UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

37 BESEN PARKWAY, LLC, on behalf of itself and all others similarly situated, Plaintiff, vs. JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), Defendant.	)	Civil Action No. 15-cv-9924

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

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Pursuant to Federal Rule of Civil Procedure 23, Plaintiff 37 Besen Parkway, LLC ("37 Besen"), by and through its counsel, Susman Godfrey L.L.P. ("Class Counsel"), respectfully submits this Memorandum of Law in Support of its Motion for Final Approval of Class Action Settlement with John Hancock Life Insurance Company (U.S.A.) ("Defendant" or "John Hancock"), requesting final approval of the Settlement and plan of distribution.

I. INTRODUCTION

After three years of hard-fought litigation, the parties agreed to a Settlement which created an all-cash fund of $91.25 million dollars for the benefit of the Class. Money from this fund will be distributed directly to Class members, with no need for claims forms and no funds reverting to John Hancock. The Settlement was reached after all fact discovery concluded, when Class Counsel had a full understanding of the facts, law, and risks, and it was achieved with the assistance of an experienced mediator. Prior to reaching the Settlement, Class Counsel reviewed and analyzed over 340,000 pages of documents (including over 2000 spreadsheets), had its experts spend 23 days *onsite* at John Hancock's offices in Boston, Massachusetts extracting directly from its policy administration systems hundreds of millions of records and cash flow entries for each of the policies owned by members of the Class; took and defended 17 highly technical depositions (some over multiple days) involving complex subjects such as insurance financial reporting, statutory accounting, mortality tables, mortality projections, and actuarial standards of practice; and prepared and filed a motion for class certification and supporting expert reports that totaled over eleven thousand pages. These efforts ultimately culminated in a mediation on May 24, 2018, which took place before Judge Theodore Katz (Ret.), a retired magistrate judge in this District, which resulted in an extraordinary amount of cash relief for the Class.

The Settlement recovered a large percentage of the $217 million overcharge calculated by Plaintiff's damages expert Mr. Robert Mills in support of class certification, an amount that was heavily disputed by John Hancock. A cash payment by John Hancock of $91.25 million therefore represents a substantial recovery and a tremendous result in light of the risks of the case. For example, at the Initial Conference, the Court *sua sponte* invited John Hancock to file a motion for judgment on the pleadings because of a potential argument that the contractual provision at issue may be "awfully vague" or "illusory." Dkt. 29 at 4:9-13 The parties submitted pre-motion letters on the topic, and John Hancock was dissuaded from filing the dispositive motion. But Plaintiff still needed to win on this central issue on class certification, summary judgment, trial, and, if successful on all three, on appeal. In light of these risks, the $91.25 million settlement is an outstanding result.

For each of these reasons and additional reasons provided for below, Plaintiff respectfully requests the Court grant final approval to the Settlement.

II. BACKGROUND

A. The Litigation

Plaintiff is the owner of a Universal Life Estate Protection (ULEP) policy issued by John Hancock. Plaintiff's policy, like every other Class policy, is a universal life insurance policy issued by John Hancock that contains the following contractual promise: "The Applied Monthly Rates will be based on our expectations of future mortality experience." Plaintiff filed this class action lawsuit in December 2015, contending that (1) John Hancock should have lowered its COI rates to account for improved mortality, (2) John Hancock incorporated improper non-mortality factors into its COI rates, and (3) John Hancock charged certain improper Age 100 Rider charges.

During discovery, Class Counsel requested, obtained, and analyzed over 340,000 pages of documents, including over two thousand spreadsheets as well as highly-technical actuarial tables and memoranda, and issued eighteen subpoenas to Defendant's reinsurers and actuarial and financial advisors. *See* Declaration of Steven G. Sklaver in Support of Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards (Sklaver Decl.) ¶ 6. Class Counsel also sought the production of policy-level data reflecting the historical credits and deductions to the account value of all Class Members' policies. This data was used to calculate the extent of the alleged breach and damages, but John Hancock said it could not produce this data because it was on decades-old computer systems that use antiquated database software written decades ago. To overcome this impasse, Class Counsel searched for, interviewed, and hired experts in databases and 1980s-era computer programming, who helped write computer code using a combination of VBA macros, Rumba scripts, and SQL queries that connected to and ran on John Hancock's systems to extract this data. In total, Plaintiff's experts spent 23 days onsite at John Hancock's offices in Boston, in real-time collaboration with Class Counsel, extracting this data from four separate John Hancock systems housing the data for the 28 products in the Class. *Id.* After extracting, sorting, processing, and analyzing this voluminous data, Plaintiff and its experts developed a sophisticated model that reconstructed the cashflows of tens of thousands of life insurance policies, and modeled what those cashflows should have looked like if John Hancock had calculated COI rates consistent with Plaintiff's theories of liability. *See* Dkt. 118.

Class Counsel took numerous depositions of John Hancock's current and former employees—including numerous actuaries, such as John Hancock's Vice President of Actuarial Policy; Assistant Vice President, Corporate Actuarial; Actuary Specialist Pricing; and Head of

the Pricing Team—and three separate John Hancock Rule 30(b)(6) designees. *See* Sklaver Decl. ¶¶ 6, 13. To squarely address this Court's inquiry as to whether there is a way to determine what John Hancock's "expectations of future mortality experience" were for the Class policies, Class Counsel analyzed John Hancock's records, on both the statutory accounting and actuarial side of the business. As a result of that thorough review, Class Counsel learned that the MY Experience System, which John Hancock had not even produced, set forth compelling evidence establishing what the Complaint alleged were John Hancock's mortality expectations. After John Hancock refused to produce data from the MY Experience System, which required Plaintiff to file a motion to compel, *see* Dkt. 60 (filed July 17, 2017), Judge Pitman ordered it produced, noting that a field in that data "provide[s] the expected deaths during a particular year," for each policy. Dkt. 83. This data then featured prominently in Plaintiff's motion for class certification and expert reports, which, in turn, preceded the mediation and Settlement. Class Counsel also prepared for and defended the depositions of 37 Besen's managers Eliazer Klein and Arnold Klein, other individuals involved in the acquisition of the policy, as well as Plaintiff's liability expert, James Rouse, who has twenty-one years of life insurance industry experience and is the co-founder of a firm that is a specialist in the longevity market, and Plaintiff's damages expert, Robert Mills. Sklaver Decl. ¶ 6.

On March 12, 2018, Plaintiff moved for class certification. Dkt. 121-26. Plaintiff's class certification filing contained two expert reports, over fifty exhibits, and totaled over eleven thousand pages. Sklaver Decl. ¶ 6.

B. Settlement Negotiations

The Settlement is the result of negotiations between the parties with the assistance of an experienced mediator, Retired Magistrate Judge Theodore Katz. The parties first met to discuss

settlement on April 28, 2017, but those conversations were unsuccessful. Substantial discovery and motion practice continued, and following the filing of Plaintiff's motion for class certification and disclosure of expert reports in support of class certification, the parties reopened the settlement dialogue, exchanging multiple proposals and counter-proposals over the course of several weeks. Sklaver Decl. ¶¶ 7-11. The parties subsequently scheduled an in-person mediation in front of Judge Katz for May 24, 2018, which resulted in a memorandum of understanding for a settlement, and immediately informed the Court of the development. Dkt. 129. A long-form settlement agreement was heavily negotiated and agreed to thereafter. A copy of this settlement agreement was previously submitted to the Court in support of preliminary approval. *See* Dkt. 133-2 ("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. Sklaver Decl. ¶¶ 7-11; Declaration of Hon. Theodore H. Katz in Support of Preliminary Approval ("Katz. Decl."), Dkt. 134 ¶¶ 7-8. Judge Katz believes that the proposed Settlement is fair and reasonable, and is a highly successful result for members of the proposed Class. *See* Katz Decl. ¶ 8. Class Counsel was well informed of material facts and the negotiations were hard-fought and non-collusive. *Id.* ¶¶ 4, 8. Class Counsel analyzed all of the contested legal and factual issues at issue to thoroughly evaluate Defendant'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 Defendant. *Id.*; Sklaver Decl. ¶ 7-12.

C. The Settlement Agreement

The Settlement calls for John Hancock to pay $91.25 million in cash relief. The net funds will be distributed directly to Class members, with no need for any Class member to submit a

claims form. This will help ensure that as many claimants as possible receive a distribution. No unclaimed funds will revert to John Hancock. *See* Settlement Agreement § 1.36.

The Settlement defines the Settlement Class as all Owners of COI Decrease Class Policies and Rider Overcharge Class Policies. COI Decrease Class Policies means:

> all universal and variable universal life insurance policies issued by John Hancock Life Insurance Company (U.S.A.), or its predecessors, that state "The Applied Monthly Rates will be based on our expectations of future mortality experience."

Excluded from the COI Decrease Class Policies are: (i) policies that disclose factors on which "Applied Monthly Rates will be based" other than or in addition to "expectations of future mortality experience"; and (ii) Flex V2 Policies. Settlement Agreement § 1.8. A specific list of all policies within the COI Decrease Class identified by policy numbers is attached as Exhibit A of the Settlement Agreement. The Rider Overcharge Class Policies are a specific list of 183 policies identified by policy number in Exhibit B of the Settlement Agreement.[1] *See* Settlement Agreement § 1.30.

Excluded from the Class are (i) all Owners that submit a timely and valid written request to be excluded from the Settlement Class; (ii) Class Counsel and their employees; and (iii) the judge presiding over the Action and the staff and immediate family of such judicial official. *See* Settlement Agreement §§ 1.9, 1.31.

Plaintiff and Class members will release any and all Claims asserted in the Action, that might have been asserted in the Action, or that hereafter may be asserted arising out of or related to the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act concerning allegations that:

[1] Exhibits A and B to the Settlement Agreement were previously lodged with the Court, but not filed publicly in light of certain privacy concerns. In addition to information contained on the notice, all members of the Class can confirm that their policies are in the Class by calling the Settlement Administrator or inputting their policy numbers on the settlement administration website, under the Check Policy Number tool, available at: https://www.johnhancockcoiclassaction.com/CheckPolicy

> (a) Defendant breached the COI Decrease Class Policies by considering non-mortality factors, such as, for example, expenses (including without limitation, administrative, maintenance, and acquisition expenses, sales commissions, taxes, and fees) reinsurance costs, persistency, future investment income, or profit, in determining Applied Monthly Rates or failing to adjust or decrease Applied Monthly Rates or any other charge to reflect changing mortality expectations; or
>
> (b) Defendant breached the Rider Overcharge Class Policies by charging Age 100 Waiver Monthly Rates in excess of that permitted by the Rider Overcharge Class Policies.

Settlement Agreement § 1.27. The Class will not release claims based on any future increase in the policies' COI rate schedules. Nor will the Class release any claims based on John Hancock's failure to pay any death benefits owed under the terms of the policies. *See* Settlement Agreement §§ 1.13, 1.27, 1.42, 3.1.

D. Notice

On November 1, 2018, the Court preliminary approved the Settlement Agreement, proposed notice plan, and proposed plan of distribution, and appointed Susman Godfrey as Class Counsel for the Settlement Class. The Court also appointed Epiq Class Action & Claims Solutions, Inc. as the Settlement Administrator. Consistent with the preliminary approval order, and after receiving all the requisite data from John Hancock, on December 21, 2018 the Settlement Administrator mailed notice to each owner of a Class policy at the address maintained in John Hancock's records.[2] Declaration of Cameron Azari (Azari Decl.) ¶ 11. The notice informed Class members that they had 45 days after notice—i.e., by February 5, 2019—to exclude themselves from the Class or object to the Settlement by sending a letter to the Settlement Administrator. On November 21, 2018, the Settlement Administrator also established the Settlement Website at www.JohnHancockCOIClassAction.com to enable members of the Settlement Class to obtain all information about this case and the Settlement. Although the opt-

[2] On July 30, 2018, the Settlement Administrator also distributed CAFA notice on the Attorney General of the United States and the state attorneys general as required by 28 U.S.C. § 1715(b). Azari Decl. ¶ 8.

out period has not yet closed as of the date that this motion was filed, to date the Settlement Administrator has received three opt-outs and no objections. Azari Decl. ¶ 19.

E. Plan of Allocation

Following preliminary approval, and consistent with the terms of the Settlement Agreement, on November 13, 2018, John Hancock deposited the $91.25 million settlement payment into a settlement escrow account maintained by Huntington National Bank. The proposed plan of allocation, which the Court has previously preliminarily approved and is attached as Exhibit D to the Settlement Agreement, ensures that proceeds will be distributed equitably on a *pro rata* basis after a minimum settlement payment is made to all Class Members. Each Class Member's *pro rata* share shall be that Class Member's share of the total damages. Those damages will be determined in accordance with the largest damages methodology set forth in the declaration of Mr. Robert Mills in support of Plaintiff's motion for class certification, Dkt. 126, which, generally (1) determines the COI Overcharge during the applicable statute of limitations as the difference between the COI charges John Hancock actually assessed on the policy and the COI charges that Plaintiff contends that John Hancock should have assessed had it set COI rates based on what Plaintiff contends was John Hancock's internal mortality assumption for that policy; and (2) determines the Age 100 Rider Overcharge during the applicable statute of limitations as the difference between the Age 100 Rider charges John Hancock actually assessed on the policy and the Age 100 Rider charges Plaintiff contends that John Hancock should have assessed by the terms of that policy's Age 100 Rider. Settlement Agreement Ex. D ¶ 3. Because John Hancock contends that certain Class members already had their claims released by a prior settlement in *Duhaime, et al. v. John Hancock Mutual Life*

Insurance Company, et al., Case No. 96-CV-10706-RGS (D. Mass.), the COI Overcharges for those policies are discounted by 50%. *Id.* ¶ 3(a)(ii).

Unlike many class action settlements, the Settlement Fund here will *not* be reduced based on any opt-outs from the Class. Upon final approval, the Settlement Administrator will distribute the Settlement Fund to eligible Class Members, net of Court-approved costs, fees, settlement administrative expenses and incentive awards. The checks will be sent *automatically* to Class members using John Hancock's database of their addresses without requiring Class Members to submit claim forms. This is not a claims-made settlement—none of the settlement funds will revert to John Hancock.

Within one year plus 30 days after the date the Settlement Administrator mails the first Settlement Fund Payments, 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 Class Members who previously cashed their checks. Settlement Agreement Ex. D ¶ 5.

III. ARGUMENT

A. The Settlement Should Be Finally Approved.

Rule 23(e) provides that the Court should grant final approval to a class action settlement if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the Court should consider both the procedural and substantive fairness of the settlement. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013). Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart*, 396 F.3d at 116-17; *Allen v. Dairy Farmers of Am., Inc.*, 2011 WL 1706778, at *2 (D. Vt. May 4, 2011).

1. The 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. Indeed, in such circumstances, "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008).

That is precisely the case here. The mediation and settlement took place only after the completion of fact discovery, during which Plaintiff deposed numerous John Hancock actuaries, studied hundreds of policy forms, dozens of John Hancock internal mortality tables, experience studies, and pricing and re-pricing memoranda, and extracted and reviewed enormous amounts of data—including hundreds of millions of rows of records – about and concerning the merits of the case, and performed the extensive analysis required to prepare a thorough motion for class certification, expert reports, and supporting liability and damages models. Courts give counsel's opinion considerable weight because they are 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 citations omitted)). The named plaintiff 37 Besen Parkway LLC similarly supports this settlement as fair, reasonable, and adequate. Declaration of Eliazer Klein ¶ 6.

Moreover, the Settlement was reached after frank and contentious negotiations, including a mediation session and negotiations conducted under the guidance of the Honorable Theodore Katz. The involvement of a mediator strengthens the presumption of fairness. *In re Flag Telecom*

Holdings, Ltd. Sec. Litig., 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) (noting that the "presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation"); *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.").

2. The 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). As demonstrated below, the Settlement satisfies the *Grinnell* factors.[3]

a. The Complexity, Expense, and Likely Duration of the Litigation (Factor 1)

"[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 381-82 (S.D.N.Y. 2013) (internal citation and

[3] "[N]ot every factor must weigh in favor of settlement[;] rather [a] court should consider the totality of these factors in light of the particular circumstances." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (internal citation and quotation omitted). And in reviewing a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (internal citation and quotation omitted).

quotation omitted). To say that this case is complex would be an understatement. Since this case was filed over three years ago, Class Counsel has reviewed hundreds of thousands of pages of documents, taken numerous highly-technical depositions, and prepared a voluminous motion for class certification and supporting expert reports with liability and damages models.

The Settlement was reached shortly before John Hancock was scheduled to file its opposition to Plaintiff's motion for class certification. If Plaintiff had successfully certified a litigation class, that class would still have faced another round of full-fledged expert discovery, a motion for summary judgment (if not more than one), motions to decertify, various *Daubert* motions, trial, and post-verdict and appellate litigation. Even assuming that the Class would clear all these hurdles, it could easily be years before the Class saw a dollar of relief. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("[T]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class."); *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)). Thus, this factor weighs strongly in favor of approval of the Settlement.

b. The Reaction of the Class to the Settlement (Factor 2)

The reaction of the Class to the Settlement, to date, strongly supports approval. John Hancock's data contained the names, addresses, and policy information for 79,033 unique policies, some with more than one policy owner. As a result, the Settlement Administrator mailed 83,961 Class Notices, directly to the addresses maintained in John Hancock's records, with subsequent follow-ups for address updates. The notice explained, in clear and concise language, the legal options and monetary benefits available to Class members under the Settlement and were created with the help of a leading expert in the form and content of notice.

While the deadline set by the Court for members of the Settlement Class to object to the Settlement or exclude themselves from the Settlement Class has not yet passed (and expires in 17 days), to date, no objections and three requests for exclusion have been received. Azari Decl. ¶ 19.

c. The Stage of the Proceedings (Factor 3)

The third *Grinnell* factor, whether Plaintiff and Class Counsel "have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement," also strong supports approval of the Settlement. *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *see also In re Global Crossing,* 225 F.R.D. 356, 458 (S.D.N.Y. 2004) (explaining that the purpose of the third *Grinnel* factor is to "assure the Court that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them" (internal quotation marks omitted)). At the time the Settlement was reached, Plaintiff had conducted extensive discovery, including analyzing substantial volumes of data and taking dozens of depositions of actuaries and each of Defendant's three corporate Rule 30(b)(6) designees. Class Counsel spent thousands of hours of time and millions of dollars in expert expenses thoroughly vetting and considering John Hancock's internal mortality projections and experience and Class members' claims in preparing their motion for class certification and accompanying expert reports. As a result of these extensive efforts, Class Counsel 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").

d. The Risks of Establishing Liability and Damages, and of Maintaining the Class Action Through Trial (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.*, 2014 WL 1224666, at *10 (S.D.N.Y. Mar 24, 2014) (quotation omitted). Instead, "the Court should balance the benefits afforded the Class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of litigation." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (emphasis in original) (internal citation and quotation omitted). In so doing, the Court need not "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[s]." *Global Crossing*, 225 F.R.D. at 459.

Although Class Counsel fervently believe in the merits of this case, it is beyond question that the Class faced substantial risks on liability, risks on damages, and risks to class certification if they proceeded with this litigation. On liability, the Class had not yet received a definitive ruling on the interpretation of the central contractual term requiring that rates be "based on expectations of future mortality experience." Although, on the pleadings alone, Plaintiff had successfully assuaged the Court's concern that this provision might be "illusory," Dkt. 29 at 4:11, it remained possible that this key issue would go against the Class at summary judgment or trial. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("[N]o matter how confident one may be of the outcome of

litigation, such confidence is often misplaced."); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) (comparing advantages of immediate cash payments with risks involved in long and uncertain litigation).

As for damages, establishing damages in this case necessarily depends on complicated actuarial modeling of tens of thousands of different insurance policies. *Park v. Thomson Corp.*, 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008) ("The complexity of Plaintiff's claims *ipso facto* creates uncertainty."). Even getting the data to power these models required a monumental effort, and John Hancock's very able counsel would challenge these models on all fronts. Even if these models did survive *Daubert* challenges, the very complexity of these models adds substantial risk to Plaintiff's claims. *See In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial inevitably would involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited" (internal quotation marks omitted)); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *18 (S.D.N.Y. Nov. 8, 2010) ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable.").

Finally, there were substantial risks to maintaining this case as a class action through trial. The Court had not yet certified a litigation class. If the Court had certified a litigation class (and assuming that certification survived the inevitable Rule 23(f) petition), the Court could nonetheless review and modify the grant of certification at any point prior to trial, such that the risk of maintaining the class through trial would never be certain. *See Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. Aug. 6, 2010) ("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 IMAX*, 283 F.R.D. at 191 (noting that "'if insurmountable management problems were to develop at any point, class certification can be revisited at any time'" (quoting *NASDAQ III*, 187 F.R.D. at 476)).

e. The Ability of Defendant to Withstand a Greater Judgment (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." *D'Amato*, 236 F.3d at 86; *see also Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009) ("[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement[s]."). Indeed, "a defendant is not required to empty its coffers before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008) (internal quotation marks omitted). 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." *Global Crossing*, 225 F.R.D. at 460.

f. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation (Factors 8 and 9)

The last two *Grinnell* 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)); *see also In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984); *NASDAQ III*, 187 F.R.D. at 478. This is not a "mathematical equation yielding a

particularized sum." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012) (internal citation and quotation omitted); *see also In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 431 (S.D.N.Y. 1993). As noted in one prominent class action, the "essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1325 (5th Cir. 1981).

Continuing this litigation would necessitate the expenditure of countless hours and dollars over several more years with no guarantee that Plaintiff would ever be able to establish liability, prove damages, and maintain certification, all of which would be required to recover anything for the Class at trial. These risks are arguably dispositive for these *Grinnell* factors. *See Bear Stearns*, 909 F. Supp. 2d at 270 ("[T]he propriety of a given settlement amount is a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery).").

Here, the $91.25 million Settlement is an excellent result. Plaintiff's damages expert estimated on class certification that within the limitations period, and assuming John Hancock was found liable, the Class was overcharged by $217 million on the high end. Sklaver Decl. ¶ 15; Dkt. 126. Given this overall range of damages and the risks of litigation, the $91.25 million recovery is a sizable recovery that strongly supports final approval. *See Grinnell*, 495 F.2d at 455 & n.2 (explaining that, in theory, a fraction of one percent of the overall damages could be a reasonable and fair settlement); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d at 229 (granting final approval to class action settlement representing approximately 2.5% of the highest damages estimate as "within the range of reasonableness in light of the best possible recovery and in light of all the attendant risks of litigation"); *In re Air*

Cargo Shipping Servs. Antitrust Litig., 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement in class action representing approximately 10.5% of the surcharges incurred by class members during the class period); *In re Med. X-Ray Film Antitrust Litig.*, 1998 WL 661515, *5-6 (E.D.N.Y. Aug. 7, 1998) (granting final approval to class action settlement representing approximately 17% of the estimated best possible recovery).

The Settlement is even more significant given the considerable risks involved in the litigation as set forth above. Plaintiff and Class Counsel carefully and thoroughly analyzed these risks when negotiating the present Settlement. The proposed Settlement is a favorable result for the Settlement Class in light of the range of possible recoveries and the risks of continued litigation. *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).

B. The Court Should Certify the Settlement Class

In accordance with the Settlement, Plaintiff respectfully requests that the Court finally certify the Settlement Class for settlement purposes. The Settlement Class consists of all Owners of COI Decrease Class Policies and Rider Overcharge Class Policies. COI Decrease Class Policies means:

> all universal and variable universal life insurance policies issued by John Hancock Life Insurance Company (U.S.A.), or its predecessors, that state "The Applied Monthly Rates will be based on our expectations of future mortality experience."

Excluded from the COI Decrease Class Policies are: (i) policies that disclose factors on which "Applied Monthly Rates will be based" other than or in addition to "expectations of future mortality experience"; and (ii) Flex V2 Policies. Settlement Agreement § 1.8. A specific list of all policies within the COI Decrease Class identified by policy numbers is attached as Exhibit A

of the Settlement Agreement. The Rider Overcharge Class Policies are a specific list of 183 policies identified by policy number in Exhibit B of the Settlement Agreement.

The Court has already conditionally certified this Class. Dkt. 138. For the reasons set forth in Plaintiff's motion for preliminary approval as well as Plaintiff's motion for class certification, 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

A notice program must satisfy both Rule 23(c)(2)(B) and Rule 23(e)(1). Rule 23(c)(2)(B) requires the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974) (quotation omitted). However, neither individual nor actual notice to every Class member is required; instead, "class counsel [need only] act[] reasonably in selecting means likely to inform the persons affected." *Jermyn v. Best Buy Stores, L.P.*, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010) (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)); *see also In re Adelphia Commc'ns Corp. Sec. & Derivatives Litig.*, 271 F. App'x 41, 44 (2d Cir. 2008). As for Rule 23(e)(1), it requires that notice of a settlement be "reasonable" — *i.e.*, it 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 proceeding." *Wal-Mart*, 396 F.3d at 114 (internal citation and quotation omitted).

Here, the robust Notice Program satisfies the requirements of due process, Rule 23, and the notice standards articulated by the Second Circuit. Pursuant to the Preliminary Approval Order, Epiq individually mailed the Notice to Class members via First-Class mail. Epiq attempted to identify the correct address for any Notices returned as undelivered. Class Counsel

also made the Notice publicly available on a website, and maintained a toll-free number for Class members with questions. Azari Decl. ¶ 11.

The Notice communicated in plain language the essential elements of the Settlement and the options available to Class Members in connection with the Settlement. The Notice describes the litigation, summarizes the Settlement's terms and benefits, describes the manner of allocating the cash payments among eligible Class members, quotes the releases verbatim, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the Settlement Class. Azari Decl. Ex 2. 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.* These features of the Notice all demonstrate due process and that the federal rules have been satisfied. *See Wal-Mart*, 396 F.3d at 114 ("Notice is 'adequate if it may be understood by the average class member.'" (quoting 4 Newberg § 11.53, at 167)).

D. The Plan of Distribution is Fair and Reasonable.

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26 2016) ("A plan need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.") (internal citations and quotations omitted). Here, the cash payment will be allocated equitably on a *pro rata* basis after a minimum settlement payment is made to all Class Members. Each Class Member's *pro rata* share shall be that Class Member's share of the total damages in accordance with the largest damages methodology set forth in the damages declaration of Plaintiff's damages expert filed in support of Plaintiff's motion for class

certification, Dkt. 126, which, (1) determines the COI Overcharge during the applicable statute of limitations as the difference between the COI charges John Hancock actually assessed on the policy and the COI charges that Plaintiff contends that John Hancock should have assessed had it set COI rates based on what Plaintiff contends was John Hancock's internal mortality assumption for that policy; and (2) determines the Age 100 Rider Overcharge during the applicable statute of limitations as the difference between the Age 100 Rider charges John Hancock actually assessed on the policy and the Age 100 Rider charges Plaintiff contends that John Hancock should have assessed by the terms of that policy's Age 100 Rider.

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 Vitamins Antitrust Litig*., 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."); *In re Lloyds' Am. Trust Fund Litig*., 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("[T]he *pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."); *PaineWebber*, 171 F.R.D. at 135 (approving pro rata distribution). Class Counsel's conclusion that this distribution plan is fair, adequate, and reasonable, is also 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"). Accordingly, the distribution plan is fair and reasonable, and should be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests 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: January 18, 2019

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Class Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

37 BESEN PARKWAY, LLC, on behalf of itself and all others similarly situated, Plaintiff, vs. JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), Defendant.	Civil Action No. 15-cv-9924 **DECLARATION OF SERVICE**

I, Glenn C. Bridgman, declare:

1. I am over eighteen years of age, I am not a party to this action, and I am an employee with the law firm of Susman Godfrey L.L.P., in the Los Angeles, California office.

2. My business address is 1900 Avenue of the Stars, Suite 1400, Los Angeles, California 90067.

3. On January 18, 2019, I served a copy of the aforementioned document via the court's CM/ECF system upon the following:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 18, 2019, at Los Angeles, California.

/s/ Glenn C. Bridgman
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