UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN HANKS, on behalf of herself and all others similarly situated, Plaintiff, vs. VOYA RETIREMENT INSURANCE AND ANNUITY COMPANY, formerly known as Aetna Life Insurance and Annuity Company, Defendant.	Civil Action No. 16-cv-6399 (PKC)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF HELEN HANKS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The Settlement—achieved on the eve of trial after five years of hard-fought litigation and following arm's-length negotiations conducted with the assistance of a highly experienced mediator—is an outstanding result for the Settlement Class.[1] When the monetary and nonmonetary benefits are combined, the Settlement Class will receive over $118 million in total value. This includes a Final Settlement Fund of $92,461,152.45 in cash payments. This cash fund on its own is equal to 76% of all COI overcharges that Defendant Voya Retirement Insurance and Annuity Company ("Voya") and its reinsurer and administrative agent the Lincoln Life and Annuity Company of New York ("Lincoln") collected through May 31, 2021 from the Settlement Class. This recovery is even greater than a previous COI settlement deemed "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, *13 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*") (cash fund equal to 68.5% of overcharges), and another COI settlement that was deemed "quite extraordinary," *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924 (PGG) ("*Hancock COI*"), Dkt. 164 at 20:08–10 (S.D.N.Y. Mar. 18, 2019) (cash fund equal to 42% of COI overcharges with no nonmonetary benefits). The Settlement also provides over $26 million in nonmonetary benefits to the Settlement Class, as valued by an expert in universal life insurance, including a guarantee by Voya and Lincoln not to impose a new COI rate increase for five years even in the face of this worldwide pandemic, unless a state regulatory body requires it, and even if otherwise permitted by the language of the policies.

Preliminary approval of the Settlement was granted on February 3, 2022 and Notice to the Class was mailed on March 4, 2022. There are over 46,000 policies in the Settlement Class. Not a

[1] Unless otherwise noted, all Capitalized Terms mean the same as in the Settlement Agreement.

single objection to the Settlement was filed. Only four requests for exclusion were received, accounting for less than one-twentieth of a percent of the total COI overcharges for the Class.

The Settlement resulted from the tenacious prosecution of this case. Class Counsel put in nearly 12,000 hours of work, which included reviewing over 350,000 pages of documents and actuarial data sets, assisting in the preparation of eight detailed expert reports, taking and defending more than 20 highly technical fact and expert depositions, preparing nearly 250 pages of briefing over the class certification, summary judgment, and pretrial phases, conducting a full-day mock trial, participating in the Final Pretrial Conference (and the supplemental briefing that followed) and preparing for trial. This hard work paid off—despite vigorous opposition from Defendant and its first-rate counsel, Plaintiff obtained certification of a nationwide class, defeated summary judgment, and won key motions *in limine* at the Final Pretrial Conference. The strengths and weaknesses of the case were well-known by the time the parties achieved the Settlement. By relentlessly pushing this certified class action all the way up to the eve of trial, Plaintiff and Class Counsel maximized the value to the Settlement Class. *See Phoenix COI*, 2015 WL 10847814, at *21 ("The risk of no recovery in complex cases of this type is real, and is heightened when Class Counsel opt to fight up to the eve of trial, in order to achieve the very best result for the class, rather than reaching a less attractive settlement early in the litigation.").

The Settlement is even more outstanding when considering the significant litigation risks that remained for the Class. At summary judgment, the Court rejected the New York Department of Financial Services' ("NYDFS") primary theory of breach, as Voya trumpeted in its motion *in limine* filings. *See* Dkt. 191 (Def. MIL No. 2) at p. 8 ("This Court has already rejected DFS's legal position as a matter of contract law."). However, the Court held that one of Plaintiff's unique theories of breach developed in discovery, supported by extensive "expert opinions" cited by the

Court, survived summary judgment. Dkt. 174 ("SJ Order") at 23–24. The sole remaining issue for trial was "whether the 2016 COI Adjustment was based on analysis of cost factors related to the in-force polices as mandated by the terms of the Policy or was based on Lincoln Life's profitability goals." *Id.* at 24. The Court is well aware of the challenges that Plaintiff would face at trial on that theory. *See id.* ("However, costs fundamentally have an effect on profits, which, generally speaking, are a measure of revenues minus costs. Consideration of spiraling costs is appropriate and these rising costs may also be reflected in a deteriorating profit margin."). The trial would have involved a battle of the experts, which itself is inherently risky. Voya also aggressively contested Plaintiff's damages model, including a motion *in limine* that had not yet been ruled on at the time of Settlement, for which the Court ordered supplemental briefing following the Final Pretrial Conference, which, if successful, would have eliminated a large portion of the damages available at trial. *See* Dkt. 202 (Def. Damages MIL) at 1–11; Declaration of Seth Ard ("Ard Decl."), Ex. 4 (5/12/21 FPTC Transcript) at 26:23–27:9. And even if Plaintiff overcame all of this, the risk would have continued with the inevitable filing of decertification motions, post-verdict motions, and appeals. *See Phoenix COI*, 2015 WL 10847814, at *6 ("Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years."); Dkt. 283 (Declaration of Mediator Robert A. Meyer ("Meyer Decl.")) ¶ 7 ("The settlement obtained is particularly fair, adequate and reasonable under the circumstances of this case because it provides a very substantial recovery for the Class, especially when measured against the obstacles standing in the way of achieving a successful resolution of the claims.").

The proposed method of distribution will ensure that Settlement Class Members are equitably compensated. The Net Settlement Fund will be allocated among Settlement Class

Members by their *pro rata* share of the total COI overcharges. There is no claim form that anyone needs to fill-out; proceeds will be mailed directly to Settlement Class Members with no reversion to Voya or Lincoln.

The Settlement is therefore fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e)(2) and the Second Circuit's *Grinnell* factors. For each of the foregoing reasons, and the additional reasons below, Plaintiff respectfully requests the Court grant final approval of the Settlement.

II. BACKGROUND

A. The COI Increase

The Settlement Class consists of owners of universal life insurance policies, comprising 18 product lines, issued by Aetna Life Insurance and Annuity Company ("Aetna"), now Voya, between 1983 and 2000. *See* Section II.D.1, *infra*. Each Settlement Class Policy contains a section titled "Cost of Insurance Rate" with express limitations on when and how COI rates used to calculate the monthly COI charges can be adjusted. *See* Ard Decl., Ex. 2 (Hanks Policy) at 7. In June 2016, Voya, at the recommendation of its reinsurer and administrative agent Lincoln, raised COI rates on the Settlement Class Policies. *See* Dkt. 174 (SJ Order) at 5–6.

B. The Class Action Litigation

In August 2016, Plaintiff filed a putative class action lawsuit, asserting claims of breach of contract against Voya and unjust enrichment against Lincoln. Dkt. 1. Prior to filing the complaint, Class Counsel conducted a comprehensive investigation of publicly available information concerning the rate hike and whether it was made in compliance with the provisions described above. *See* Ard Decl. ¶¶ 5–7. Neither Voya nor Lincoln moved to dismiss the fulsome and well-pleaded Complaint. *See* Dkts. 27–28 (Nov. 1, 2016 answers). The Court appointed Class Counsel as Interim Class Counsel on February 8, 2017. Dkt. 41.

The parties engaged in extensive fact discovery, which included the production and review of nearly 350,000 pages of documents and data sets, including detailed policy-level data for more than 46,000 life insurance policies. *See* Ard Decl. ¶¶ 8–13, 15. Class Counsel took the depositions of 4 corporate representatives and 14 individual witnesses for Voya and Lincoln, including Voya's Chief Financial Officer, Chief Actuary, and the Chief Risk Officer for individual life, annuities, and employee benefits, and Lincoln's Senior Vice Presidents for Life Solutions, Financial Management and Strategy for Life Solutions, and Life Insurance Product Development. *See id.* ¶ 9. Class Counsel also defended the deposition of Plaintiff Helen Hanks. *See id.* Plaintiff also conducted extensive third-party discovery and submitted numerous freedom of information law requests to state regulators, which resulted in the production of highly relevant documents related to Voya's and Lincoln's profitability metrics and uncovered important documents between Voya and the NYDFS regarding its investigation of the increase that had not previously been produced during discovery. *See id.* ¶¶ 11–12.

The parties then collectively produced 11 expert reports and took and defended 8 expert depositions. *See* Ard Decl. ¶¶ 14–15. Plaintiff designated four expert witnesses: actuarial expert Christopher Hause, reinsurance expert Neil Pearson, insurance regulatory practices expert Bruce Foudree, and damages expert Robert Mills. *See id.* ¶ 14. These experts, with the assistance of Class Counsel, put together eight reports totaling 274 pages that were supported by more than 50,000 pages of exhibits, attachments, or appendices. *See id.* ¶¶ 14–15. Voya designated three experts: Timothy Pfeifer for actuarial issues, Neil Rector for regulatory practices, and Dr. David Babbel for damages (with Professor Craig Merrill later substituted in for Dr. Babbel), who produced three expert reports totaling 150 pages, with exhibits totaling 72 pages and 15 spreadsheets. *See id.* ¶ 14. All experts were deposed. *See id.*

Plaintiff moved for class certification on August 15, 2018. *See* Dkts. 85–91, 96–97. Collectively, Plaintiff prepared and filed 35 pages of briefing supported by 50 exhibits totaling hundreds of additional pages. *See* Ard Decl. ¶ 16. The Court granted Plaintiff's motion for class certification in March 2019, certifying a breach-of-contract class against Voya, but denied the motion as to Lincoln. *See* Dkt. 110. The parties subsequently stipulated to a voluntary dismissal of Lincoln without prejudice. Dkts. 131–32. The Court found that Plaintiff Helen Hanks was an adequate Class Representative and appointed Susman Godfrey as Class Counsel. Dkt. 110 at 8–9, 20–21. The Court subsequently approved Plaintiff's proposed form and manner of notice. Dkt. 122. Notice was mailed out in June 2019. *Id.*; Dkt. 130-2. Twelve policies timely and validly opted out during the notice period. *See* Ard Decl. ¶ 19; Settlement Agreement § 5.

The parties next briefed and filed cross-motions for summary judgment. Dkts. 133–45, 148–152. Collectively, Plaintiff filed 100 pages of briefing supported by 83 exhibits, which included a flash drive with detailed and extensive policy and actuarial data. *See* Ard Decl. ¶ 20. Voya affirmatively sought summary judgment on all of Plaintiff's breach theories and opposed Plaintiff's cross-motion, filing a combined 93 pages of briefing supported by 29 exhibits. *See id.* On September 30, 2020, the Court granted in-part and denied-in part Voya's motion for summary judgment and denied Plaintiff's motion for summary judgment. *See* Dkt. 174. The Court granted summary judgment on certain of Plaintiff's breach theories–including the primary theory that NYDFS espoused in challenging the increase – but held that "an issue of material fact" remains on Plaintiff's independently developed "estimates of future cost factors" theory of breach. *Id.* at 24–25; *see also* Ard Decl. ¶¶ 6, 15 (describing Plaintiff's and Class Counsel's efforts during fact and expert discovery to investigate and develop independent theories of breach beyond those raised by NYDFS). After the summary judgment order, Plaintiff held a full-day mock trial on January

15, 2021, which required weeks of preparation, including the creation of extensive multimedia presentations. *See* Ard Decl. ¶ 22.

The parties then began pre-trial filings. Between January 28, 2021 and April 19, 2021, the parties fully briefed thirteen motions *in limine*. *See* Dkts. 189–212, 230–35, 241–43. Collectively, Plaintiff prepared 112 pages of briefing supported by 49 exhibits again totaling hundreds of additional pages. Ard Decl. ¶ 23. The parties also submitted proposed jury instructions, *voir dire* questions, and verdict forms. *See* Dkts. 213–15, 217, 224–26. The parties filed their proposed Final Pretrial Conference Order on April 27, 2021, which included witness lists, depositions designations, and exhibit lists. *See* Dkt. 244.

The Court held the final pretrial conference on May 12, 2021. *See* Dkt. 250–51. Plaintiff won key motions at the hearing, including defeating a motion to exclude critical testimony from Plaintiff's actuarial expert Christopher Hause and a motion to exclude key evidence related to NYDFS's investigation of Voya. *See* Ard Decl., Ex. 4 (5/12/21 FPTC Transcript). Following the final pretrial conference, the Court ordered supplemental briefing on Voya's motion *in limine*, which remained under submission following the conference, regarding past damages that attacked a vast swath of historical damages at issue. The parties filed the supplemental briefing with regard to past damages, and the motion remained under submission at the time the Settlement was reached. *See* Dkts. 254–57. On August 31, 2021, the Court informed the parties that this matter was set as the backup trial for the week of December 6, 2021. *See* Dkt. 263.

C. Settlement Negotiations, Preliminary Approval, and Class Notice

The Settlement is the result of extensive, arms-length negotiations between the parties with the assistance of an experienced mediator, Robert A. Meyer, Esq., with JAMS. *See* Ard Decl. ¶¶ 22–28, 44; Meyer Decl. ¶¶ 2–7. Throughout the life of the case, the parties have exchanged numerous settlement demands and counter-offers and have engaged in several separate unsuccessful

mediations, including on June 7, 2017, November 13, 2019, and March 6, 2020, all of which were in person in New York. *See* Ard Decl. ¶ 25. Following the Court's final pre-trial conference, the parties scheduled an in-person mediation before Mr. Meyer on August 11, 2021 in Los Angeles, California. *See* Ard Decl. ¶¶ 25–27; Meyer Decl. ¶ 4. Following that in-person mediation, the parties continued settlement communications for the next few months, which culminated in a memorandum of understanding for a settlement on October 21, 2021. *See* Ard Decl. ¶ 28. A long-form settlement was heavily negotiated, involving the exchange of multiple drafts over a two-month period, and was fully executed on January 5, 2022. *See id.*

Throughout the process, the Settlement negotiations were conducted by highly qualified and experienced counsel on both sides at arm's length. *See* Ard Decl. ¶¶ 25, 28, 44; Meyer Decl. ¶¶ 3–7. The mediator, Mr. Meyer, believes that the proposed Settlement is a "highly successful result" for Settlement Class Members, and is a "fair, reasonable, and adequate resolution." *See id.* ¶¶ 3–7. Mr. Meyer declares that Class Counsel was "engaged, motivated, and knowledgeable about the case," advocated "zealously," and that the parties engaged in a "robust, adversarial, and arm's length negotiation process." *Id.*

On February 3, 2022, the Court issued the "Order Preliminarily Approving Class Action Settlement." Dkt. 286. The Order stated that Class Counsel "ha[d] provided the Court with information sufficient to enable it to determine whether to give notice of the proposed settlement to the Class pursuant to Rule 23(e)(1)(A)." *Id.* Using this information, the Court determined that it "will likely be able to find that the Settlement is fair, reasonable and adequate after considering the Rule 23(e)(2)(A)–(D) factors and the factors identified in [*Grinnell*]." *Id*. The Court set a final fairness hearing for June 29, 2022. *Id.*; Dkt. 288.

The Court also approved the proposed class notice plan, holding that the short- and long-form notices and manner of dissemination "meet the requirements of Federal Rule of Civil Procedure 23(c)(2)(B)" and "shall constitute due and sufficient notice to all persons and entities entitled thereto." Dkt. 286. ¶¶ 7-15. The Court required one edit to the long-form notice, *id.* at ¶ 9, which was implemented before posting on the website. *See* Ard Decl. ¶ 30. The Court appointed JND Legal Administration, LLC ("JND") as the Settlement Administrator and provided deadlines for mailing, the website, and the toll-free phone number. Dkt. 286 at ¶¶ 7, 10–15.

The Notice Program proceeded consistently with the Preliminary Approval Order and therefore met the requirements of Rule 23 and due process. JND mailed the approved short-form notice to potential Settlement Class members on March 4, 2022, using mailing addresses provided by Voya and Lincoln. *See* Dkts. 289–90 (Proof of Mailing and Supporting Declaration). Only 1,723 notices were returned as undeliverable without a forwarding address, and JND conducted skip tracing for those returned notices to forward 553 notices to updated addresses, of which only 86 were returned as undeliverable. *See* Declaration of Kimberly K. Ness ("Ness Decl.") ¶ 5. Through these methods, the direct mailing notice effort successfully reached an outstanding 97.3% of potential Settlement Class Member addresses. *See id.* ¶ 6. The long-form Settlement notice was posted on the class website (www.voyacoilitigation.com) and a call-in line was established on March 4, 2022. *See* Dkts. 289–90. As of June 7, 2022, the website has tracked 1,337 unique users with almost 4000 page views. *See* Ness Decl. ¶ 12. The phone line has received 220 calls. *See id.* ¶ 8. JND and Class Counsel have promptly responded to all questions and inquires received from potential Settlement Class Members. *See* Ard Decl. ¶ 30; Ness Decl. ¶¶ 9, 11.

On January 18, 2022, Voya sent Class Action Fairness Act ("CAFA") notices to the Attorney General of the United States and the State Attorneys General as required by 28 U.S.C.

§ 1715(b). *See* Ard Decl. ¶ 31. No objection to the Settlement was received from any Attorney General. *See id.*

On April 4, 2022, Class Counsel filed its Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Award. *See* Dkts. 291–96. Pursuant to Federal Rule of Civil Procedure 23(e)(4) and the Court's Preliminary Approval Order (Dkt. 286), potential Settlement Class Members could opt out of the Settlement or object to the Settlement by April 19, 2022. No potential Settlement Class Member objected by that deadline (or since), and JND received only four opt-out requests. *See* Ard Decl. ¶¶ 33–34.

D. The Settlement Agreement

1. The Settlement Class

In March 2019, the Court certified a class of "[a]ll owners of universal life (including variable universal life) insurance policies issued by Aetna Life Insurance and Annuity Company ("Aetna") that were subjected to the cost of insurance rate increase announced in 2016." *See* Dkt. 110. Only twelve policies opted out after class certification. Settlement Agreement § 5. The Settlement Agreement provided for an additional opt-out period pursuant to Federal Rule of Civil Procedure 23(e)(4). *See id.* §§ 44–45. The Settlement Class is therefore the class certified on March 13, 2019 (Dkt. 110), with the exclusion of the policies that timely and validly opted out. *See id.* §§ 4–5, 27, 34, 44–45. In addition, the Settlement Class excludes Class Counsel and their employees; Voya and Lincoln; officers and directors of Voya and Lincoln, and members of their immediate families; the heirs, successors or assigns of any of the foregoing; the Court, the Court's staff, and their immediate families. *See id.* § 4.

2. Monetary and Nonmonetary Relief for Settlement Class Members

The Settlement awards both cash relief and non-cash relief worth over $118 million to the Settlement Class. The Settlement Agreement includes a cash Settlement Fund of up to $92.5

million, which is reduced, on a *pro-rata* basis, for policies that opted out during the Rule 23(e)(4) opt-out period (resulting in the Final Settlement Fund). *See* Settlement Agreement §§ 42, 44. The four policies that opted out during the Rule 23 (e)(4) period accounted for only $51,114.21 of the $121,708,160 in total COI overcharges for the Class through May 31, 2021 (~0.04%). *See* Ard Decl. ¶ 37. The *pro-rata* reduction therefore results in a Final Settlement Fund of $92,461,152.45. *See id.*; Settlement Agreement § 44–45.[2] The Final Settlement Fund is equal to 76% of all COI overcharges collected by Voya and Lincoln from the Settlement Class Policies through May 31, 2021. *See* Ard Decl. ¶ 38. No portion of the Final Settlement Fund will revert to Voya or Lincoln. *See* Settlement Agreement § 16.

The Settlement also includes significant nonmonetary relief. *First*, for a period of five years after the date on which the Court approves the settlement, "Voya and Lincoln agree that COI rates on the Class Policies will not be increased above the current rate schedules implemented on June 1, 2016, unless Voya is ordered to do so by a state regulatory body." *See* Settlement Agreement §§ 14, 49. Thus, even if Voya or Lincoln has a future change in cost factors (including any alleged increase in mortality from COVID-19), COI rates will not increase for 5 years unless ordered to do so by a regulator. An expert with extensive experience in the life insurance industry has opined that this nonmonetary relief is worth $25,985,761 to the Settlement Class. *See* Dkt. 294 (Declaration of Keith McNally ("McNally Decl.")) ¶ 11, Ex. A (Report). *Second*, Voya and Lincoln have agreed not to challenge the validity and enforceability of any eligible policies owned by Settlement Class Members on the grounds of lack of an insurable interest, stranger originated life insurance ("STOLI"), or misrepresentations in the application for such policies. *See* Settlement Agreement § 50. Mr. McNally calculated that this nonmonetary relief adds an additional $264,193

[2] The formula for the pro-rata reduction is: (1 – ($51,114.21 / $121,708,160)) x $92,500,000.

of value for the Settlement Class, resulting in a total value of $26,231,954 in nonmonetary relief from the Settlement. *See* McNally Decl. ¶ 11.

3. Release

Once the Settlement becomes final, the Releasing Parties will release the Released Parties from "all Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Action arising out of the facts alleged in the Action." Settlement Agreement §§ 15, 28–30, 62. The Settlement Class will not release "new claims that could not have been asserted in the Action because they are based upon a future rate schedule increase in Voya's COI charges that occurs after October 20, 2021" or claims arising from Voya or Lincoln's failure to pay any death benefits owed under the terms of the policies. *Id.* §§ 13, 62, 67.

4. Awards, Costs, and Fees

Class Counsel filed its motion for fees, expenses, and an incentive award on April 4, 2022. *See* Dkts. 291–96. Class Counsel sought 33% of the Final Settlement Fund, incurred litigation expenses, and a $25,000 incentive award for Plaintiff Hanks, in compliance with the Preliminary Approval Order. *See id.*; Ard Decl. ¶ 32. Settlement Class Members were given the opportunity to object to the fee, expense, and incentive award motion. No potential Settlement Class Member filed an objection or otherwise objected to the fee, expense, and incentive award motion, either by the objection deadline or thereafter, including through June 8, 2022. *See* Ard Decl. ¶ 34.

Because the Final Settlement Fund was reduced by one additional opt-out received after the fee motion was filed, and Class Counsel committed to seeking 33% of the Final Settlement Fund after accounting for all opt-outs, Class Counsel will amend its requested attorneys' fees to $30,512,180.31, which is slightly lower than what was requested in the initial motion

($30,524,637.87). *See* Ard Decl. ¶ 43; *compare* Dkt. 292 at 5–6. Class Counsel will submit an updated Proposed Order for fees and expenses with its reply, due June 22, 2022.

E. Distribution Plan

The proposed plan of distribution, as set forth in the notice papers and which is described in Exhibit 5 to the Ard Declaration, distributes proceeds directly to Settlement Class Members on a *pro rata* basis without the need for a claim form. This ensures that proceeds will be distributed equitably and as many claimants as possible will receive a distribution. A Settlement Class Member's *pro rata* share of the Net Settlement Fund shall be that Settlement Class Member's *pro rata* share of the total COI overcharge damages through May 31, 2021. *See id.* Those damages will be determined in accordance with the methodology set forth in the Expert Report of Robert Mills (Dkt. 206-5), which determines the COI Overcharge for a Policy as the difference between the COI charges actually assessed on the Policy since June 1, 2016 and the COI charges that would have been deducted from the policy accounts using the COI rate scale in place prior to the 2016 COI Increase. *See* Ard Decl., Ex. 5; Mills Report ¶ 23–31.

Proceeds will be mailed within 30 days after the Final Settlement Date using the addresses that Voya and Lincoln maintain on file. *See* Ard Decl., Ex. 5. Within one year plus 30 days after the date the Settlement Administrator mails the proceeds, to the extent feasible and practical in light of the costs of administering such subsequent payments, any funds remaining in the Settlement Fund shall be re-distributed on a *pro rata* basis to Settlement Class Members who previously cashed their checks. *See id.*

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standard

Federal courts strongly favor and encourage settlements, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116–17 (2d Cir. 2005) ("We are mindful

of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." (internal quotation marks and citation omitted)). *See also In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) ("Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement."). Under Rule 23(e)(2):

> 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.

These factors, which were added to Rule 23 in December 2018, were designed to supplement, rather than displace, the existing factors used by courts to evaluate settlement proposals. *See* Fed. R. Civ. P. 23, 2018 Advisory Note, Subdivision (e)(2). The previously existing factors in the Second Circuit are the nine factors listed in *City of Detroit v. Grinnell Corp*:

> (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 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 granting preliminary approval under Rule 23(e)(1), the Court already held that the Settlement is likely to meet this standard. *See* Dkt. 286 at ¶ 4 ("[T]he Court will likely be able to find that the Settlement is fair, reasonable and adequate after considering the Rule 23(e)(2)(A)–(D) factors and the factors identified in [*Grinnell*].").[3]

B. The Proposed Settlement Satisfies the Rule 23(e)(2) Factors

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

"Determination of adequacy typically 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)).

The Court has determined on numerous occasions that Lead Plaintiff Helen Hanks and Class Counsel have and will adequately represent Settlement Class Members. *See* Dkt. 110 (3/13/19 Class Cert. Order) at 8–9 (finding Plaintiff Hanks "understands her duties as a class representative and has dedicated a significant amount of time to working with her attorneys on this litigation" and has interests in line with other Class Members); *id.* at 20–21 (finding that Class Counsel "has significant experience litigating class actions" and "[i]ts performance in the present case demonstrates competence to protect the interests of the class"); Dkt. 286 (Preliminary

[3] Because the Settlement Class is the previously certified Class (Dkt. 110) excluding any opt outs, the Court does not need to recertify a class. *See* Dkt. 286 at ¶ 3 (Preliminary Approval Order stating: "[T]he definition of Class in the Settlement Agreement is the same as the certified class, with the exception of policyowners who timely and validly opted-out after class certification"); *accord* William B. Rubenstein, 4 Newberg on Class Actions § 13:16 (5th ed., Dec. 2021 Update).

Approval Order) at ¶ 4 (the Court will "likely be able to find" that Plaintiff and Class Counsel have satisfied Rule 23(e)(2)(A)).

Plaintiff's interests continue to be aligned with other Settlement Class Members. Settlement Class Members, including Lead Plaintiff, share an overriding, common interest in obtaining the largest monetary and nonmonetary recovery possible. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004); *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:58 (5th ed., Dec. 2021 Update) ("All that is required—as the phrase 'absence of conflict' suggests—is sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class." (citations omitted)). There are no "antagonistic" interests involved here. Plaintiff and Class Counsel have continued to vigorously and competently litigate this case through summary judgment, pretrial motions, mediation, and the Settlement approval process. *See* Ard Decl. ¶¶ 18–36, 44. Rule 23(e)(2)(A) therefore supports final approval of the proposed Settlement.

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

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." The Second Circuit recognizes "a presumption of fairness, reasonableness, and adequacy as to the settlement where 'a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal–Mart Stores*, 396 F.3d at 116). "Evidence of a truly adversarial bargaining process helps assuage [the concern of collusive settlements] and there appears to be no better evidence of such a process than the presence of a neutral third party mediator:" Rubinstein, *supra*, 4 Newberg on Class Actions § 13:50 (citing Fed. R. Civ. P. 23, 2018 Advisory Note). Here, the settlement is the result of repeated and hard-fought arms'-length negotiations among competent, experienced counsel and a mediator with extensive experience in complex litigation, class actions,

and insurance issues. *See* Ard Decl. ¶¶ 2, 25–28, 44; Meyer Decl. ¶¶ 2–7. Rule 23(e)(2)(B) therefore supports final approval of the proposed Settlement.

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

Rule 23(e)(2)(C) requires that "the relief provided for the class is adequate, taking into account" four subfactors: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)."

The Settlement provides more than $118 million in total relief to the Settlement Class, including $92,461,152.45 in cash relief that, on its own, is equal to 76% of COI overcharges for Settlement Class Members through May 31, 2021. This monetary relief compares favorably to other approved COI class action settlements. *See, e.g.*, *Phoenix COI*, 2015 WL 10847814, at *10–11, *13 (cash fund equal to 68.5% of overcharges); *Hancock COI*, Dkt. 145 at 19 (cash fund equal to 42% of COI overcharges). The adequacy of the relief is further underscored by an analysis of the four Rule 23(e)(2)(C) subfactors and related *Grinnell* factors.

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

In order 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, Paragraphs (C) and (D). This inquiry overlaps with a number of the *Grinnell* factors.

First, the "complexity, expense and likely duration of the litigation," *see Grinnell*, 495 F.2d 448 at 463 (Factor 1), supports final approval. In *Phoenix COI*, Judge McMahon found another COI case "indisputably complex," explaining:

> The complaint alleged the breach of an insurance contract, the resolution of which would require conflicting testimony by experts as to actuarial standards, the original and revised pricing assumptions used by Phoenix for the PAUL insurance products at issue, and what it means to "recoup past losses" or "discriminate unfairly" within a "class" of insured. These complex claims were bitterly fought, as Defendants developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuarial issues for the key questions. The court has issued opinions of great length of complexity in connection with motions to dismiss and for summary judgment.

2015 WL 10847814, at *6 (granting final approval of a COI class action settlement). The same can be said of this case—the Court has issued detailed, complex opinions in response to the parties' motions for class certification and summary judgment, and trial would have featured dueling actuarial experts testifying about actuarial standards, insurance principles, and technical actuarial assumptions, documents, and data. And 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, there are substantial risks of establishing liability and damages. As a result of the Court's summary judgment order, the primary theory of breach relied upon by the NYDFS has been rejected, along with others. *See generally* Dkt. 174 (SJ Order). The sole remaining issue for trial is "whether the 2016 COI Adjustment was based on analysis of cost factors related to the in-force polices as mandated by the terms of the Policy or was based on Lincoln Life's profitability goals." *Id.* at 24. Voya contends that it would have been able to prove at trial that "there was no

breach of contract because contractually proper future cost factors were the basis of the 2016 COI adjustment." Dkt. 244 (Proposed FPTC Order) at 7–10. Indeed, the Court's summary judgment order acknowledged that Voya could prevail on the "cost factors" theory of liability: "costs fundamentally have an effect on profits, which, generally speaking, are a measure of revenues minus costs" and "[c]onsideration of spiraling costs is appropriate and these rising costs may also be reflected in a deteriorating profit margin." *See* Dkt. 174 at 24. Further, Plaintiff would have faced a "battle of the experts" at trial—a battle in which no party is ever assured to prevail. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744–45 (S.D.N.Y. 1985) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited[.]"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

On damages, Voya's motion *in limine* that remained pending even after the Final Pretrial Conference and subject to supplemental briefing sought to preclude a substantial amount of the damages the Class could recover at trial. *See* Dkt. 202 (Def. Damages MIL) at 1–11; Dkt. 233 (Pltf. Damages MIL Opp.) at 1. Voya also intended to argue that, even if there were a breach, damages were substantially smaller than what Plaintiff contended. *See* Ard Decl., Ex. 4 (5/12/21 FPTC Transcript) at 26:23–27:9 (Voya's counsel arguing that the jury would potentially find that 95% of the increase was proper even if a breach occurred); *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[T]he litigation risks attendant to these possibilities weighed heavily in favor of the fairness of a settlement under which plaintiffs achieved substantial benefits[.]").

Finally, the 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," *see* 495 F.2d at 463—also support final approval. The Settlement's $118 million in monetary and nonmonetary

relief—in the form of a cash fund, 5-year COI rate freeze, and waiver of policy validity defenses—provides a tremendous recovery. *See* Ard Decl. ¶¶ 37–39; Settlement Agreement §§ 42, 49–50. The cash fund alone, totaling $92,461,152.45 after the reductions for opt outs, is equal to 76% of past COI overcharges. And it represents multiples of potential damages under Voya's damages theories, which would have dramatically reduced or wiped out entirely the damages for Settlement Class Members. *See* Dkt. 202 (Def. Damages MIL) at 1–11; Dkt. 233 (Pltf. Damages MIL Opp.) at 1; Ard Decl., Ex. 4 (5/12/21 FPTC Transcript) at 26:23–27:9. As discussed above, the nonmonetary relief—valued at over $26 million-- adds significant value to the already substantial monetary recovery. *See* Ard Decl. ¶ 39.

This settlement easily falls within the range of reasonableness, particularly in light of the significant litigation risks discussed above. The cash value by itself approaches the maximum that would be available at trial, and the nonmonetary relief goes beyond what could have been obtained at trial. In *Phoenix COI*, Judge McMahon held that a COI settlement with a cash award amount equal to 68.5% of past damages was "one of the most remunerative settlements this court has ever been asked to approve," *see* 2015 WL 10847814, at *11, and, in other types of cases, courts routinely approve settlements with far lower-percentage awards. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement value that was 10.5% of total damages); *In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (preliminarily approving settlement cash award that was 10–15% of total damages).

Furthermore, settlement "assures immediate payment of substantial amounts to Class Members," "even if it means sacrificing speculative payment of a hypothetically larger amount years down the road." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y.

2012) (quotation marks omitted). And Class Counsel's certification of the reasonableness of the settlement, *see* Ard Decl. ¶¶ 3, 38–39, 45, is given considerable weight because Class Counsel is closest to the facts and risks associated with the litigation, *see In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *5 (S.D.N.Y. Dec. 19, 2014) ("[Lead Counsel's] opinion is entitled to great weight." (quotation marks and citation omitted)), particularly when the settlement occurs on the eve of trial, after years of litigation, and the strength of the claims have been tested with the Court through summary judgment and motions *in limine*, as well as with mock juries.

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

The second subfactor takes into account "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). 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. *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Plaintiff's proposed plan of allocation provides for an equitable *pro rata* distribution of proceeds without any claim form or process. *See* Section II.E., *supra*. This distribution plan was preliminarily approved by the Court. *See* Dkt. 286. "This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable." *Phoenix COI*, 2015 WL 10847814, at *12 (collecting cases); *see also In re Lloyd's Am. Tr. Fund Litig.*, 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("[*P*]*ro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to be the fairest method of allocating the settlement benefits.").

(c) Rule 23(e)(2)(C)(iii) Subfactor: The terms of any proposed award of attorneys' fees

The third subfactor takes into account "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Here, Class Counsel seeks 33% of the Final Settlement Fund (i.e., the cash fund, exclusive of and not including the estimated $26,231,954 in nonmonetary relief). *See* Ard Decl. ¶ 43. The reasonableness of this fee request was explained in detail in Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Award. *See* Dkts. 291–96. No Settlement Class Member objected to the fee request. *See* Ard Decl. ¶ 34.

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

The final subfactor, Rule 23(e)(2)(C)(iv), takes into account "any agreement required to be identified under Rule 23(e)(3)." Rule 23(e)(3) requires the "parties seeking approval" to "file a statement identifying any agreement made in connection with the proposal." There are no agreements beyond the Settlement Agreement.

* * *

Rule 23(e)(2)(C) therefore supports final approval of the proposed Settlement.

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

The final Rule 23(e)(2) factor requires the Court to consider whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). This analysis focuses on "inequitable treatment of some class members vis-a-vis others" and can include "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *Id.*, 2018 Advisory Note. Here, the proposed plan of allocation

equitably treats class members by distributing damages on a *pro rata* basis using Settlement Class Members' shares of the total damages. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) ("This plan of allocation has an obvious rational basis, appears to treat the class members equitably, faced no objections from class members, and has the benefit of simplicity."). The releases are also equitable, as they treat all Class Members equally and do not affect the apportionment of damages. Rule 23(e)(2)(D) therefore supports final approval.

C. The Remaining *Grinnell* Factors Also Support Final Approval

The second factor—"[t]he reaction of the class to the settlement," *see* 495 F.2d at 463—"is perhaps the most significant factor to be weighted in considering [the Settlement's] adequacy." *See Jander v. Ret. Plans Comm. of IBM*, 2021 WL 3115709, at *3 (S.D.N.Y. July 22, 2021).

Here, the Settlement Administrator provided notice consistent with the Court's Preliminary Approval Order (Dkt. 286), resulting in 97.3% of potential Settlement Class Member addresses being successfully reached by direct mail. *See* Section II.C, *supra*. There were zero objections, and only 4 policies (out of more than 46,000) opted out. This "absence of objections by the class is extraordinarily positive and weighs in favor of settlement." *Jander*, 2021 WL 3115709, at *3; *see also 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."). This factor therefore strongly supports approval of the proposed Settlement.

The third *Grinnell* factor—"the stage of the proceedings and the amount of discovery completed," *see* 495 F.2d at 463—addresses "whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). This case was on the eve of trial after extensive discovery, summary judgment briefing, and pretrial

work. *See* Ard Decl. ¶¶ 8–28. Plaintiff and Class Counsel therefore had an extensive understanding of the strengths and weaknesses of the case at the time of Settlement. This is more than sufficient to satisfy the third *Grinnell* factor. *See, e.g.*, *Phoenix COI*, 2015 WL 10847814, at *7–8 ("Class Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of the strengths and weaknesses of the Class's claims and Defendants' defenses, and the likelihood of obtaining a larger recovery for the Class if this litigation continued.").

The sixth *Grinnell* factor is "the risks of maintaining the class action through the trial." *See* 495 F.2d at 463. "The risk of maintaining a class through trial is present in any class action." *Guippone v. BH S&B Holdings LLC*, 2016 WL 5811888, at *7 (S.D.N.Y. Sept. 23, 2016); *accord Asare v. Change Group of New York, Inc.*, 2013 WL 6144764, at *12 (S.D.N.Y. Nov. 18, 2013). Here, a ruling in Voya's favor on its pending damages motion could lead to a future motion from Voya to decertify the class. Thus, the sixth *Grinnell* factor supports final approval.

The final *Grinnell* factor—"the ability of the defendants to withstand a greater judgment," 495 F.2d at 463—is neutral. Although Voya and Lincoln could potentially withstand a greater judgment, "[t]his factor, standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). "[A] defendant is not required to empty its coffers before a settlement can be found adequate. The mere fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Phoenix COI*, 2015 WL 10847814, at *9 (citations and quotation marks omitted).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the Settlement, approve the Notice Program as being in compliance with Rule 23 and due process, and approve the plan of distribution as fair, reasonable, and adequate.

Dated: June 9, 2022

/s/ Seth Ard

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on the following counsel, this June 9, 2022.

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