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 PRELIMINARY APPROVAL OF SETTLEMENT

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Plaintiff 37 Besen Parkway, LLC, individually and on behalf of the class of policy owners proposed to be certified for purposes of settlement (the "Settlement Class" or "Class"), have entered into a settlement agreement (the "Settlement" or "Settlement Agreement") with Defendant John Hancock Life Insurance Company (U.S.A.) ("John Hancock").[1] Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff respectfully moves the Court for an order:

- Preliminarily approving the Settlement and distribution plan and scheduling a final approval hearing at which the Court will consider final approval of the Settlement, final approval of the plan of allocation, and Class Counsel's motion for fees and costs;
- Certifying the Settlement Class, appointing Plaintiff as Class representative and Susman Godfrey L.L.P. as Class Counsel for purposes of the Settlement; and
- Approving the form and manner of notice to the Settlement Class.

The Settlement, if approved, will conclude this class litigation in its entirety.

I. INTRODUCTION

The Settlement reached after more than two-and-a-half years of hard-fought litigation provides the Class with a $91.25 million cash payment. The money will be distributed directly to Class members, with no need for claims forms and no funds reverting to John Hancock.

On preliminary approval, the question is whether the Settlement's substantive terms fall within the range of "possible" approval, such that notice should be sent to the Class and a full fairness hearing should be held. The substantial recovery obtained for the Class in light of the risks of continued litigation easily meets that test. Class Counsel researched and discovered this alleged breach of contract on their own, without any governmental investigation, and filed the first suit alleging that John Hancock failed to decrease its cost of insurance rates. At the initial

[1] Unless otherwise noted, all Capitalized Terms mean the same as in the Settlement Agreement, which is attached as Exhibit 2 to the Declaration of Steven Sklaver.

conference in this case, the Court expressed concern regarding whether Plaintiff can sustain a breach of contract claim in light of a "fundamental issue about the language in the policy that could be dispositive," questioned whether the key contractual terms at the heart of this litigation were even "enforceable," and invited John Hancock to file "a dispositive motion addressing" whether Plaintiff can even "get[] at the issue of [John Hancock's] expectations of future mortality experience." Transcript of May 5, 2016 Hearing ("Tr.") (Dkt. 29) at 4:3-19, 12:5-8, 17:25-18:3. After persuading John Hancock not to file a proposed motion for judgment on the pleadings, 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 reams of data about tens of thousands of Class policies and working with and investigating John Hancock's policy administration systems, took and defended 16 highly technical depositions (some over multiple days) involving subjects such as insurance financial reporting, statutory accounting, mortality tables, and actuarial science, and prepared 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, and resulted in an extraordinary amount of cash relief for the Class. *See* Declaration of Theodore Katz ¶ 1. The $91.25 million settlement fund will used to compensate tens of thousands of elderly insureds, and is a remarkable result for an alleged breach of a contractual promise that this Court had preliminary concerns about being "awfully vague" and "almost sounds illusory." Dkt. 29 at 4:11.

At the final approval hearing, the Court will have before it more extensive submissions in support of the Settlement and will be asked to make a determination as to whether the Settlement

is fair, reasonable, and adequate in light of all of the relevant factors. At this time, Plaintiff requests only that the Court grant preliminary approval of the Settlement so that Class members can receive notice of the Settlement and the final approval hearing.

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 Hancock that contains the following contractual promise: "The Applied Monthly Rates will be based on our expectations of future mortality experience." Plaintiff filed a putative 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) that John Hancock charged certain improper Age 100 Rider charges. At the initial conference in this case, the Court inquired about the enforceability of the promise to base COI rates on John Hancock's expectations of future mortality experience, and asked the parties to brief whether John Hancock should be permitted to file an early motion for judgment on the pleadings on this issue. Dkt. 29. Following successful briefing by Plaintiff and oral argument at a conference held before the Court, John Hancock ultimately decided not to move for judgment on the pleadings. Dkt. 39.

Merits discovery began in the summer of 2016. During discovery, Class Counsel 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* Sklaver Decl. ¶ 9. Plaintiff 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 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 hired an expert in databases and 1980s-era computer programming, who helped write computer code that 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 extracting this data from four separate John Hancock's systems housing the data for the 28 products in the Class. *Id.* ¶ 9. 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 using alternative mortality tables. *See* Dkt. 118.

Class Counsel took numerous depositions of John Hancock's current and former employees, officers, and three separate 30(b)(6) designees. *See* Sklaver Decl. ¶ 10. Among other motion practice, Class Counsel successfully moved to compel John Hancock to produce hundreds of thousands of records of data from its key "MY Experience System," as well as for John Hancock to produce Rule 30(b)(6) designees prepared to testify about all 28 product lines in the Class. Dkt. 82. The motion practice that resulted in the production of the MY Experience System data was one of many key turning points in the litigation. To 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, Plaintiff's counsel scoured John Hancock's records. As a result of that review, Plaintiff learned that the MY Experience System, from which John Hancock had not yet produced data, set forth what Plaintif contends were John Hancock's mortality expectations. After Hancock refused to produce data from the MY Experience System and 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 the table "provide[s] the expected deaths during a particular year," for each policy. Dkt. 83. This data then featured heavily in Plaintiff's motion for class certification, 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, as well as Plaintiff's liability expert, James Rouse, and Plaintiff's economic expert, Robert Mills. Sklaver Decl. ¶ 10.

On March 12, 2018, Plaintiff moved to certify both a COI Overcharge Class and a Rider Overcharge Class. Dkt. 113. Plaintiff's class certification filing contained two expert reports, over fifty exhibits, and totaled over eleven thousand pages. Sklaver Decl. ¶ 11.

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. Pursuant to the Court's July 15, 2016 scheduling order, Dkt. 34, as amended on Sept. 14, 2016 (Dkt. 43 at ¶ 6(f)), 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, the parties reopened the settlement dialogue, exchanging multiple proposals and counter-proposals over the course of several weeks. The parties subsequently scheduled an in-person mediation in front of Judge Katz, which took place on 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.

Throughout the process, the Settlement negotiations were conducted by highly qualified and experienced counsel on both sides at arm's length. Sklaver Decl. ¶¶ 2-3, 11; Katz Decl. ¶¶ 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.* 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.*.

C. The Settlement Agreement

1. Consideration and Settlement Class

The Settlement awards $91.25 million in cash relief. The 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. 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.[2] 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. Settlement Agreement §§ 1.9, 1.31.

2. Release, Payments, and Opt-Outs

Notices will be mailed out to each owner of a Class policy at the address maintained in John Hancock's records within 30 days after preliminary approval. Settlement Agreement § 4. Class members will have 45 days after notice is sent to exclude themselves from the Class by sending a letter to the Settlement Administrator. *Id.* § 5. 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. The Settlement Administrator will also conduct individual address searches, using their own databases and other sources, to confirm the address for owners of terminated policies. Declaration of Cameron R. Azari ¶¶ 11-13. This is not a claims-made settlement—none of the settlement funds will revert to John Hancock.

Once the settlement becomes final, Plaintiff and Class members will release any and all

[2] Exhibit A has been lodged with the Court, but given its volume and that it is merely a list of policy numbers, has not been filed publicly in light of certain privacy concerns. All Settlement members will be able to confirm that their policies are in the class by inputting their policy numbers on the settlement administration website.

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:

> (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.

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. Settlement Agreement §§ 1.13, 1.27, 1.42, 3.1.

3. Costs and Fees

The Settlement provides that up to $1 million of the Settlement Fund may be used on a non-refundable basis for Notice and Administration costs. The Settlement also provides that that Class Counsel may seek reimbursement of expenses and an award up to one-third of the Settlement Fund. The Settlement also provides that Class Counsel may request incentive awards of up to $40,000 to each of the two representatives of the Plaintiff who testified in this action for its services as representatives on behalf of the Class. Class Counsel will file a motion seeking reimbursement of their costs, fees, and incentive awards, which will be proposed to be scheduled to be heard at the same time as the final approval hearing. Class members will be given an opportunity to object to that application prior to the final approval hearing. No such costs, fees, or awards will be distributed without Court order. Settlement Agreement §§ 6.1, 6.3, 10.6.

4. Plan of Allocation

The proposed plan of allocation, attached as Exhibit D to the Settlement, 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 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. Settlement Agreement Ex. D ¶ 3. As John Hancock contends that a certain portion of the Class 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 will have their COI Overcharge discounted by 50%. *Id.* ¶ 3(a)(ii).

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 Proposed Settlement Warrants Preliminary Approval

1. Legal Standard Governing Preliminary Approval

Preliminary approval of a Settlement is appropriate if "the proposed Settlement Agreement is within the range of possible settlement approval, such that notice to the Class is appropriate." *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08-cv-8713(PGG), 2009 WL 6583141, at *1 (S.D.N.Y. Dec. 29, 2009) (Gardephe, J.). Preliminary approval "simply allows notice to issue to the class and for Class Members to object to or opt-out of the settlement." *Clem v. Keybank*, No. 13-cv-789, 2014 WL 1265909, at *1 (S.D.N.Y. Mar. 27, 2014). "After the notice period, the Court will be able to evaluate the settlement with the benefit of the Class Members' input." *Id.* Preliminary approval "requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Id.* (quoting *Clark v. Ecolab, Inc.,* Nos. 07-cv-8623, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009)). Preliminary approval is granted where the settlement "has no obvious defects" and the allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted." *Danieli v. IBM*, No. 08-cv-3688, 2009 WL 6583144, at *4–5 (S.D.N.Y. Nov. 16, 2009).

In conducting a preliminary approval inquiry, a court considers both the negotiating process for the settlement (procedural fairness) and the settlement's substantive terms (substantive fairness). *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (citations omitted). A settlement process is procedurally fair where the settlement "is the result of extensive, arm's length negotiations by counsel well-versed in the prosecution of [the asserted type of] actions." *Grant v. Warner Music Group Corp.*, 13-cv-5031, 2015 WL 10846300, at *1 (S.D.N.Y. Aug. 21, 2015) (Gardephe, J.). "If the proposed settlement 'appears to fall within the range of possible approval, the court should order that the class

members receive notice of the settlement.'" *Kelen v. World Fin. Network Nat. Bank*, 302 F.R.D. 56, 68 (S.D.N.Y. 2014)

The settlement of complex class action litigation is strongly favored. The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (internal quotation marks and citation omitted); *Yuzary v. HSBC Bank USA, N.A.*, No. 12-cv-3693(PGG), 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013) (Gardephe, J.) (noting "the 'strong judicial policy favoring settlements' of class action suits").

2. The Proposed Settlement is Procedurally Fair

The Settlement was the result of extensive, arm's length negotiations by counsel well-versed in the prosecution of contract and cost-of-insurance litigation. The terms of the Settlement were negotiated over course of several months, culminating in the May 24, 2018 mediation in front of retired Magistrate Judge Theodore Katz. Katz Decl. ¶¶ 6-7. That mediation took place only after the completion of discovery, during which Plaintiff extracted enormous amounts of data about and concerning the merits of the case and the Class's policies directly from John Hancock's systems and performed the extensive analysis required to prepare a motion for class certification, expert reports, and supporting liability and damages models. All this makes the Settlement procedurally fair, as there is 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." *See McReynolds v. Richards–Cantave,* 588 F.3d 790, 803 (2d Cir. 2009) (alteration and internal quotation marks omitted); *Kelen,* 302 F.R.D. at 68. The extensive participation of an experienced mediator "reinforces that the Settlement Agreement is non-collusive." *Johnson v. Brennan*, 2011 WL

1872405, at *1 (S.D.N.Y. May 17, 2011); *see also McMahon*, 2010 WL 2399328, at *4 ("Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process.").

Further, it is the opinion of Class Counsel and an experienced mediator that this settlement is fair, reasonable, and adequate. Sklaver Decl. ¶ 4. 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.*, No. 12-cv-8557-CM, 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)).

3. The Proposed Settlement is Substantively Fair

The proposed settlement falls within the "range of possible settlement approval," which is sufficient for preliminary approval. *Johnson*, 2011 WL 1872405, at *1. Where, as here, counsel for the parties engaged in diligent arm's-length negotiations, a settlement is generally entitled to "a presumption of fairness." *Yuzari*, 2013 WL 5492998, at *4.

The $91.25 million cash payment is a remarkable recovery. Mr. Robert Mills, plaintiff's damages expert on class certification, had two damages models which calculated that within the limitations period and through August 2016, and assuming John Hancock was found liable for breach of contract as alleged in the Complaint, the Class was potentially overcharged by as much as $217 million, or possibly substantially less, using a different methodology. Sklaver Decl. ¶ 13; Dkt. 126. Given the overall damages, the $91.25 million recovery is far greater than what is needed to justify final approval. *See City of Detroit v. Grinnell Corp*., 495 F.2d 448, 455 & n.2 (2d Cir. 1974) (explaining that, in theory, a fraction of one percent of the overall damages could be a reasonable and fair settlement). The Settlement is clearly within the "range of *possible* approval," which is all that preliminary approval requires. *See Johnson*, 2011 WL 1872405, at

*1.

Other terms reinforce the substantive fairness of the Settlement. No funds will revert to John Hancock, and checks will be automatically mailed to Class members using John Hancock's database of Class member addresses. The assurance of immediate payment supports the reasonableness of the Settlement. *See Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) (explaining that if a settlement "assures immediate payment of substantial amounts to Class Members," that is a factor supporting *final* approval of the settlement, "even if it means sacrificing speculative payment of a hypothetically larger amount years down the road" (quotation marks omitted)).

While there is no need at the preliminary approval stage to consider the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell* factors"), these factors nevertheless weigh strongly in favor of preliminary approval. First, the litigation was complex, as attested by the long history of the litigation, allegations, data reviewed, mortality tables studied, actuarial science and economics employed, and the sheer size of and methodology used in plaintiff's motion for class certification and supporting documentation and reports. The Settlement also ends future litigation and uncertainty. 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 a motion for summary judgment (if not more than one), an inevitable motion 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 five years or more before the Class saw a dollar of relief. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (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 Securities Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 210 ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)).

The second *Grinnell* factor, the reaction of the Class, is premature. The third factor, which is designed to "assure the Court that counsel for the plaintiffs have weighed their position based on a full consideration of the possibilities facing them," strongly favors preliminary approval given the stage of the proceedings. *Global Crossing,* 225 F.R.D. at 458. Plaintiff had conducted *extensive* discovery, including analyzing substantial and technical data extracted from John Hancock's systems. Plaintiff had thoroughly vetted and considered Class members' claims in preparing their motion for Class certification. Class Counsel had a full record against which to measure the adequacy of the Settlement.

Regarding factors 4, 5 and 6, "the complexity of Plaintiffs' claims *ipso facto* creates uncertainty." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009). Moreover, the sheer number of steps between Plaintiff and an eventual recovery counsel in favor of preliminary approval. The Class still would need to (1) get certified, (2) survive summary judgment, (3) avoid decertification, (4) prevail at trial, and (5) preserve a successful verdict on appeal. *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[T]he litigation risks attendant to these possibilities [like decertification] weighed heavily in favor of the fairness of a settlement."). Regarding factor 7, even if Defendant could withstand a greater judgment, this does not undermine the fairness of the Settlement even for final approval. *Global Crossing*, 225 F.R.D. at 460 ("[T]he 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.")

For factors 8 and 9, the $91.25 million cash payment by John Hancock represents a

significant recovery in light of the total estimated damages and the risks of litigation. *See Grinnell Corp*., 495 F.2d at 455 & n.2.

B. The Proposed Settlement Class Should Be Certified

"The Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Flores v. Anjost Corp.*, 284 F.R.D. 112, 122 (S.D.N.Y. 2012) (internal quotation marks omitted). A court may grant certification where, as here, the proposed Settlement Class satisfies the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *See Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir. 1982). Manageability under Rule 23(b)(3) is not at issue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested . . . .").

The settlement class should be certified for all the reasons set forth in Plaintiff's motion for class certification. *See* Dkt. 122. As plaintiff explained in its motion for class certification, courts routinely certify class actions, like this one, alleging breaches of identical COI provisions of standardized life insurance policies. *See, e.g*., *Fleisher v. Phoenix Life Ins. Co*., 2013 WL 12224042, at *13 (S.D.N.Y. July 12, 2013) ("*Phoenix COI*") ("Because the 2011 class alleges breach of contract case arising out of standardized insurance policy forms, the common questions of law and fact predominate over any individual questions. The insurance policies at issue contain provisions regarding how COI rates are set and what Phoenix can consider in making any changes in rates, and these terms are substantively identical for all the policies held by the members of the Class[]."); *Feller v. Transamerica Life Ins. Co*., 2017 WL 6496803, at *13 (C.D. Cal. Dec. 11, 2017); *Lincoln Nat. Life Ins. Co. v. Bezich*, 33 N.E. 3d 1160, 1171 (Ind. Ct. App.

2015);[3] *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig*., 270 F.R.D. 521, 529-30 (N.D. Cal. 2010*); In re Conseco Life Ins. Co. Cost of Ins. Litig*., No. ML 04-1610, 2006 WL 5678842, at *4 (C.D. Cal. Apr. 26, 2005). Against this background of courts routinely granting class certification of COI class actions where certification is disputed, there is no obstacle to certifying a *settlement* class here. Certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *Prudential*, 163 F.R.D. at 205. Conditional certification for settlement purposes facilitates notice of a preliminarily approved settlement. *See, e.g.*, *Grant*, 2015 WL 10846300, at *1 (granting preliminary approval and conditionally certifying a settlement class).

1. The Settlement Class Meets the Requirements of Rule 23(a)

a. Numerosity

In the Second Circuit, "[n]umerosity is presumed at a level of 40 members*." Zimmerman v. Portfolio Recovery Assocs*., *LLC*, 276 F.R.D. 174, 179 (S.D.N.Y. 2011) (quoting *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). There are tens of thousands of policies in the COI Overcharge Class and 183 policies in the Rider Overcharge Class, easily satisfying numerosity.

b. Commonality

Commonality is established where a classwide proceeding may "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The commonality requirement "is not demanding," *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418 (S.D.N.Y. 2012), and poses "a 'low hurdle,'"

[3] Under Indiana Rule of Civil Procedure 58(A), the decision in *Lincoln* was automatically vacated when the Indiana Supreme Court granted Lincoln's petition to hear the case. The parties subsequently settled that class action, approved by the Court and jointly dismissed the Supreme Court appeal.

McIntire v. China MediaExpress Holdings, Inc., 38 F. Supp. 3d 415, 424 (S.D.N.Y. 2014). Even "a single common question will do." *Wal-Mart*, 564 U.S. at 359. Rule 23(a)(2) in no way "mandate[s] that all class members make identical claims and arguments, only that [the] common issues of fact or law affect all class members," and "[a] court may find a common issue of law even though there exists some factual variation among class members' specific grievances." *Stinson v. City of N.Y.*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012) (internal quotation marks omitted).

Here, there are numerous common questions susceptible to common answers, including Hancock's alleged breach of identical provisions in form insurance contracts. As in other certified COI class actions, the interpretation of these form insurance contracts – *e.g.*, determining whether Hancock had an obligation to update rates, whether Hancock could load its AMRs with margins over mortality, and whether Hancock could assess Age 100 rider charges beyond the maximum age permitted in the policy – will resolve common questions central to the resolution of the case. *See, e.g.*, *Phoenix COI*, 2013 WL 12224042, at *8 ("[B]reach of contract *is* the central issue in the case brought by [plaintiff] on behalf of the [] Class." (emphasis in original)).

c. Typicality

The typicality requirement is "not demanding," *Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 283 F.R.D. 199, 208 (S.D.N.Y. 2012), and is satisfied where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability," *Surdu v. Madison Glob., LLC*, 2017 WL 3842859, at *4 (S.D.N.Y. 2017) (internal quotation marks omitted). "The focus of the typicality inquiry is not on the plaintiff['s] behavior, but rather on the defendant[s'] actions." *New Jersey Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, 2011 WL 3874821, at *2 (S.D.N.Y. Aug. 16, 2011), amended in part, 2014 WL 1013835 (S.D.N.Y. Mar. 17, 2014). Here,

all claims arise from a single course of conduct by Hancock and rely on identical legal arguments and contractual provisions that are virtually uniform across every policy in the Class. *See Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 75 (E.D.N.Y. 2004) (finding typicality when insurer's "contracts are uniform regarding the provisions pertinent to this litigation"). As in all other certified COI class actions, "the representatives of each proposed class complain of the same unlawful conduct as every other member of the class." *Phoenix COI*, 2013 WL 12224042, at *11.

d. Adequacy

Adequacy of representation is measured by two standards: "First, class counsel must be 'qualified, experienced and generally able' to conduct the litigation. Second, the class members must not have interests that are 'antagonistic' to one another." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 142 (2d Cir. 2001). "In order to defeat a motion for certification … the conflict must be fundamental." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quotations omitted).

The Settlement Class satisfies both requirements. The Court already found Class Counsel has the qualifications, experience, and ability to prosecute the claims in appointing it as interim class counsel, Dkt. 26 (May 2, 2016 Order), and Class Counsel prosecuted the case vigorously, conducting a thorough examination of the merits before reaching this hard-fought, arm's-length Settlement. Nor are there are any conflicts between or among the named Plaintiff and other Class Members. Plaintiff's interests are directly aligned with Class Members – to maximize the amount recovered from Hancock for its alleged breach of contract. Since filing this action, Plaintiff has taken its role and obligations to the Class seriously, actively participating and monitoring the litigation, including by having two of its representatives each submit to separate

depositions.

Proceeds will be distributed equitably on a *pro rata* basis after a minimum settlement payment is made to all Class Members, and all Class Members share an overriding interest in obtaining the largest monetary recovery possible from John Hancock. *See Global Crossing*, 225 F.R.D. at 453 (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *see also* 1 Newberg on Class Actions § 3:58 (5th ed. 2013) ("Adequacy does not require complete identity of claims or interests between the proposed representative and the class. 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)).

2. The Settlement Class Meets the Requirements of Rule 23(b)(3)

Certification of a class for settlement purposes requires a showing that "questions of law or fact predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Manageability is not at issue for a settlement class. *Amchem Prods.*, 521 U.S. at 615.

a. Predominance

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623-24. The predominance requirement is relaxed for a settlement class because "with a settlement class, the manageability concerns posed by numerous individual questions of reliance disappear." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 241 (2d Cir. 2012).

Courts in this Circuit regularly find that predominance is satisfied for claims, like these, that allege breach of standardized, form contracts. *Phoenix COI*, 2013 WL 12224042, at *13 ("There is widespread agreement that certification under Rule 23(b)(3) is warranted for claims

that involve contracts that . . . contain the same or essentially the same terms.") (collecting cases); *Steinberg*, 224 F.R.D. at 74 ("[C]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such."); *accord Dupler v. Costco Wholesale Corp*., 249 F.R.D. 29, 37 (E.D.N.Y. 2008) ("An overwhelming number of courts have held that claims arising out of form contracts are particularly appropriate for class action treatment."). Here, because the "class alleges [a] breach of contract case arising out of standardized insurance policy forms, the common questions of law and fact predominate over any individual questions." *Phoenix COI*, 2013 WL 12224042, at *13.

b. Superiority

Finally, the Court must balance, in terms of fairness and efficiency, the advantages of class action treatment against alternative available methods of adjudication. *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297, 301 (E.D.N.Y. 2006). The Court needs to consider "the efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications." *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 458 (E.D.N.Y. 1996). Here, any interests of Class Members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. *See In re Buspirone Patent Litig.,* 210 F.R.D 43, 58 (S.D.N.Y. 2002) ("The numerous common issues of fact and law and the difficulty of numerous individual lawsuits indicates that a class action is superior to other methods for a fair and efficient adjudication of the controversy.").

3. Proposed Class Counsel Satisfies Rule 23(g) and the Class Representative Is Proper

Rule 23(g) governs appointment of counsel for the Class. Here, Class Counsel has

vigorously prosecuted this case and spent tireless hours achieving this highly favorable Settlement for the Class. Sklaver Decl. ¶¶ 8-11. Susman Godfrey L.L.P. has significant experience in prosecuting cost of insurance class actions, which makes the firm particularly well-suited to serve as Class Counsel. Sklaver Decl. ¶ 3 & Ex. 1. The Court already found that Susman Godfrey has the qualifications, experience, and ability to prosecute the claims in appointing it as interim class counsel, Dkt. 26 (May 2, 2016 Order). As for the Class representative, for the reasons explained above, 37 Besen has claims that are typical and adequate for the Settlement Class, and should be appointed representatives of the Settlement Class.

C. Notice to the Class

There are two requirements for notice. First, "Courts in this Circuit have explained that a Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally and informs the Class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." *Charron*, 874 F. Supp. 2d at 191; *accord Wal-Mart Stores, Inc.*, 396 F.3d at 113-14 ("There are no rigid rules . . . ; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." (internal quotations omitted)). Second, the manner of sending notice to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem*, 521 U.S. at 617.

The form of notice here satisfies due process because it informs Class members of the terms of the settlement and the options open to them in plain language. *See Newberg* § 11.53 (the form of notice is "adequate if it may be understood by the average class member"). The notice, which is attached as Exhibit C to the Settlement Agreement, communicates in plain language the

essential elements of the Settlement and the options available to Class Members in connection with the Settlement and final approval. *Id.*

The manner of sending notice, which relies on direct mailing to individual Class members using John Hancock's address database, is the best notice practicable here. Azari Decl. ¶ 18. Direct notice will be sent by mail to all Class members using their last known address. This is a particularly effective method because in-force policyholders are expected to maintain their current addresses with John Hancock. In cases where the policy is no-longer in force, the last known address is already on file and the administrator will use its own extensive database of addresses to confirm that address on file, to assist in having notices go directly to Class members. A website will also be maintained so that anyone can read about the settlement and easily find all documents pertinent to the Settlement. The Settlement Administrator will also research and attempt re-delivery of any Notices returned as undeliverable. Azari Decl. ¶¶ 11-17.

Courts routinely recognize that direct mailings to class members, using known addresses maintained by a defendant or other sources, is the best notice practicable under the circumstances. *See, e.g.*, *United States v. New York*, No. 13-cv-4165, 2014 WL 1028982, at *5 (E.D.N.Y. Mar. 17, 2014) (where class notice was mailed directly to 3,876 class members "who were identified by Defendants," the "simple and direct notice was 'the best notice practicable under the circumstances'" (quoting *In re Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 133 (S.D.N.Y. 2008)). The notice plan gives Class members 45 days to opt-out, which is particularly appropriate given that notice will be sent directly to Class members using known addresses. Courts regularly approve opt-out periods of similar or even shorter length. *See, e.g.*, *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04-cv-8144, 2009 WL 5178546, at *13 (S.D.N.Y. Dec. 23, 2009) (approving 30–day opt-out period in complex securities fraud class

action).

D. The Proposed Plan of Allocation is Reasonable

A distribution plan is fair as long as it has a "reasonable, rational basis." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015). Because mathematical precision is impossible in calculating claims for a large class, 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.'" *In re Tremont Sec. Law, State Law & Ins. Litig.*, 699 F. App'x 8, 13 (2d Cir. 2017) (summary order) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997)).

A proposed plan of allocation, such as here, 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.*, No. 99-cv-197, 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.*, No. 96-cv-1262, 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*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). Furthermore, Class Counsel's conclusion that the distribution plan is fair, adequate, and reasonable, Sklaver Decl. ¶ 4, is entitled to great weight. *See Meredith Corp.*, 87 F. Supp. 3d at 667 ("[I]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.")

E. Proposed Schedule

Plaintiff proposes the following dates for the deadlines for the notice plan and for the final fairness hearing, subject to the approval of the Court:

EVENT	DAYS FROM PRELIMINARY APPROVAL	PROPOSED DATE/DEADLINE (if Preliminary Approval Granted August 8, 2018)
Send notice to Class members	30 days	September 7, 2018
Deadline to file motion for (1) final approval, and (2) award of attorneys' fees and expenses	60 days	October 8, 2018
Deadline to request exclusion from the Class or objections to the Settlement	75 days	October 22, 2018
Final Approval Hearing	90 days	November 6, 2018

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (i) preliminarily approve the proposed Settlement as within the range of fairness, reasonableness and adequacy; (ii) certify the Settlement Class, appoint Plaintiff as Class representatives and Susman Godfrey L.L.P. as Class Counsel for Settlement purposes; (iii) approve the proposed form and manner of notice to the Settlement Class; and (iv) schedule a date and time for a hearing to consider final approval of the Settlement and related matters.

Dated: July 20, 2018

/s/ Steven G. Sklaver

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Interim 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 July 20, 2018, I served a copy of the MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT via email upon the following persons:

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

Dated: July 20, 2018, at Los Angeles, California.

/s/ Glenn C. Bridgman
Glenn C. Bridgman