UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: LINCOLN NATIONAL COI LITIGATION	Case No.: 2:16-cv-6605-GJP
IN RE: LINCOLN NATIONAL 2017 COI RATE LITIGATION	Case No.: 2:17-cv-04150-GJP

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS

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I. INTRODUCTION

Plaintiffs in the two above-captioned class action cases challenged the contractual validity of "cost of insurance" ("COI") rate increases Defendant Lincoln National Life Insurance Company and its parent Lincoln National Corporation (collectively, "Lincoln") allegedly applied to approximately 50,000 universal life ("UL") policies ("Policies") in 2016 and 2017 (collectively, the "COI Increases"). Lincoln used the increased COI rates to determine the amount it withdrew each month from the Policies' account values. Plaintiffs alleged that Lincoln applied impermissible and erroneous assumptions to justify the COI Increases, thereby breaching the Policies' standardized language governing the limited permissible grounds for such increases.

Throughout the past seven years of hard-fought litigation, Lincoln has vigorously defended the COI Increases as warranted and permissible under the contracts. The validity of the COI Increases turned on esoteric actuarial issues, requiring an enormous amount of discovery (including 22 highly technical fact depositions) and expert analysis (with over $1.5 million in expert fees paid by Class Counsel). Joint Declaration in Support of Class Counsel's Motion for Approval of Common Fund Payment, etc., 2016 Action, ECF 252-2; 2017 Action, ECF 126-2 (collectively, "Jt. Decl.") ¶¶ 13 & 48; *id*., Exhibits 4 & 5. Lincoln forcefully attacked Plaintiffs' bid for class certification, and class certification was initially denied. Jt. Decl. ¶ 19. Undeterred, Plaintiffs developed a substantial legal and factual basis for a renewed motion for class certification addressing the perceived deficiencies identified by the Court from their earlier motion. *Id.* Over Lincoln's objection, the Court granted Class Plaintiffs leave to file a new class certification motion. It only was then, after the exhaustive development of factual and expert support for the putative class claims, that each side agreed to mediation before The Honorable Diane Welsh (Ret.). *Id.* ¶¶ 5-6.

The mediation was successful. Reached through arms' length negotiations, the proposed Settlement is designed to mitigate the impact of the allegedly impermissible COI Increases for each participating Policy owner (the "Settlement Class" and "Final Settlement Class Members"), through:

(i) a settlement fund of $109,957,440.75 ("Final Settlement Fund") providing direct, non-reversionary cash payments, which will return to each Final Settlement Class Member the same percentage of the disputed overcharges imposed on their Policies (subject to a minimum assumed overcharge of $200) ("the Cash Benefit");

(ii) a five-year COI rate freeze prohibiting Lincoln from imposing any further COI rate increases on their Policies ("the Freeze Benefit"); and

(iii) voluntary restrictions on Lincoln's ability to cancel Policies or to deny death claims based on a purported lack of insurable interest or misrepresentations in Policy applications ("the No Contest Benefit").

Jt. Decl. ¶¶ 22-24. Policyowner reaction to the proposed Settlement is overwhelmingly positive. Of more than 50,000 Policies eligible for relief under the Settlement, owners of only 79 Policies (just 0.156% of the Policies) excluded their Policies from the Settlement Class, either by filing a separate case against Lincoln challenging the COI Increase, or by submitting a timely request for exclusion to the Settlement Administrator. Of the 79 excluded Policies, 30 were excluded under Section 1.22(e) of the Settlement Agreement because they are or were the subject of separate litigation challenging the COI Increase, and another 41 are owned by a single financial institution. Equally as telling, there are only ***two*** objections to the Settlement itself, neither of which shows the Settlement to be anything other than fair, reasonable, and adequate under the record presented.

Accordingly, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and well-established Third Circuit jurisprudence, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement and final certification of the Settlement Class. A proposed Order and Judgment in a form agreed to by Plaintiffs and Lincoln is attached hereto as Exhibit A.

II. THE GENESIS, TERMS, AND NOTICE OF THE PROPOSED SETTLEMENT

A. Procedural History of the Actions

The procedural history of the Actions has been summarized in Plaintiffs' previous briefs (a) in support of their motion for preliminary approval[1] and (b) in support of their application for court approval of common fund payment of attorneys' fees, litigation expenses, and service awards.[2] Plaintiffs' Counsel collectively devoted more than 33,675 hours of time representing Plaintiffs and the proposed class members in these Actions. Jt. Decl. ¶ 31. Those efforts included: (i) comprehensive discovery requiring the review and analysis of nearly one million pages of documents, data, and native spreadsheets produced in the Actions; (ii) briefing and arguing numerous pretrial motions including those directed to the sufficiency of the pleadings, discovery motions, class certification motions, *Daubert* motions, and scheduling and case management disputes; (iii) retaining and working with consulting and testifying experts; (iv) taking or defending more than 50 depositions; (v) collecting and producing documents in response to Lincoln's discovery requests; (vi) serving and enforcing third-party subpoenas; (vii) preparing for and attending two mediations; and (viii) negotiating and documenting the proposed Settlement. *Id.* ¶¶ 4-20.

B. Terms of the Settlement Agreement

The proposed Settlement Agreement is intended to resolve all putative policyowner claims arising out of the challenged COI Increases alleged at any time in either the 2016 Action or the 2017 Action.

First, in exchange for a release of liability from those Settlement Class members who do not exclude themselves from the Settlement Class, Lincoln has agreed to establish a common

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[1] 2016 Action, ECF 247; 2017 Action, ECF 121.
[2] 2016 Action, ECF 252; 2017 Action, ECF 126.

settlement cash fund of up to $117,750,000 ("the Settlement Fund"). 2016 Action, ECF 247-1 ("Settlement Agreement"), at 8-9. Lincoln's obligation to fund the Settlement Fund is reduced, however, by deducting therefrom an amount equal to $117,750,000.00 multiplied by the sum of the Policy Claim Percentages for all Class Policies that are not Final Settlement Class Policies.[3]

The Parties agree that, after adjusting the amount of the Settlement Fund based on the exclusions from the Final Settlement Class, the Final Settlement Fund equals $109,957,440.75. After payment of the costs to administer the Settlement Fund, attorneys' fees, reimbursed litigation expenses, and Service Awards, the Settlement Administrator will distribute the Net Settlement Fund to the Owners of the Final Settlement Class Policies in proportion to their respective Policy Claim Amounts. Settlement Agreement, Section 2.1. No portion of the Settlement Fund will be returned to Lincoln. *Id.,* Section 2.2(d).

Lincoln also agrees under the Settlement Agreement to the Freeze Benefit and the No Contest Benefit. Pursuant to the Freeze Benefit, Lincoln agrees that for a period of five (5) years following the date of the Order and Judgment approving the Settlement, it will not apply to the Final Settlement Class Policies any increase in COI rates over those COI rates included in the COI rate schedules applied to the Final Settlement Class Policies implemented in 2016 or 2017 and challenged in the Actions, unless ordered to do so by a state regulatory body. And under the No Contest Benefit, Lincoln agrees not to take legal action (including asserting an affirmative defense

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[3] The Policy Claim Percentage for any Class Policy means the percentage obtained by dividing the Policy Claim Amount for that Class Policy by the total of all Policy Claim Amounts. Policy Claim Amount means the dollar amount based on the difference between: (a) the sum of the monthly deductions withdrawn from the policy value of the Class Policy for all months through September 30, 2022 in which the COI charge following the applicable COI Increase was greater than the COI charge under the COI rate schedule in effect immediately prior to the applicable COI Increase, and (b) the sum of the monthly deductions that would have been withdrawn from the policy value of the Class Policy for such months under the cost of insurance rate schedule in effect immediately prior to the COI Increase applicable to the Class Policy; provided however that the minimum Policy Claim Amount for each Final Settlement Class Policy will be $200.

or counterclaim) that seeks to void, rescind, cancel, have declared void, or seek to deny a death claim for any Final Settlement Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in applying for, the Final Settlement Class Policy, except as set forth in the Settlement Agreement. Settlement Agreement, Section 3.

C. Preliminary Approval of the Settlement and Notice to the Settlement Class

On June 14, 2023, the Court (a) preliminarily certified the Settlement Class, (b) appointed Plaintiffs as Settlement Class representatives, (c) appointed counsel previously appointed to the Interim Class Counsel Steering Committees for these cases – Barrack, Rodos & Bacine; Bonnett Fairbourn Friedman & Balint, PC; Susman Godfrey L.L.P.; The Moskowitz Law Firm, PLLC; and Girard Sharp LLP – as Class Counsel; (d) granted preliminary approval of the Settlement; (e) approved the proposed Notice of Settlement; (f) approved the plan for providing notice to the Settlement Class; and (g) scheduled a Fairness Hearing for October 4, 2023. *See* 2016 Action, ECF 249; 2017 Action, ECF 123 (collectively, "the Preliminary Approval Order").

The Court appointed JND Legal Administration ("JND") as Settlement Administrator to provide notice as approved by the Court to Settlement Class Members and to assist in administering the Settlement as provided in the Settlement Agreement. Declaration of Kimberly K. Ness Regarding Settlement Administration ("JND Decl."). Based on information contained in Lincoln's records, JND distributed the Court-approved Class Notice directly to Owners of the Class Policies in accordance with the Court-approved plan for providing notice to the Settlement Class. JND Decl. ¶¶ 5-6. Both the manner and form of notice complied with Rule 23. *See, e.g*, *McDermid v. Inovio Pharms., Inc*. ("*Inovio*"), 2023 WL 227355, at *4 (E.D. Pa. Jan. 18, 2023) (Pappert, J.). In particular, the Class Notice apprised Settlement Class Members of (among other disclosures) the nature of the Actions, the definition of the Settlement Class, the claims and issues

in the Actions, and the claims that would be released through the Settlement Agreement. JND Decl. Ex. A. The Class Notice also (i) advised that a Settlement Class Member may enter an appearance through counsel, if desired, but that no affirmative action is required to be a member of the Settlement Class; (ii) described the binding effect of a judgment on Settlement Class Members under Rule 23(c)(3); (iii) stated the procedures and deadlines for Settlement Class Members to exclude themselves from the Settlement Class or to file an objection to any aspect of the proposed Settlement, including the requested approval of Class Counsel's attorneys' fees and expenses and class representative service awards; (iv) stated the basis, method of calculation, and timeline to recover from the Settlement; and (v) included the date, time, and location of the Fairness Hearing. *Id.*

Finally, Lincoln timely served the Notices of Settlement upon the appropriate officials as defined by, and in compliance with, the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), within ten days of the filing of Plaintiffs' Motion for Preliminary Approval on March 24, 2023. 2016 Action, ECF 255; 2017 Action, ECF 129.

D. Exclusions from and Objections to the Settlement

The Court's Preliminary Approval Order set August 21, 2023, as the deadline to (a) request exclusion from the Settlement Class, or (b) file an objection to the proposed Settlement.

- **Exclusions**

All told, there have been only 79 Policies excluded from the Settlement Class. As of the August 21, 2023 deadline, the Owners of only 49 Policies chose to opt out of the Settlement Class by submitting timely requests for exclusion to the Settlement Administrator pursuant to Section 1.22(a) of the Settlement Agreement. And as of August 31, the Settlement Administrator has not received any late-filed requests for exclusion. JND Decl. Another 30 Policies were excluded automatically under Section 1.22(e) because they were or are the subject of litigation challenging

the COI Increases. The Parties agree that, pursuant to Section 2.1(c) of the Settlement Agreement, the Final Settlement Fund accordingly equals $109,957,440.75.

- **Objections**

As of the August 21, 2023 deadline, there were only two objections to the proposed Settlement. 2016 Action, ECF 253; 2017 Action, ECF 127 ("Wovas Objection"); 2016 Action ECF 254; 2017 Action ECF 128 ("West Objection"). Although Wovas was complimentary of Plaintiffs' Counsel's "admirable role representing Class members," he ultimately took the position that "[n]othing short of being made whole from Lincoln's pricing strategy would be a financially equitable remedy." Wovas Objection ¶ 20. The West Objection similarly seeks a greater settlement benefit, under the theory that Lincoln inappropriately used the COI Increases to subsidize its interest crediting rates. West Objection, at 1. We address each of the objections below in Section III.A.5.

III. ARGUMENT

A. The Court Should Finally Approve the Settlement Because it is Fair, Reasonable, Adequate, and in the Best Interest of the Settlement Class

A class action settlement may be approved upon a judicial finding that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 436 (3d Cir. 2016); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998). "In this process, trial judges bear the important responsibility of protecting absent class members," and must be "assur[ed] that the settlement represents adequate compensation for the release of the class claims." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 319 (3d Cir. 2011) (internal quotation marks omitted).

The Third Circuit applies a "strong presumption in favor of voluntary settlement agreements," which is "especially strong in class actions and other complex cases . . . because they

promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts.'" *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2009) (en banc); *accord In re Gen. Motors Corp. Pick-Up Trucks Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *In re CIGNA Corp.*, 2007 WL 2071898, at *3 (E.D. Pa. July 13, 2007) ("Settlement of complex class action litigation conserves valuable judicial resources, avoids the expense of formal litigation, and resolves disputes that otherwise could linger for years.").

Under Federal Rule of Civil Procedure 23(e)(2), the Court is to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

This Court has explained that "these factors are like the *Girsh* factors previously applied to decide whether a class action settlement is fair and reasonable in the Third Circuit." *Teh Shou Kao & T S Kao v. CardConnect Corp.,* 2021 WL 698173, at *6 n.3 (E.D. Pa. Feb. 23, 2021) ("*CardConnect*") (Pappert, J.) (analyzing the fairness and adequacy of a class action settlement without specifically applying the *Girsh* factors and observing that they are mostly duplicative of Rule 23(e)) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)); *see also Hall v. Accolade, Inc.*, 2019 WL

3996621, at *2 n.1 (E.D. Pa. Aug. 23, 2019) ("The *Girsh* factors predate the recent revisions to Rule 23, which now explicitly identifies the factors that courts should apply in scrutinizing proposed class settlements, and the discussion in *Girsh* substantially overlaps with the factors identified in Rule 23.").[4]

The Third Circuit in *Prudential* also advised courts to consider, where applicable, certain additional factors:

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d at 323; *accord In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *9 (E.D. Pa. Jan. 25, 2016).

As shown below, the proposed Settlement is not only presumptively fair, it is in fact a very favorable result for the Settlement Class in light of the risks, costs, and delays attendant to continued litigation of the Actions. All of the Rule 23(e)/*Girsh* factors and the applicable *Prudential* considerations weigh strongly in favor of final approval of the Settlement Agreement.

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[4] The previously applied *Girsh* factors include: (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . ." *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 488 (3d Cir. 2017) (citing *Girsh,* 521 F.2d at 157).

1. The Proposed Settlement Is Presumptively Fair

The first two factors under Rule 23(e)(2) – adequacy of representation for the class and the arm's-length nature of the settlement negotiations – overlap with the third *Girsh* factor, which focuses on the stage of the proceedings and the amount of discovery completed. *See* Fed. R. Civ. P. 23(e)(2)(A)-(B); *Girsh*, 521 F.2d at 157; *see also Warfarin*, 391 F.3d at 535 (noting similar considerations for applying presumption of fairness).

Here, Plaintiffs and their counsel have amply represented the members of the proposed Settlement Class by diligently and zealously prosecuting this litigation on their behalf, including, inter alia, by engaging in extensive document review, retaining experts and expert consultants, taking and defending numerous fact and expert depositions, filing briefs in opposition to Lincoln's dismissal motion, pursuing discovery motions, moving for class certification, appearing at numerous hearings before this Court and the Special Master, and engaging in extensive settlement negotiations, including thorough pre-mediation briefing. Jt. Decl. ¶¶ 7-21; *compare, ViroPharma*, 2016 WL 312108, at *11 (approving settlement after arm's length negotiation overseen by Phillips ADR Enterprises after the parties "had fully briefed the main issues in the case and conducted merits-based . . . discovery"). Further, Plaintiffs' counsel are highly experienced in prosecuting complex class actions in this Circuit and throughout the country, including in many other actions relating to cost of insurance policy provisions, and were previously appointed as Interim Class Counsel in the two Actions. Jt. Decl. ¶¶ 1, 42; Declaration of Jeffrey W. Golan, 2016 Action, ECF 247-4 ¶ 5, 2017 Action ECF 121-4 ¶ 5 (collectively, "Golan Decl."); *see, e.g., ViroPharma*, 2016 WL 312108, at *11 (stating that courts "'afford[] considerable weight to the views of experienced counsel regarding the merits of the settlement'").

Nor is there any doubt that the proposed Settlement was negotiated at arm's length. *See* Rule 23(e)(2)(B); *see also Warfarin*, 391 F.3d at 535 (citing arm's-length negotiations as a factor

in assessing presumption of fairness). The first mediation – which was not successful – took place in October 2021. Golan Decl. ¶ 4. After further litigation in the Actions, and the rulings entered by the Court on August 9, 2022, and October 3, 2022, settlement discussions began anew and culminated in a second mediation before former Magistrate Judge Welsh on December 13, 2022, and through follow-on discussions and negotiations between the Parties. *Id.*

The direct participation of an experienced mediator further ensures that the negotiations were non-collusive and conducted properly. *CardConnect*, 2021 WL 698173, at *7 ("'[T]he participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties.'") (alterations in original); *Rose v. Travelers Home & Marine Ins. Co.*, 2020 WL 4059613, at *7 (E.D. Pa. July 20, 2020) (same). The Parties chose to mediate with Judge Welsh because she is highly skilled and widely recognized in this judicial district and elsewhere as a leader in complex dispute resolution. *See* Golan Decl. ¶ 4.

For her part, Judge Welsh has attested that "the negotiations were fair, at arms' length, and in good faith;" and that '[w]hile both sides zealously advocated their respective positions, they also both recognized the significant risks they faced if they proceeded with the litigation, as well as the substantial costs to pursue the matter through continued class certification proceedings, merits expert discovery, summary judgment, trial and appeal." Declaration of Hon. Diane M. Welsh, 2016 Action, ECF 246-4 ¶¶ 7-8; 2017 Action, ECF 121-4 ¶¶ 7-8 (collectively, "Welsh Decl."). Without purporting to usurp the role of the Court in reviewing the proposed Settlement, Judge Welsh unequivocally endorsed it as (in her opinion) "a thorough, deliberative, and comprehensive resolution that will benefit class members through meaningful monetary relief and avoids the considerable risks and costs inherent in class action litigation." *Id.* ¶¶ 9-10.

There is also no doubt here that "counsel had an adequate appreciation of the merits of the case before negotiating" the Settlement Agreement. *Warfarin*, 391 F.3d at 537. As detailed above, given the voluminous documents reviewed, numerous depositions taken and extensive motion practice, Plaintiffs knew what important witnesses would testify to and what hurdles would need to be overcome at summary judgment and trial. All of this, combined with Plaintiffs' Counsel's extensive class action litigation experience, was more than sufficient for a rigorous evaluation of the relative strengths and weaknesses of the claims and defenses in this case at the mediation. *See ViroPharma*, 2016 WL 312108, at *11; *In re Philips/Magnavox Television Litig.*, 2012 WL 1677244, at *11 (D.N.J. May 14, 2022) ("'Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.'").

Plaintiffs and their counsel firmly believe that the Settlement Agreement is in the best interests of the Settlement Class and their conclusion is to be afforded considerable weight. Golan Decl. ¶ 6; *see ViroPharma*, 2016 WL 312108, at *11 (explaining that "when the settlement results from arm's-length negotiations, the Court 'affords considerable weight to the views of experienced counsel regarding the merits of the settlement'"); *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 387 (E.D. Pa. 2015) *aff'd*, 821 F.3d 410 (3d Cir. 2016) ("'[A] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.'"), *aff'd*, 821 F.3d 410 (3d Cir. 2016); *Alves v. Main*, 2012 WL6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014) ("[C]ourts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class.'").

2. The Proposed Settlement Is Adequate Given the Risks of Continued Litigation

Rule 23(e)(2)(C)(i), which overlaps with *Girsh* factors 1 and 4-9, instructs the Court to consider the adequacy of the settlement relief in light of the costs, risks, and delay that trial and appeal could inevitably impose. Fed. R. Civ. P. 23(e)(2)(C)(i); *Girsh*, 521 F.2d at 157 (factor one focuses on the complexity, expense, and likely duration of the litigation; factors four through nine focus on the risks). These factors likewise weigh heavily in favor of final approval of the Settlement.

The original consolidated cases, filed in 2016 and 2017, face the same risks inherent in any complex federal litigation, compounded by the length of time that summary judgment, trial, and any appeals would consume. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 103 (D.N.J. 2012) ("By reaching a favorable Settlement with most of the remaining Defendants prior to the disposition of Defendant's renewed dismissal motions or even an eventual trial, Class Counsel have avoided significant expense and delay, and have also provided an immediate benefit to the Settlement Class."). In particular, Plaintiffs faced significant risk in establishing Lincoln's liability under the provisions of the Policies at issue, in light of the actions taken by Lincoln in setting the increased COI rates and the anticipated opposing views of the parties' respective experts, as well as damages issues at trial. Jt. Decl. ¶ 38; *see Girsh*, 521 F.2d at 157 (risks of establishing liability and damages are factors that can support settlement approval).

Furthermore, as reflected in the Court's class certification orders, the expert issues in this matter are complex, and there would have been significant challenges in presenting those concepts to a jury. Lincoln has been consistent and zealous in its opposition to Plaintiffs' claims, and to Plaintiffs' position that a class would ultimately have been certified and sustained on appeal. The same degree of zealous defense can be expected at all future phases of these proceedings (including *Daubert* motions and motions for summary judgment) if the Settlement is not approved. There is

certainly no guarantee that Plaintiffs, who carry the burden of proof on the claims asserted in the Actions, would succeed on new motions for class certification or the anticipated summary judgment and *Daubert* motions, let alone at trial. And as with any case that goes before a jury, there is significant risk of losing. Plaintiffs believe their case is strong but acknowledge that there are risks to ultimately prevailing at every step through trial if litigation continues. Settlement removes all risk, uncertainty, and delay, and confers immediate monetary and other benefits to the Class.

3. The Means of Distributing Relief and the Level of Fees Are Appropriate

Rule 23(e)(2)(C) requires the Court to consider the effectiveness of the proposed method for distributing relief, the terms of the proposed attorneys' fees, and the existence of any other "agreement[s]." Fed. R. Civ. P. 23(e)(3)(2)(C)(ii)-(iv). The mechanics and efficacy of the distribution process are straightforward: in return for the release of any conceivable claims challenging the COI Increases, all Final Settlement Class Members will automatically receive a cash payment equal to the *pro rata* portion of the difference in the COI charges before and after the challenged COI Increases applicable to their Policies, subject to a minimum assumed COI overcharge of $200 on each Policy. Jt. Decl. ¶ 22; *see Inovio*, 2023 WL 227355, at *6 ("The settlement . . . treats class members equitably relative to each other because each member's recovery is proportional to his or her actual loss suffered."). Lincoln has reliable contact information for every such Owner, to whom relief will be automatically delivered without the need to file a claim. The other benefits of the Settlement – such as the five-year freeze on future COI rate increases – will likewise be executed without the need for action by any Owner.

Lastly, Rule 23(e)(2)(C)(iii) directs courts to address "the terms of any proposed award of attorney's fees, including timing of payment." The Settlement Agreement provided that Class Counsel would apply for an award of attorneys' fees and reimbursement of litigation expenses

before the objection deadline and thus well in advance of the Fairness Hearing. Critically, the Settlement is not conditioned on the Court's approval of these fee and expense requests. *See* Settlement Agreement ¶ 7.5. On August 4, 2023, Class Counsel filed a motion for the payment of attorneys' fees, expense reimbursement, and service awards, which was consistent with the fee percentage and litigation expenses cap identified in the earlier distributed Court-approved Notice. 2016 Action, ECF 252; 2017 Action, ECF 126. That motion sought, among other things, an award of 33% of the Final Settlement Fund plus reimbursement of approximately $2.3 million in litigation expenses incurred by Plaintiffs' Counsel. Jt. Decl. ¶ 3. Not a single objection has been made to Plaintiffs' Counsel's request for attorney's fees and reimbursement of litigation expenses.

Plaintiffs' Counsel's 33% fee application is well within the norm for awards in common fund cases since such fee awards "generally range from 19% to 45% of the settlement fund." *Inovio*, 2023 WL 227355, at *12; *accord In re Ravisent Technologies, Inc. Sec. Litig*., 2005 WL 906361, at *11 (E.D. Pa. 2005) ("[C]ourts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."); *CardConnect,* 2021 WL 698173, at *8-10 (awarding attorney's fees of 33.3% in class settlement that created a fund with a value up to $7.65 million). Counsel in a common fund settlement are also routinely entitled to reimbursement of those litigation expenses that are "adequately documented and reasonable and appropriately incurred in the prosecution of the class action." *ViroPharma*, 2016 WL 312108, at *11 (citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)); *see, e.g., Inovio*, 2023 WL 227355, at *13. In short, there is nothing with respect to either fees or expenses that would otherwise undermine the Settlement's suitability for final approval, and there are no "other" agreements beyond the terms of the publicly disclosed Settlement Agreement.

4. The Response of the Settlement Class Favors Approval of the Settlement

Although the *Girsh* factors pre-date the revisions to Rule 23, they remain informative. The only *Girsh* factor not addressed above is the reaction of the class to the settlement. *Girsh,* 521 F.2d at 157. Here, out of approximately 50,129 Policies in the Settlement Class, there were 78 policies subject to requests for exclusion, one policy excluded based on prior litigation, and only 2 objections. JND Decl. ¶¶ 12-15. This extremely low level of opposition from Settlement Class Members (99.996% of Settlement Class Members did not object) favors a finding that the Settlement is fair, reasonable, and adequate. *See In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *4 (E.D. Pa. Jan. 3, 2008) ("A lack of objections demonstrates that the Class views the settlement as a success and finds the request for counsel fees to be reasonable."); *In re Cendent Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement . . . ."); *Remick v. City of Philadelphia*, 2022 WL 2703601, at *4 (E.D. Pa. July 12, 2022) (noting that "[a] low number of objectors compared to the potential number of class members creates a strong presumption in favor of approving the settlement"); *In re Wawa, Inc. Data Security Litig.*, 2022 WL 1173179, at *5 (E.D. Pa. Apr. 20, 2022) ("The Court finds that the low number of objections and the lack of strong arguments regarding a negative reaction weigh in favor of final approval.").

5. Neither Objection Warrants Denying the Settlements Benefits to the Rest of the Settlement Class

Neither objection lodged to the proposed Settlement raises a legitimate concern with respect to the fairness, reasonableness, or adequacy of the proposed Settlement. The crux of the Wovas Objection is that the Settlement does not eliminate all of the financial harms caused by Lincoln's conduct, and that "nothing short of being made whole" is an acceptable result. Wovas

Objection, ¶ 20. But a settlement is necessarily a compromise that takes into account the risks of the class receiving nothing through continued litigation and, thus, a settlement that provides relief for more than 100% of the harms caused is unrealistic. *See, e.g., Dickerson v. York Int'l Corp.*, 2017 WL 3601948, at *9 (M.D. Pa. Aug. 22, 2017) (objection seeking recovery of 100% of out-of-pocket losses "fundamentally misapprehends the bargained-for nature of the benefit provided: a settlement necessarily requires all parties to make calculated concessions").

The West Objection likewise purports to insist on more settlement relief, premised on the notion that Lincoln is using the COI Increase to subsidize its obligation to credit interest on Policy account values. Unfortunately, courts have already rejected this legal theory. *See, e.g., EFG Bank AG, Cayman Branch v. Transamerica Life Ins. Co*., 2017 WL 3017596, at *6-7 (C.D. Cal. July 10, 2017) (rejecting plaintiffs' argument that consideration of a policy's guaranteed minimum interest rate would lead to absurd results or render the "guaranteed minimum" illusory).

In any event, the question for the Court is not whether the Settlement could have been better (almost every settlement could be "better" with more money), but whether it is fair, reasonable, and adequate. *Gray v. BMW of N. Am., LLC*, 2017 WL 3638771, at *3 (D.N.J. Aug. 24, 2017) ("Perhaps an ideal settlement would provide additional monetary compensation and additional relief for the [objector's] frustration, but settlements are by definition the product of compromise, and the possibility 'that a settlement could have been better . . . does not mean the settlement presented was not fair, reasonable or adequate.'" (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998))); *see also, e.g.*, *In re Mercedes-Benz Emissions Litigation*, 2021 WL 7833193, at *11 (D.N.J. Aug. 2, 2021) (overruling objections to class settlement calling for different settlement with better relief, and for more compensation, without considering the risk

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of continued litigation). As discussed above, the proposed Settlement of nearly $110 million in cash alone certainly meets the governing "fair, reasonable, and adequate" standard.

B. The Court Should Approve the Plan of Allocation

As noted above, Plaintiffs propose that Final Settlement Class Members' payments will be equal to the percent of the total COI overcharges applicable to all Policies that are attributable to each Final Settlement Class Member's Policies, subject to a minimum assumed COI overcharge of $200 on each Policy (the "Policy Claim Amount"). *Pro rata* distributions are standard practice in class action litigation and should be approved here. *See Inovio*, 2023 WL 227355, at *6 (approving *pro rata* distribution). Plaintiffs have calculated the *pro rata* overcharge percentage applicable to each Policy.

C. The Court Should Certify the Settlement Class

The benefits of the Settlement Agreement can only be realized through the certification of the Settlement Class. *See, e.g.*, *Inovio*, 2023 WL 227355, at *2-3 (certifying settlement class). Thus, under the Settlement Agreement and Rule 23, the Parties seek certification of the Settlement Class, which consists of all Owners of:

> Any JP Legend 300, JP Lifewriter Legend 100, 200, and 400 series, JP Legend 3000, LifeSight 30, LifeSight 31, LifeSight 32, JP UL 101, JP UL 102, JP UL 103, JP UL 130, JP UL 131, and Vision 20 life insurance policy subjected to an increase in the cost of insurance rates as announced by Lincoln in 2016 or 2017, excluding the Excluded Policies.
>
> Excluded from the Settlement Class are or will be:
>
> (a) all Owners of Class Policies who submit a valid Opt-Out Request, but solely with respect to the Class Policy that is the subject of the Opt-Out Request;
>
> (b) the Honorable Gerald J. Pappert, United States District Court Judge of the Eastern District of Pennsylvania (or other Circuit, District, or Magistrate Judge presiding over the Actions) and court personnel employed in Judge Pappert's (or such other judge's) chambers or courtroom;

(c) Lincoln and its affiliates, parents, subsidiaries, successors, predecessors, and any entity in which Lincoln has a controlling interest;

(d) any officer or director of Lincoln identified in the Form 10-K Annual Report of either Lincoln National Corporation or The Lincoln National Life Insurance Company, filed with the United States Securities and Exchange Commission for the fiscal year ended December 31, 2021;

(e) those Owners of Class Policies who have commenced a lawsuit challenging the COI Increases through an individual action and served Lincoln with the complaint or other operative pleading in the lawsuit prior to the conclusion of the Opt-Out/Objection Period, but solely with respect to the Class Policy that is the subject of such aforementioned lawsuit;

(f) the legal representatives, successors, or assigns of any of the individuals or entities described in (a) through (e), but only in their capacity as legal representative, successor, or assignee.

To obtain class certification, a plaintiff must meet Rule 23(a)'s four requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a). Plaintiff must also demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Third Circuit also recognizes an additional, implicit ascertainability requirement. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012) (calling ascertainability an "essential prerequisite" to class certification).

The Court is to apply a "rigorous certification analysis" to ensure that each of the foregoing certification requirements are met. *See Sullivan*, 667 F.3d at 306. Nevertheless, when a court is "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Sullivan*, 667 F.3d at 322 n.56 (same). Consistent with the Court's findings at the preliminary approval stage

(Preliminary Approval Order ¶ 3), and for the reasons set forth below, the requirements of Rule 23 are indeed met here.

1. Numerosity

The Settlement Class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see also Allen v. Ollie's Bargain Outlet,* 37 F.4th 890, 895 (3d Cir. 2022). Based on documents produced by Lincoln, over 50,000 Class Notices were mailed to potential members of the Settlement Class. Jt. Decl. ¶ 25; JND Decl. ¶¶ 5-6.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy this element, the class claims must be predicated on a common contention, capable of resolution across the entire class. *Ebner v. Merchs. & Med. Credit Corp.*, 2017 WL 1079966, at *2 (E.D. Pa. Mar. 22, 2017) (citing *Warfarin*, 391 F.3d at 527-28). When, as here, a group of plaintiffs are impacted by a uniform course of conduct or policy, the commonality test is readily satisfied. *Id.*

Common questions of fact and law are prevalent in this case because Plaintiffs' claims turn on across-the-board actions taken by Lincoln with respect to common standardized contract provisions. As the Court found in ruling on Plaintiffs' initial motion for class certification, "[t]he proper interpretation of their contracts is a question common to all class members. Whether the list of factors in the policies' cost of insurance provision is exhaustive, whether reinsurance utilization and investment earnings are permitted factors, and whether the policy prohibits Lincoln from recouping past losses will be answered the same way for each policy. Answering these questions is 'apt to drive the resolution of the litigation.'" 2016 Action, ECF 237 at 25; *see* 2017 Action, ECF 110 at 27-28. In short, whether Lincoln's actions breached uniform Policy contract provisions or were otherwise unlawful pose common questions with common answers.

3. Typicality

"Where claims of the representative plaintiffs arise from the same alleged wrongful conduct on the part of the defendant, the typicality prong is satisfied." *Ebner*, 2017 WL 1079966, at *2 (internal quotation marks omitted). In this case, the Plaintiffs complain of the same unlawful conduct as every other member of the proposed Settlement Class, in that all were subjected to the COI Increases in alleged violation of the terms of their Policies. The Court previously determined that the Plaintiffs claims satisfy the typicality requirement, noting that "Plaintiffs' legal theories and claims do not differ from those of the class." 2016 Action, ECF 237, at 26; 2017 Action, ECF 110, at 29; *accord Feller v. Transamerica Life Ins. Co.*, 2017 WL 6496803, at *8 (C.D. Cal. Dec. 11, 2017) (likewise finding typicality satisfied where all policyholders were subjected to the challenged COI rate increases).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To evaluate whether Plaintiffs are adequate class representatives, "[t]he Court must inquire into the 'qualifications of counsel to represent the class,' and then assess whether there are 'conflicts of interest between named parties and the class they seek to represent.'" *Ebner*, 2017 WL 1079966, at *2 (quoting *Prudential*, 148 F.3d at 312).

Here, Class Counsel are highly qualified and experienced in class action litigation against major insurance companies, including other class actions challenging COI rate increases imposed on universal life products. Golan Decl. ¶ 5. As the Court earlier concluded, "Plaintiffs' counsel have extensive experience litigating class actions[,] they have successfully certified classes challenging cost of insurance increases[, and] [t]hey have performed ably in this case, and the Court has no reason to doubt their adequacy." 2016 Action ECF 237, at 27; 2017 Action ECF 110, at 29-30. Moreover, none of the Plaintiffs has any conflicts of interest with other members of

the Settlement Class that would preclude their service as adequate class representatives. Plaintiffs have diligently fulfilled their responsibilities as proposed class representatives throughout these actions, conferring with Class Counsel and participating in the discovery process. Jt. Decl. ¶ 55.

"It is not unusual for a class settlement to release all claims arising out of a transaction or occurrence" as a "judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action." *Halley*, 861 F.3d at 494 (internal quotation marks omitted). Because the Released Claims include all claims that were or could have been asserted in these Actions arising from the facts, transactions and acts that were either alleged or otherwise put at issue in the Actions, final approval of the Settlement Agreement will once and for all resolve all such claims, including those for violations of state consumer laws and for breaches of the implied covenant of good faith and fair dealing. Furthermore, the fact that a nationwide class settlement may encompass claims involving different state laws or speculation that some claims may be "stronger" than others does not create a disabling conflict between the Plaintiffs and the Settlement Class Members. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 347-48 (3d Cir. 2010) (observing that "alleged differences in the strength of the various claims asserted in this class action do not, by themselves, demonstrate conflicting or antagonistic interests within the class . . . [nor do] differences in state law create conflicts among class members that preclude a finding of adequate representation").

5. Predominance

The Rule 23(b)(3) predominance requirement is typically satisfied in cases like this, "which involve allegations arising from form contracts or documents present[ing] the classic case for treatment as a class action." *Robinson v. Countrywide Credit Indus.*, 1997 WL 634502, at *3 (E.D. Pa. Oct. 8, 1997) (internal quotation marks omitted); *accord Zeno v. Ford Motor Co.*, 238 F.R.D. 173, 197 (W.D. Pa. 2006) (same); *Meyer v. CUNA Mut. Grp.*, 2006 WL 197122, at *23 (W.D. Pa.

Jan. 25, 2006) (same). As the Third Circuit stated: "Because form contracts should be interpreted uniformly as to all signatories, Pennsylvania and federal courts have recognized that claims involving the interpretation of standard form contracts are particularly well-suited for class treatment." *Gillis v. Respond Power, LLC*, 677 F. App'x 752, 756 (3d Cir. 2017).

Here, Plaintiffs alleged that Lincoln breached its obligations under the Class Policies by imposing the COI Increases based in part on factors that were not allowed by uniform COI provisions of standardized policy contracts. This claim is provable through class-wide evidence because it turns on the interpretation of contract provisions common to all Class Policies (presenting a common issue of law) and whether Lincoln considered the alleged impermissible factors (presenting numerous common factual issues). As the Court previously recognized, if "Lincoln considered impermissible factors when adjusting cost of insurance rates" as Plaintiffs allege, "Rule 23(b)(3)'s predominance inquiry would be easily satisfied." 2016 Action, ECF 237 at 48.

Furthermore, in the context of a proposed ***settlement*** class, as opposed to a litigation class, a court is "not as concerned with formulating some prediction as to how [variances] would play out at trial, for the proposal is that there be no trial." *Sullivan*, 667 F.3d at 303. Consequently, "[t]he proposed settlement [itself] . . . obviates the difficulties inherent in proving the elements of varied claims at trial . . . ." *Id.* at 304; *see also Warfarin*, 391 F.3d at 529 ("[W]hen dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class.").

This result is not altered by the Court's earlier ruling denying certification. A court may decline to certify a class for litigation purposes only to later certify the same or a similar class for

the limited purpose of settling the litigation. *See e.g., In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262-63 (3rd Cir. 2009) (rejecting argument of an objector that a settlement class could not be certified unless a litigation class could have been certified); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2013 WL 12333442, at *56 (N.D. Cal. Jan. 8, 2013), *report and recommendation adopted sub nom. In re Dynamic Random Access Memory Antitrust Litig.*, 2014 WL 12879520 (N.D. Cal. June 27, 2014) (holding that nothing in the court's prior ruling denying class certification as to a proposed litigation class prevented the court from subsequently granting certification for settlement purposes) (citing *Ins. Brokerage*, 579 F.3d 241).

Certification of a Settlement Class coextensive with the originally sought litigation class is warranted here as well. First, common questions of fact and law may predominate with regards to a settlement class, even though separate individual questions could pose obstacles to certification of a litigation class. *See, e.g., Halley v. Honeywell Int'l, Inc.*, 2015 WL 3616875, at *2 (D.N.J. May 1, 2015) ("In light of the agreement to settle the Action and the resulting elimination of individual issues that [the settling defendant] contends preclude certification of a litigation class, the questions of law and fact common to all members of the Settlement Classes predominate over questions affecting only individual members of those Classes, and certification of the Settlement Classes is superior to other available methods for the fair and efficient resolution of this controversy, satisfying Rule 23(b)(3).").

Second, predominance exists here because the Settlement Class is limited to those Class Policies subjected to an increase in the cost of insurance rates under the COI Increases. Accordingly, all Settlement Class Members were assessed alleged overcharges and the Settlement provides cash payments reflecting the overcharges resulting from the COI Increases.

6. Superiority

The superiority requirement of Rule 23(b)(3) "asks the court to 'balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.'" *Prudential*, 148 F.3d at 316. Considerations of judicial economy underscore the superiority of a class action here. Settlement on a class basis will provide for prompt compensation of Settlement Class Members for their damages. Further, the Settlement removes the inefficient and overwhelming costs of individual trials. Class-wide resolution of the claims at issue in the Actions effectuates the fundamental goals of Rule 23: (1) to promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims, who would otherwise be economically precluded from doing so, the opportunity to assert their rights. 7A Fed. Prac. & Proc. Civ. § 1754 (4th ed.).

7. Ascertainability

Finally, "[p]laintiffs must show that '(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 469-70 (3d Cir. 2020) (quoting *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015)). Both requirements are easily satisfied here, because the Policies included in the Settlement Class are all identifiable by policy number. *See* Jt. Decl., Exhibit B. Such records provide a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Kelly v. RealPage Inc.*, 47 F.4th 202, 222 (3d Cir. 2022) (internal quotation marks omitted); *accord, Carerra v. Bayer Corp.*, 727 F.3d 300, 308 n.2 (3d Cir. 2013) ("[A]scertainability only requires the plaintiff to show that class members can be identified.").

IV. CONCLUSION

For the foregoing reasons, Class Plaintiffs and Class Counsel respectfully submit that the Court should (a) grant final approval of the Settlement Agreement as fair, reasonable, and adequate and (b) certify the Settlement Class for purposes of implementing the Settlement. A proposed order approving the Settlement and certifying the Settlement Class is included with this Motion.

Dated: September 5, 2023

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