data from John Hancock, on February 9, 2022, the Settlement Administrator mailed the Class Notice via first-class mail to 1,308 records on the Settlement Class. *Id.* ¶¶ 9-11. The Notice informed Class Members that they had until March 28, 2022, to exclude themselves from the Class or object to the Settlement by sending a letter to the Settlement Administrator. *Id.* ¶¶ 14, 25, 29. That deadline has passed and the Settlement Administrator received only 10 requests for exclusion from the Class (some of which are from entities represented by the same law firm already involved in

the pending follow-on related actions), which represents a total of 155 policies on the Class List and 12.3% of the total Class of Policies in the Settlement. *Id.* ¶ 27; Ard Final Approval Decl. ¶ 4. Not a single Class Member objected to the Settlement. Intrepido-Bowden Decl. ¶ 30; Ard Final Approval Decl. ¶ 5.

D. Plan of Allocation

The proposed plan of allocation (*see* Dkt. 201-5), which the Court has previously preliminarily approved, ensures that proceeds will be distributed equitably on a *pro rata* basis after any minimum settlement payment is made to eligible Class Members. Class members do not need to fill out claim forms. Money will be sent to them automatically in the mail, using the addresses that John Hancock maintains on file. *See* Settlement Agreement § 2.3(b) (Dkt. 201-4).

Each Class Member's *pro rata* share will represent the respective share of the total overcharges paid by that Class Member as of August 31, 2021. *See* Settlement Agreement §§ 1.38, 2.1(b) (Dkt. 201-4). Those overcharges will represent the difference between the COI charges John Hancock actually assessed on the policy after implementation of the COI increase through August 31, 2021 and the amount that John Hancock would have assessed under the prior rate scale, absent the COI increase. Ard Decl. (Dkt. 208) ¶¶ 35-36. All in-force policies will also benefit from the guarantee of policy validity and the five-year COI freeze and MFN clause. Settlement Agreement § 3 (Dkt. 201-4); Ard Decl. (Dkt. 208) ¶ 38.

Within 30 days after the Final Settlement Date—defined as the exhaustion of all possible appeals from this Court's entry of the Order and Judgment finally approving the settlement and dismissing the case with prejudice—the Settlement Administrator will calculate each Final Settlement Class Member's distribution pursuant to the plan of allocation. Settlement Agreement §§ 1.18, 2.3(b). Within 14 days after that, the Settlement Administrator is to send each Final

Settlement Class Member, via first-class postage prepaid, a settlement check in the amount of the share of the Net Settlement Fund to which the Final Settlement Class Member is entitled. Settlement Agreement § 2.3(b) (Dkt. 201-4); *see also* Plan of Allocation (Dkt. 201-5). Within one year plus 30 days after the date the Settlement Administrator mails settlement checks, the Settlement Administrator will mail additional checks to distribute on a *pro rata* basis any funds remaining in the Settlement Fund to those that cashed their checks in the first distribution, subject to the economic and administrative feasibility of mailing such additional checks. Settlement Agreement § 2.3(b) (Dkt. 201-4); *see also* Plan of Allocation (Dkt. 201-5). None of the settlement funds will revert to John Hancock. Settlement Agreement § 2.2(d) (Dkt. 201-4).

III. ARGUMENT

A. The Settlement Is Fair, Reasonable, and Adequate

Final approval is appropriate where the Court determines that a class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Public policy favors the settlement of disputed claims among private litigants, particularly class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005). In assessing final approval, courts consider both procedural and substantive fairness. *See id.* at 116.

1. The Proposed Class Action Settlement Is Procedurally Fair

Where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," the settlement enjoys a "presumption of fairness." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000); *see also Wal-Mart*, 396 F.3d at 116. Several factors are relevant in determining the procedural fairness of a settlement, including (i) "[c]ounsel conducting the negotiations should be experienced in similar cases"; (ii) "settlement should come at a time when sufficient discovery has been conducted, enabling counsel and the parties to accurately assess the strengths and weaknesses

of their cases"; and (iii) "[t]he settlement should be the result of arm's length, hard-fought negotiations rather than the collusion of otherwise adversarial parties." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 477, 482 (S.D.N.Y. 2015) (Hellerstein, J.). Each of these factors is present.

First, Class Counsel Susman Godfrey has considerable experience with complex commercial litigation, class actions, and litigation challenging COI rates. *See* Dkt. 201-3 (profile of Susman Godfrey's class action litigation and of Class Counsel); Ard Decl. (Dkt. 208) ¶ 4. The firm has represented classes of policyowners seeking recovery of COI overcharges against insurers, including Phoenix Life Insurance Company ("Phoenix"), AXA Equitable Life Insurance Company, Voya Life Insurance Company, and Security Life of Denver. Ard Decl. (Dkt. 208) ¶ 4. Courts within the Southern District of New York have previously approved settlements negotiated by Susman Godfrey in class action litigation arising out of COI rate charges by Phoenix and John Hancock. *See Phoenix COI*, 2015 WL 10847814, at *11; *Hancock COI I*, 15-cv-9924 (PGG), (S.D.N.Y. Mar. 18, 2019), Order Approving Class Action Settlement, Dkt. 161.

Second, the Settlement Agreement was reached after 3.5 years of hard-fought discovery through which counsel and the parties could accurately assess the strengths and weaknesses of their positions. During this time, Plaintiffs took and defended 23 highly technical depositions and analyzed nearly 1 million pages of documents, which included extensive actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all Class Members' policies, and thousands of spreadsheets. Ard Decl. (Dkt. 208) ¶¶ 10-11, 21-22. Plaintiffs purchased a license necessary to access the proprietary software AXIS at the cost of nearly $50,000 per year and were therefore able to review and reconstruct John Hancock's extremely complex actuarial models. *Id.* ¶¶ 12, 26. Through issuing third party subpoenas,

Plaintiffs obtained and reviewed critical relevant discovery from John Hancock's reinsurers and the entities that conducted peer reviews of John Hancock's COI increase pursuant to Canadian regulations. *Id.* ¶¶ 16-17. As a result of these efforts, Plaintiffs and John Hancock were able to accurately assess the merits of the case before settlement.

Third, as the Court stated during the conference on Plaintiffs' motion for preliminary approval, the Settlement was "clearly done at arm's length." Jan. 5, 2022 H'rg. Tr. at 11:11 (Dkt. 208-1). Moreover, the involvement of a mediator strengthens the presumption of fairness. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator's involvement . . . helps to ensure that the proceedings were free of collusion and undue pressure."). Here, the Settlement was reached after a mediation session and negotiations conducted under the guidance of a highly respected mediator and former United States magistrate judge in the Southern District of New York, the Honorable James C. Francis (Ret.). Francis Decl. (Dkt. 201-6) ¶¶ 4, 6, 8; Ard Decl. (Dkt. 208) ¶¶ 29-33.

2. The Proposed Class Action Settlement Is Substantively Fair: *Grinnell Factors*

The Settlement is also substantively fair. The Second Circuit has identified nine factors courts should examine when considering whether to grant final approval to a proposed class settlement (the "*Grinnell* factors"):

> (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, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 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). "In applying

these factors, 'not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances.'" *Phoenix COI*, 2015 WL 10847814, at *5 (quoting *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y.2008)).

As demonstrated below, the Settlement satisfies the *Grinnell* factors.

i. Complexity, Expense, and Likely Duration of the Litigation (*Grinnell* Factor 1)

The first factor, which addresses "the complexity, expense and likely duration of the litigation," strongly supports approval. *Grinnell*, 495 F.2d at 463. This litigation was indisputably complex. The complaint alleges the breach of an insurance contract, including that John Hancock's COI rate increase was not "based on" the enumerated factors in the policies, was nonuniform and discriminatory, and was designed to recoup past losses rather than respond to future expectations of actuarial assumptions. Dkt. 167 ¶¶ 43-87. Resolving these issues would require conflicting testimony by experts as to actuarial standards and trends, the original and modified pricing assumptions used by John Hancock for the at-issue products, and what it means to recoup past losses or discriminate unfairly within a class of insured. Judge McMahon recognized that similar COI litigation, which turned on expert disputes, was "indisputably complex." *See 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 . . . .")

The Settlement also ends future litigation and uncertainty, and avoids COVID-related backlogs in trial schedules. If the litigation were ongoing, Plaintiffs would face class certification briefing, motions for summary judgment, motions to decertify the class, various *Daubert* motions, trial, and post-verdict and appellate litigation. Even assuming Plaintiffs would clear these hurdles,

it could be years before the Class saw a dollar of relief. When, as here, the Settlement ends future litigation and uncertainty and delivers immediate relief to the class, this *Grinnell* factor weighs in favor of approval. *See In re World Trade Ctr. Disaster Site Litig.*, 124 F. Supp. 3d 281, 286 (S.D.N.Y. 2015) (Hellerstein, J.) (when "a settlement will enable plaintiffs to realize the benefits of the settlement proceeds now, not later" that "reflects a satisfactory disposition of disputed issues"); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("The potential for this litigation to result in great expense and to continue for a long time suggests that settlement is in the best interests of the Class." (quoting *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y.1995)); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)).

ii. Reaction of the Class to Settlement (*Grinnell* Factor 2)

The second factor, the "reaction of the class to the settlement," strongly supports approval. *Grinnell*, 495 F.2d at 463. Specifically, "'the absence of objectants may itself be taken as evidencing the fairness of a settlement.'" *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (quoting *Ross v. A.H. Robins*, 700 F. Supp. 682, 684 (S.D.N.Y.1988)).

The Settlement Administrator mailed 1,308 Class Notices directly to the addresses maintained in John Hancock's records, with subsequent follows-ups for address updates. Intrepido-Bowden Decl. ¶¶ 11, 16. The direct mailed notice effort successfully reached 98% of Settlement Class Members. *Id.* ¶ 24. The Notice was also transmitted over the PR Newswire Internet wire service and appeared on *The New York Times*, *The Financial Times,* and the *Wall Street Journal* (which was specifically suggested by the Court at the preliminary approval hearing). *Id.* ¶ 17; Jan. 5, 2022 H'rg. Tr. at 11:23-12:20 (Dkt. 208-1). The Settlement Administrator established a public website, which hosts copies of important case documents (including, but not

limited to, the Long Form Notice and Short Form Notice), answers frequently asked questions, and provides important information about Settlement deadlines and options outlined in the Class Notice. Intrepido-Bowden Decl. ¶ 19. Class Members were provided a dedicated P.O. Box and toll-free hotline with live support to contact the Settlement Administrator. *Id.* ¶¶ 21, 23. The Notice explained, in clear and concise language, the legal options and monetary benefits available to Class Members under the Settlement. *Id.* ¶¶ 12-15.

The deadline to object or request exclusion from the Class has passed, and *not a single Class member objected*, and this is a Class that John Hancock contends contains many large and sophisticated investors who are all owners of million dollar-plus life insurance policies. Intrepido-Bowden Decl. ¶ 30; Ard Final Approval Decl. ¶ 5. In addition, the Settlement Administrator received only 10 requests for exclusion from the Class (some of which are from entities represented by the same law firm already involved in the pending follow-on related actions). Intrepido-Bowden Decl. ¶ 27; Ard Final Approval Decl. ¶ 4. Two letters were received but neither objected to nor criticized the outstanding result achieved by this Settlement – the first was sent by someone in prison who does not own a policy in the class, and the second letter criticized John Hancock's conduct but did not criticize the Settlement. *See* Ard Final Approval Decl. ¶¶ 6-7; *see also id.*, Exs. A-B.

iii. Stage of Proceedings and Amount of Discovery Completed (*Grinnell* Factor 3)

The third *Grinnell* factor, which looks to "the stage of the proceedings and the amount of discovery completed," also strongly supports approval of the Settlement. *Grinnell*, 495 F.2d at 463. When evaluating the third factor, this Court "focuses on whether the plaintiffs 'obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal.'" *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 177

(S.D.N.Y. 2014) (quoting *Bellifemine v. Sanofi–Aventis U.S. LLC*, No. 07 Civ. 2207(JGK), 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010)).

At the time the Settlement was reached, Class Counsel and Plaintiffs had conducted extensive discovery and determined a fair assessment of the case merits. Class Counsel analyzed substantial volumes of data and took key depositions of John Hancock's actuaries and executives. Ard Decl. (Dkt. 208) ¶¶ 10-11, 21-22. To help prove its case, Class Counsel devoted significant time preparing expert reports and reconstructing John Hancock's actuarial models, which required 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 technical productions it made. *Id.* ¶¶ 26-27. As a result of these extensive efforts, Class Counsel and Plaintiffs had a full record against which to measure the adequacy of the Settlement. *See In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and the adequacy of settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues" (quotation omitted)).

iv. Risk of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial (*Grinnell* Factors 4, 5, and 6)

The fourth, fifth and sixth *Grinnell* factors, which address "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463.

In assessing factors 4, 5 and 6, which are often considered together, the Court is not required to decide the merits of the case, resolve unsettled legal questions, or to "foresee with absolute certainty the outcome of the case." *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961

CM, 2014 WL 1224666, at *10 (S.D.N.Y. Mar 24, 2014) (quotation omitted). Instead, "'the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement.'" *Phoenix COI*, 2015 WL 10847814, at *8 (quoting *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y.2004)). "In assessing the risks, courts recognize that 'the complexity of Plaintiff's claims *ipso facto* creates uncertainty.'" *Id.* (quoting *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009)). While Plaintiffs and Class Counsel believe that they would prevail in the claims asserted against John Hancock, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial, and appeals.

On liability, the complaint alleged that John 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. Ard Decl. (Dkt. 208) ¶ 18. Plaintiffs' proof of these issues would rest on highly technical actuarial disputes and expert evidence that the jury could decide either way. It remained possible that these key issues would go against the Class at summary judgment or at trial. *See Phoenix COI*, 2015 WL 10847814, at *9 (noting, in light of competing expert opinions concerning actuarial concepts in COI case, it was "unclear how a jury would decide these disputed issues at trial"); *In re Bear Stearns*, 909 F. Supp. 2d at 267 ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured.").

As for damages, establishing damages in this case depends on complicated actuarial modeling of hundreds of different insurance policies. Getting the data to power Plaintiffs' models required a monumental effort, including the purchase of a license to proprietary AXIS software and negotiating with John Hancock about deficiencies in its productions. Ard Decl. (Dkt. 208)

¶¶ 12-13, 22-26. It is probable that John Hancock's very able counsel would challenge these models on all fronts. Even if the models did survive *Daubert* challenges, their very complexity adds substantial risk to Plaintiffs' claims. *See Phoenix COI*, 2015 WL 10847814, at *9 (noting, in light of defendants' challenges to plaintiffs' damages model in COI case, that "[e]ven if Plaintiffs won the liability phase, Plaintiffs also faced risks in establishing damages during the separate damages phase of trial," and settlement thereby "remove[d] substantial uncertainties about Plaintiffs' chances of success").

Finally, there were substantial risks to maintaining this case as a class action through trial and appeals. *See Bellifemine*, 2010 WL 3119374, at *4 ("There is no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime during the proceedings."); *see also In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (stating "'if insurmountable management problems were to develop at any point, class certification can be revisited at any time'" (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998))). And even if Plaintiffs were to succeed at trial, John Hancock would certainly file post-trial motions and, if necessary, an appeal. "The appeal of the complex insurance and actuarial issues in this case is likely to be lengthy and expensive, and there is no assurance that Plaintiffs would prevail." *Phoenix COI*, 2015 WL 10847814, at *9; *see also In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting that "[i]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success" and citing a case where a multimillion-dollar judgment was reversed).

v. Ability of Defendants to Withstand a Greater Judgment (*Grinnell* Factor 7)

The seventh *Grinnell* factor addresses the defendant's ability to withstand a greater judgment. Even if John Hancock could withstand a greater judgment, "'this factor, standing alone,

does not suggest that the settlement is unfair.'" *Phoenix COI*, 2015 WL 10847814, at *9 (quoting *D'Amato*, 236 F.3d at 86). "Indeed, 'a defendant is not required to empty its coffers before a settlement can be found adequate.'" *Id.* (quoting *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 CIV. 5173 (RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008)). "The mere fact that a defendant 'is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.'" *Id.* (quoting *In re Glob. Crossing*, 225 F.R.D. at 460).

vi. Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery and All the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

The final two *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," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. These factors "recognize[] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). In analyzing these two factors, a reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. "The determination of whether a settlement amount is reasonable 'does not involve the use of a mathematical equation yielding a particularized sum.'" *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012) (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005)). Rather, "there is a range of reasonableness with respect to a settlement." *Wal-Mart*, 396 F.3d at 119 (quoting *Newman*, 646 F.2d at 693). Moreover, the settlement amount must be judged "not in comparison with the possible

recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Shapiro*, 2014 WL 1224666, at *11 (quotation omitted). When determining the reasonableness of settlement funds, the Court may consider the "overall value of the settlement" including "monetary as well as non-monetary relief." *Phoenix COI*, 2015 WL 10847814, at *10.

As the Court already recognized, this Settlement is outstanding. The Settlement Fund, which provides for cash relief 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." *Phoenix COI*, 2015 WL 10847814, at *11, *13. It beats by an ever wider margin a settlement in another COI case against John Hancock. According to Judge Gardephe, that settlement, which provided for 42% of the COI overcharges, was "quite extraordinary." *Hancock COI I*, Dkt. 164 at 20:10 (S.D.N.Y. Mar. 18, 2019). The Settlement also provides for substantial non-monetary relief, valued for all participating Class Members at $50.48 million. Ard Final Approval Decl. ¶ 9. The total settlement value to the Class, including cash and non-cash relief exceeds $143 million. *Id.* ¶ 10. As *Phoenix COI* and *Hancock COI I* illustrate, the combination of monetary and non-monetary benefits is an extraordinary recovery in light of the total projected damages and the risks of litigation and well within the permitted range on final approval. *See also Grinnell*, 495 F.2d at 455 & n.2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement); *Massiah*, 2012 WL 5874655, at *5 ("[W]hen a 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, settlement is reasonable under this factor.") (internal quotation marks omitted); *In re Air Cargo Shipping Servs. Antitrust Litig.*, Case No. 06-MD-1775, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009)

(approving settlement in price-fixing class action representing approximately 10.5% of the surcharges incurred by class members during the class period).

B. The Court Should Certify the Settlement Class

In accordance with the Settlement, Plaintiffs respectfully request that the Court finally certify the Settlement Class for settlement purposes. The Settlement Class consists of all "Owners of Class Policies." For purposes of the Settlement, Class Policies means any universal life insurance policy issued by John Hancock that was subjected to the COI rate schedule increase in 2018 and 2019, excluding (i) the policies at issue in the Individual Actions[1]; (ii) the following policies, which have previously reached settlements with John Hancock: 94656436, 93706844, 93717346, 93717353, 93717361, 93717379, 93752541, 94265337, 94472578, 93970200, 94270709, 93509370, and 93787802; and (iii) the policies that opted out of the Class.

The Court has already conditionally certified this class. *See* Dkt. 203. For the reasons set forth in Plaintiff's motion for preliminary approval (Dkt. 201), the proposed Settlement Class more than satisfies the requirements for certification of a settlement class.

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 class action 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.*

[1] The Individual Actions refer to: (i) *Davydov v. JHNY and JHUSA*, 18-cv-09825 (S.D.N.Y.); (ii) *Twin Lakes and Lakewood Holdings v. JHNY and JHUSA*, 655429/2018 (N.Y. Sup. Ct.); (iii) *LSH and Wells Fargo v. JHNY and JHUSA*, 19- cv-1009 (S.D.N.Y.); (iv) *Lipschitz et al. v. JHNY*, 655579/2019 (N.Y. Sup. Ct.); (v) *VICOF II Trust et al. v. JHNY*, 19-cv-11093 (S.D.N.Y.); (vi) *Wells Fargo v. John Hancock Life Insurance Company (U.S.A.)*, 20-cv-5032 (S.D.N.Y.); (vii) *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. JHNY and JHUSA*, 650452/2021 (N.Y. Sup. Ct.); and (viii) all actions consolidated with (v) pursuant to the Court's Oct. 14, 2021 Order (19-cv-11093, Dkt. 99).

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 more than meets the requirements of due process, Rule 23, and the notice standards articulated by the Second Circuit. Pursuant to the Preliminary Approval Order, the Settlement Administrator mailed the Court-approved Class Notice via first-class mail to the 1,308 records on the Settlement Class list. Intrepido-Bowden Decl. ¶ 11. Only 39 notices were returned as undeliverable, and the Settlement Administrator conducted skip tracing for those returned Notices to forward 7 notices to updated addresses. *Id.* ¶ 16. Through these methods, the direct mailed notice effort successfully reached 98% of Settlement Class Members. *Id.* ¶ 24. The Notice also appeared in prominent newspapers, including the *New York Times*, *USA Today*, the *Financial Times*, and the *Wall Street Journal* (which was specifically suggested by the Court at the preliminary approval hearing). *Id.* ¶ 17; Jan. 5, 2022 H'rg. Tr. at 11:23-12:20 (Dkt. 208-1). 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. Intrepido-Bowden Decl. ¶¶ 19, 21, 23.

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 incentive awards, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the cash settlement class. *Id.* ¶¶ 12-14, 18. Additionally, the Notice prominently notifies class members how they can obtain more information from Class Counsel or the Settlement Administrator though a toll-free number, a website, and traditional channels including mail and telephone. *Id.* ¶ 15. 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)).

D. The Distribution Plan Is Fair and Reasonable

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). Courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information," not mathematical precision. *PaineWebber*, 171 F.R.D. at 133. Here, each Final Settlement Class Member will be issued a check for their pro-rata share of the Settlement Fund, after certain expenses have been deducted. At a minimum, the check will be for $100, but in most cases, it will be for a much greater amount. Specifically, each of the Class Policies has been assigned a *pro rata* share of the Settlement tied to their proportional share of the incremental COI charges collected

by John Hancock from the specific Class Policy through August 31, 2021 (the "Policy Settlement Amount"). For each Class Policy that validly opted out of this Settlement, the Settlement Fund was reduced by the Policy Settlement Amount for that Class Policy, resulting in what is called the "Final Settlement Fund." After deducting settlement administration expenses, incentive awards, and Class Counsel's fees and expenses, the remainder of the Final Settlement Fund will be used to pay the Final Settlement Class Members on a *pro-rata* basis, based on each Class Policy's share of the total Settlement Fund. This distribution plan was fully explained in the Notice and was preliminarily approved by the Court.

This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable. *See In re Lloyd's Am. Trust Fund Litig.*, No. 96–CV–1262, 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("*[P]ro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."); *see also Phoenix COI*, 2015 WL 10847814, at *12 (approving pro rata distribution); *PaineWebber*, 171 F.R.D. at 134-35 (same). It is the opinion of Class Counsel that the distribution plan is fair, adequate, and reasonable (Ard Decl. (Dkt. 208) ¶¶ 36, 39), and this conclusion is entitled to great weight. *See In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (approving allocation plan and according counsel's opinion "considerable weight"). Class Counsel further believes the Settlement represents a good result for the Class because the checks will be mailed automatically to eligible Class Members and none of the cash in the settlement fund will be returned to John Hancock. Ard Decl. (Dkt. 208) ¶ 37. Accordingly, the distribution plan is fair and reasonable, and should be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant final approval to the Settlement, certify the Settlement Class, approve the Notice as being in compliance 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: April 11, 2022

/s/ Seth Ard

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