UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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Plaintiff Helen Hanks, individually and on behalf of the previously-certified Class,[1] has entered into a settlement agreement (the "Settlement" or "Settlement Agreement") with Defendant Voya Retirement Insurance and Annuity Company ("Voya"). Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff respectfully moves the Court for an order:

- Preliminarily approving the proposed Settlement, plan of allocation, and the form and manner of notice.
- Directing notice to the Class under Rule 23(e)(1).
- 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, costs, and service awards.

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

I. INTRODUCTION

After 5 years of hard-fought litigation, months of arm's-length negotiations with the assistance of an experienced mediator, and following the conclusion of the final pre-trial conference, Plaintiff, Voya, and its administrator and reinsurer the Lincoln Life & Annuity Company of New York ("Lincoln") agreed to settle this exceptionally complex insurance class action on the eve of trial. The settlement provides the following monetary and non-monetary benefits to the Class:

- **CASH.** A $92.5 million cash payment, reduced for post-settlement opt-outs. This is not a claims-made settlement; checks will be mailed directly to Class members who do not opt-out without requiring them to submit proofs of claim, using Voya's and Lincoln's records, and settlement funds do not revert to Voya or Lincoln.

[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 Seth Ard.

- **CLASS COI RATE SCHEDULE INCREASE FREEZE.** A total and complete freeze on any cost of insurance ("COI") increase for five additional years, subject only to any increase affirmatively required by Voya's regulator. Thus, even if Voya or Lincoln has a future change in cost factors that would otherwise permit a COI rate increase under the terms of the policies—including any cost factors that may have increased due to any surge in mortality due to the COVID-19 pandemic—Voya and Lincoln will not increase COI rates for 5 years. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for a substantial period of time.
- **VALIDITY STIPULATION & STOLI WAIVER.** As part of the Settlement, Voya and Lincoln have agreed not to challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of lack of an insurable interest, stranger originated life insurance ("STOLI"), or misrepresentations in the application for such policies.

The cash portion of the settlement fund represents a substantial portion of the total potential damages, which were disputed by the parties and is the subject of a pending motion *in limine*. Moreover, the non-cash portion of the settlement adds meaningful additional value, which further enhances the value of the Settlement to the Class. *See* Declaration of Seth Ard ("Ard Decl.") ¶¶ 18, 23. Overall, the Settlement is at least in line with other settlements in COI increase class actions to which courts have granted preliminary and final approval. *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *10–11 (S.D.N.Y. Sept. 9, 2015) (granting final approval to a class action settlement with a cash award amount equal to 68.5% of

past damages, which was "one of the most remunerative settlements this court has ever been asked to approve").

The Settlement is even better when examined in light of the history of the case. During discovery, Plaintiff learned that the New York regulator—the New York Department of Financial Services ("NYDFS")—expressed its view that Voya's COI Increase breached the "class basis" provision in the policy. Plaintiff alleged the same theory here, but also invested extensive time, effort, and money developing other, unique theories of breach. That decision to aggressively litigate all aspects of this case paid off in spades for the Class. At summary judgment, the Court rejected the NYDFS's primary theory of breach, as Voya trumpeted in its motion *in limine* filings. *See* Dkt. 191 (Def. MIL No. 2) at p. 8 ("This Court has already rejected DFS's legal position as a matter of contract law."). Had Plaintiff stopped there, the case would have been over. However, the Court held that one of Plaintiff's unique theories of breach developed in discovery, supported by extensive "expert opinions" cited by the Court, survived summary judgment. Dkt. 174 ("SJ Order") at 23–24 (published as *Hanks v. Voya Ret. Ins. & Annuity Co.*, 492 F. Supp. 3d 232, 249 (S.D.N.Y. 2020)). After prevailing on key motion-in-*limine* rulings, Plaintiff was able to parlay that sole theory of breach into this extraordinary result. That was possible only because Plaintiff litigated the case vigorously, thoroughly, creatively, and was willing to take this case to trial, which resulted in Voya paying substantial money and agreeing to the five-year rate freeze and additional relief to avoid a trial in the case.

As this Court is well aware, the litigation was expansive and hard-fought. Plaintiff's successful motion for class certification alone was the product of 35 total pages of briefing supported by 50 exhibits that included 8 expert reports and 14 depositions. *See* Ard Decl. ¶ 8; Dkt. 89. Class Counsel recommends this Settlement to the Court only after investing significant effort

in this litigation, obtaining and analyzing nearly 350,000 pages of documents in discovery, working extensively with liability and damages experts, briefing numerous motions, and taking and defending 27 fact and expert depositions. *Id.* ¶¶ 5–8, 12, 14–15. The expert discovery alone testifies to the complexity and hard-fought nature of the case: the parties collectively produced 11 expert reports and took 8 expert depositions. *Id.* ¶ 7. The arm's-length settlement negotiations were also extensive: the parties attended four separate in-person mediation sessions each conducted by a highly experienced and respected mediator. *Id.* ¶¶ 16–17. The support of the Settlement's terms by Plaintiff, Class Counsel and the Mediator is further testimony to the fairness of the Settlement.

This settlement easily warrants preliminary approval because the Court will "likely be able" to approve the settlement and the Court has already certified a litigation class. Fed. R. Civ. P. 23(e)(1)(B).

II. BACKGROUND

A. The COI Increase

The Class consists of owners of over 46,000 universal life insurance policies ("Class Policies"), comprising 18 product lines, issued by Aetna Life Insurance and Annuity Company ("Aetna"), now Voya, between 1983 and 2000.[2] Each Class Policy contains a section titled "Cost of Insurance Rate" with express limitations on when and how COI rates used to calculate the monthly COI charges can be adjusted. Plaintiff's policy, which is representative of the language included in all Class Policies, states in relevant part:

[2] Specifically, the Class is "the class certified by the Class Certification Order, more specifically '[a]ll owners of universal life (including variable universal life) insurance policies issued by Aetna Life Insurance and Annuity Company ("Aetna") that were subjected to the cost of insurance rate increase announced in 2016,'" with the exclusion of the "Class Certification Opt-Outs; Class Counsel and their employees; Voya and Lincoln; officers and directors of Voya and Lincoln, and members of their immediate families; the heirs, successors or assigns of any of the foregoing; the Court, the Court's staff, and their immediate families." *See* Settlement Agreement § 4. The Class Certification Opt Outs are "the policies that timely and validly opted-out during the notice period following the" Court's March 13, 2019 class certification order (Dkt. 110). *See id.* §§ 5–6.

> The monthly Cost of Insurance rates may be adjusted by Aetna from time to time. Adjustments will be on a class basis and will be based on Aetna's estimates for future cost factors, such as mortality, investment income, expenses and the length of time policies stay in force. Any adjustments will be made on a uniform basis. However, the rate during any policy year may never exceed the rate shown for that year in the Table of Guaranteed Maximum Insurance Rates in this policy. Those rates are based on the 1958 Commissioners Standard Ordinary Mortality Table, male or female.

See Ard Decl., Ex. 3 (Hanks Policy) at 7. In June 2016, Voya, at the recommendation of its reinsurer and administrative agent The Lincoln Life & Annuity Company of New York ("Lincoln"), raised COI rates on the Class Policies. *See* Dkt. 174 ("SJ Order") at 5–6.

B. The Litigation

In August 2016, Plaintiff filed a putative class action lawsuit, asserting claims of breach of contract against Voya and unjust enrichment against Lincoln. Dkt. 1. The parties engaged in fact discovery, which included the production and review of nearly 350,000 pages of documents and data sets, the depositions of 4 corporate representatives and 14 individual witnesses for Voya and Lincoln, and the deposition of Plaintiff Helen Hanks. *See* Ard Decl. ¶¶ 5–6. The parties then undertook expert discovery. *See id.* ¶ 7. Plaintiff designated four expert witnesses: actuarial expert Christopher Hause, reinsurance expert Neil Pearson, insurance regulatory practices expert Bruce Foudree, and damages expert Robert Mills. *See id.* Voya designated three experts: Timothy Pfeifer for actuarial issues, Neil Rector for regulatory practices, and Dr. David Babbel for damages (with Professor Craig Merrill later substituted in for Dr. Babbel). *See id*. The parties collectively produced 11 reports and took and defended 8 expert depositions. *See id.*

Following 35 pages of briefing that included 50 exhibits, including expert reports, *id.* ¶ 8, the Court granted in part Plaintiff's motion for class certification in March 2019, certifying a breach-of-contract class against Voya, but denied the motion as to Lincoln. *See* Dkt. 110. The Court subsequently approved Plaintiff's proposed form and manner of notice, including the

retention of JND Legal Administration LLC ("JND") as the Notice Administrator. Dkt. 122. Notice was mailed out in June 2019 and the opt-out period ended on July 29, 2019. *Id.*; Dkt. 130-2. Twelve policies timely and validly opted out during the notice period. *See* Ard Decl. ¶ 11; Settlement Agreement § 5.

The parties next briefed and filed cross-motions for summary judgment. Dkts. 133–45, 148–152. Collectively, Plaintiff filed 100 pages of briefing supported by 83 exhibits. Ard Decl. ¶ 12. On September 30, 2020, the Court granted in-part and denied-in part Voya's motion for summary judgment and denied Plaintiff's motion for summary judgment. *See* SJ Order. The Court granted summary judgment on certain of Plaintiff's breach theories – including the primary theory that the NYDFS espoused – but held that "an issue of material fact" remains on Plaintiff's last theory of breach, namely the "estimates of future cost factors" theory of breach. *See id.* at 24.

The parties then began trial preparation. Between January 28, 2021 and April 19, 2021, the parties fully briefed thirteen motions *in limine*—nine from Plaintiff and four from Voya. *See* Dkts. 189–212, 230–35, 241–43. Plaintiff's briefing on these motions totaled 112 pages supported by 49 exhibits. Ard Decl. ¶ 14. The parties also submitted proposed jury instructions, *voir dire* questions, and verdict forms. *See* Dkts. 213–15, 217, 224–26. The parties filed their proposed Final Pretrial Conference Order on April 27, 2021, which included witness lists, depositions designations, and exhibit lists. *See* Dkt. 244. The Court held the final pretrial conference on May 12, 2021. *See* Dkt. 250–51. Following the final pretrial conference, the Court ordered supplemental briefing on Voya's still-pending motion *in limine* regarding past damages that attacked a vast swath of historical damages at issue, which the parties submitted and remained under consideration by the Court at the time this Settlement was reached. *See* Dkts. 254–57. On August 31, 2021, the Court informed the parties that this matter was set as the backup trial for the week of December 6, 2021.

See Dkt. 263.

C. Settlement Negotiations

The Settlement is the result of extensive, arms-length negotiations between the parties with the assistance of an experienced mediator, Robert A. Meyer, Esq., with JAMS. *See* Ard Decl. ¶¶ 3, 16–17 22–23; Declaration of Robert A. Meyer, Esq. ("Meyer Decl.") ¶¶ 2–7. Through the life of the case, the parties have exchanged numerous settlement offers and counter-offers and have engaged in several separate unsuccessful mediations, including on June 7, 2017, November 13, 2019, and March 6, 2020, all of which were in person in New York. *See* Ard Decl. ¶ 16. Following the Court's final pre-trial conference, the parties reopened the settlement dialogue and scheduled an in-person mediation before Mr. Meyer, which took place on August 11, 2021 in Los Angeles, California. *See* Ard Decl. ¶ 17; Meyer Decl. ¶ 4. Following the in-person mediation, the parties continued to engage in follow-on settlement communications, which resulted in a memorandum of understanding for a settlement. *See* Ard Decl. ¶ 17. The parties immediately informed the Court of the development. Dkt. 264. A long-form settlement agreement was heavily negotiated and agreed to thereafter. *See* Ard Decl. ¶ 3, 17; *id.*, Ex. 2 (Settlement Agreement).

Throughout the process, the Settlement negotiations were conducted by highly qualified and experienced counsel on both sides at arm's length. *See* Ard Decl. ¶¶ 2–3, 16–17, 22; Meyer Decl. ¶¶ 3–7. The mediator, Mr. Meyer, believes that the proposed Settlement is a highly successful result for Class Members, and is fair and reasonable. *See* Meyer Decl. ¶¶ 3, 5, 7. Class Counsel was well informed of material facts and the negotiations were hard-fought and non-collusive. *See id.* ¶¶ 3–7. Class Counsel analyzed all of the contested legal and factual issues to thoroughly evaluate Voya'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. *See id.*

D. The Settlement Agreement

1. The Settlement Class

A class was certified in March 2019 and the opt-out period ended in July 2019. The Settlement Agreement provides for an additional opt-out period pursuant to Federal Rule of Civil Procedure 23(e)(4). *See* Settlement Agreement §§ 44–45. The Settlement Class will therefore be the class certified on March 13, 2019 (Dkt. 110), with the exclusion of the policies that timely and validly opted out during the initial opt-out period (referred to as "Class Certification Opt-Outs" in the Settlement Agreement) and any policies that timely and validly opt out during the Rule 23(e)(4) opt-out period (referred to as the "Post-Settlement Opt-Outs" in the Settlement Agreement). *See id.* §§ 4–5, 27, 34, 44–45.[3] The awards and releases in the Settlement Agreement only apply to the Settlement Class.

2. Consideration

The Settlement awards both cash relief and non-cash relief to the Settlement Class. With respect to the cash relief, a $92.5 million Settlement Fund will be funded for the benefit of the Settlement Class. *See* Settlement Agreement § 42. This amount will be reduced, on a *pro-rata* basis measured by the incremental COI charges collected by Voya and Lincoln from June 1, 2016 through May 31, 2021, for each policy that timely and validly opts out during the Rule 23(e)(4) opt-out period. *See id.* § 44.[4] No portion of the Final Settlement Fund (*i.e.* the post-reduction

[3] In addition, the Settlement Class will exclude Class Counsel and their employees; Voya and Lincoln; officers and directors of Voya and Lincoln, and members of their immediate families; the heirs, successors or assigns of any of the foregoing; the Court, the Court's staff, and their immediate families. *See id.* § 4.

[4] For example, "if 1% of the total incremental COI charges collected by Voya and Lincoln from June 1, 2016 through May 31, 2021 are attributable to Post-Settlement Opt-Outs, the Settlement Fund will be reduced by 1% (i.e., to $91.575 million)." *See id.* No reduction will occur for policies that opted out after class certification. *See id.*

amount) will revert back to Voya or Lincoln. *See id.* § 16.

The Settlement Agreement also provides two forms of significant non-cash relief. *First*, for a period of five years after the date on which the Court approves the settlement, "Voya and Lincoln agree that COI rates on the Class Policies will not be increased above the current rate schedules implemented on June 1, 2016, unless Voya is ordered to do so by a state regulatory body." *See* Settlement Agreement §§ 14, 49. *Second*, "Voya and Lincoln agree to not take any legal action (including asserting as an affirmative defense or counter-claim), or cause to take any legal action, that seeks to void, rescind, cancel, have declared void, or seeks to deny coverage under or deny a death claim for any 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 policy" *Id.* § 50.

3. Release

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

4. Awards, Costs, and Fees

The Settlement provides for an incentive award of up to $25,000 for Plaintiff and class representative Helen Hanks for her services on behalf of the Settlement Class. *See* Settlement Agreement §§ 18, 55. The Settlement Agreement also provides for attorneys' fees in an amount not to exceed 33% of the gross benefits provided to the Settlement Class and reimbursement for all expenses incurred or to be incurred. *See id.* §§ 8, 56. The amounts as approved by the Court will be paid out of the Final Settlement Fund. *See id.* §§ 8, 16, 18, 21, 55–56.

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.

E. Notice

Plaintiff requests that the Court approve substantially the same notice plan that was previously approved by the Court after class certification, *see* Dkt. 122 (Order Approving Form and Manner of Notice), including the appointment of the same administrator, JND, as the Settlement Administrator.[5] The proposed notice plan, which is described in paragraphs 24–29 of the Ard Declaration and paragraphs 11–17 of the Declaration of Jennifer Keough, provides that within 7 days of the Court's order granting the motion for preliminary approval, Voya and Lincoln will provide JND with a list of owner-address information that is available from their files. *See* Ard Decl. ¶ 26. Within 30 days after the motion for preliminary approval is granted, JND will mail the short-form notice attached as Exhibit B to the Keough Declarations to all addresses on the list

[5] Pursuant to the Settlement Agreement, Voya and Lincoln approved JND as the Settlement Administrator and will not oppose the proposed form and manner of notice. *See* Settlement Agreement §§ 33, 51.

from Voya and Lincoln. *See* Ard Decl. ¶ 27; Keough Decl. ¶¶ 11–13.[6] JND will also post a copy of the long-form notice attached as Exhibit C to the Keough Declaration to the website established during the provision of notice for class certification (https://www.voyacoilitigation.com/) and will establish and maintain an automated toll-free number that Class Members may call to obtain information about the litigation. *See* Ard Decl. ¶ 28; Keough Decl. ¶¶ 14–15. Class Members who wish to be excluded from the Settlement Class must send a letter to JND requesting exclusion that is postmarked no later than 45 days after the Notice Date. *See* Ard Decl. ¶ 29; Keough Decl., Exs. B–C.[7]

Within 10 days following the filing of this motion, Voya shall serve notices of the proposed Settlement upon the appropriate officials in compliance with the requirements of the Class Action Fairness Act, 28 U.S.C. §1715. *See* Settlement Agreement § 54.

F. Distribution Plan

The proposed plan of allocation, as set forth in the notice papers and which is described in Exhibit 4 to the Ard Declaration, distributes proceeds directly to Class Members on a *pro rata* basis without the need for a claim form. This ensures that proceeds will be distributed equitably and as many claimants as possible will receive a distribution. Each Class Member's *pro rata* share shall be that Class Member's share of the total damages. *See* Ard Decl., Ex. 4. Those damages will be determined in accordance with the methodology set forth in the Expert Report of Robert Mills (Dkt. 206-5), which determines the COI Overcharge for a Policy as the difference between the COI charges actually assessed on the Policy since June 1, 2016 and the COI charges that would

[6] Prior to mailing, JND will update the addresses using the National Change of Address database. *See* Keough Decl. ¶ 13. JND will re-mail any short-form notices returned by the United States Postal Service with a forwarding address. *See id.*

[7] The complete instructions for requesting exclusion are included in the long-form notice. *See* Keough Decl., Ex. C. If a Policy Owner owns multiple policies, that Owner may stay in or opt-out of the Settlement Class separately for each policy. *See* Settlement Decl. § 45.

have been deducted from the policy accounts but-for the 2016 COI Increase. *See* Ard Decl., Ex. 4; Mills Report ¶ 23–31. All in-force policies will also benefit from the guarantee of policy validity and the five-year COI freeze.

Class members will not need to fill out claim forms. Money will be sent to them automatically in the mail, using the addresses that Voya and Lincoln maintain on file. Proceeds will be mailed within 30 days after the Final Settlement Date. *See* Ard Decl., Ex. 4.[8] Within one year plus 30 days after the date the Settlement Administrator mails the proceeds, to the extent feasible and practical in light of the costs of administering such subsequent payments, any funds remaining in the Settlement Fund shall be re-distributed on a *pro rata* basis to Class Members who previously cashed their checks. *See* Ard Decl., Ex. 4.

III. ARGUMENT

A. The Proposed Settlement Warrants Preliminary Approval under Rule 23(e)

1. Legal Standard

Federal Rule of Civil Procedure 23(e) requires court approval for a class action settlement. "Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (internal quotation marks and citation omitted). 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-*

[8] The Settlement Agreement defines the Final Settlement Date as "the latest of: (i) the date of final affirmance on any appeal of the [the Court's order granting final approval of the Settlement]; (ii) the date of final dismissal with prejudice of the last pending appeal from the [the Court's order granting final approval of the Settlement]; or (iii) if no appeal is filed, the expiration of the time for filing or noticing any form of valid appeal from the [the Court's order granting final approval of the Settlement]." *See* Settlement Agreement §§ 15, 22.

Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116-17 (2d Cir. 2005) (internal quotation marks and citation omitted).[9]

At the preliminary approval stage, the "parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class" and the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1). Rule 23(e)(2), in turn, states:

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

These factors, introduced to Rule 23 in December 2018, were designed to supplement, rather than displace, the existing factors used by courts to evaluate settlement proposals. *See* Fed. R. Civ. P. 23, 2018 Advisory Note, Subdivision (e)(2).

[9] *See also In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) ("Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.").

2. The Proposed Settlement Satisfies Rule 23(e)(2)

a) Plaintiff Helen Hanks and Class Counsel Have Adequately Represented the Class Throughout this Litigation

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

The Court has already held that Lead Plaintiff Helen Hanks and Class Counsel will adequately represent Class Members in its March 13, 2019 order granting class certification. *See* Dkt. 110 (Class Cert. Order) at 8–9 (finding Plaintiff Hanks "understands her duties as a class representative and has dedicated a significant amount of time to working with her attorneys on this litigation" and has interests in line with other Class Members); *id.* at 20–21 (finding that Class Counsel "has significant experience litigating class actions" and "[i]ts performance in the present case demonstrates competence to protect the interests of the class").[10]

Proceeds will be distributed equally on a *pro rata* basis. All Class Members share an overriding interest in obtaining the largest monetary recovery possible. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (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* William B. Rubenstein, 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

[10] Published as *Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374 (S.D.N.Y. 2019).

conflict' suggests—is sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class." (citations omitted)).

Plaintiff's interests continue to be aligned with other Class Members, and Plaintiff and Class Counsel have continued to vigorously and competently litigate this case through summary judgment, pretrial motions, and mediation. *See* Ard Decl. ¶¶ 10–17. Rule 23(e)(2)(A) therefore supports approval.

b) The Parties Negotiated the Settlement Agreement at Arms' Length

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." The Second Circuit recognizes "a presumption of fairness, reasonableness, and adequacy as to the settlement where 'a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal–Mart Stores*, 396 F.3d at 116). "The assistance 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).[11]

Here, the settlement is the result of repeated and hard-fought arms'-length negotiations among competent, experienced counsel and a mediator with extensive experience in complex litigation, class actions, and insurance issues. *See* Ard Decl. ¶¶ 16–17, 22; Meyer Decl. ¶¶ 2–7. Rule 23(e)(2)(B) therefore supports approval.

c) The Relief Provided to the Settlement Class is Adequate

Rule 23(e)(2)(C) requires that "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;

[11] *Accord* Joseph M. McLaughlin, 2 McLaughlin on Class Actions § 6:7 (18th ed. 2021) ("Settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion.").

(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)."

i. The costs, risks, and delay of trial and appeal

In order to assess adequacy under Rule 23(e)(2)(C)(i), "courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." Fed. R. Civ. P. 23, 2018 Advisory Note, Paragraphs (C) and (D). This inquiry overlaps with a number of factors identified in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). *First*, the "complexity, expense and likely duration of the litigation" *Grinnell* factor (Factor 1) supports preliminary approval. *See id*. In *Fleisher v. Phoenix Life Insurance Company*, Judge McMahon found another COI case "indisputably complex," explaining:

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

2015 WL 10847814, at *6 (S.D.N.Y. Sept. 9, 2015) (granting final approval of a COI class action settlement). The same can be said of this case—the Court has issued detailed, complex opinions in response to the parties' motions for class certification and summary judgment, and trial would have featured dueling actuarial experts testifying about actuarial standards, insurance principles, and technical actuarial assumptions, documents, and data.

And even if Plaintiff prevailed at trial, this case would likely be tied up in years of post-trial briefing and appellate practice. *See Fleisher*, 2015 WL 10847814, at *6 ("The Settlement also

ends future litigation and uncertainty. Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years."); *Strougo ex rel. Brazilian Equity Fund, Inc. 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" (citation omitted)).[12]

Second, the *Grinnell* factors of "the risks of establishing liability" and "the risks of establishing damages" (Factors 4–5), *see Grinnell*, 495 F.2d at 463, also support approval. "This factor does not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Glob. Crossing*, 225 F.R.D. at 459.

Here, there are substantial risks of establishing liability and damages. As a result of the Court's summary judgment order, the primary theory of breach relied upon by the NYDFS has been rejected, along with others. *See generally* Dkt. 174 (SJ Order). The sole remaining issue for trial is "whether the 2016 COI Adjustment was based on analysis of cost factors related to the in-force polices as mandated by the terms of the Policy or was based on Lincoln Life's profitability goals." SJ Order at 24. The Court is well aware of the challenges that Plaintiff would face at trial. Voya laid out its contentions for the liability phase of the trial in detail in the pretrial order. Dkt. 244 (Proposed FPTC Order) at 7–10. Amongst other things, Voya contends that it will be able to prove at trial that "there was no breach of contract because contractually proper future cost factors were the basis of the 2016 COI adjustment." *Id.* at 7. Further, as discussed in more detail below, Voya has raised a number of damages arguments that, if accepted, could wipe out a substantial

[12] *See also In re Prudential Securities Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)).

portion of Plaintiff's alleged damages. The Settlement removes substantial uncertainties about Plaintiff's chances of success or potential decertification. *See 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 under which plaintiffs achieved substantial benefits[.]").

ii. The effectiveness of any proposed method of distributing relief to the class.

The second Rule 23(e)(2)(C) subfactor takes into account "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). "A distribution plan is fair and reasonable as long as it has a 'reasonable, rational basis.'" *Fleisher*, 2015 WL 10847814, at *12 (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)).

Plaintiff's proposed plan of allocation provides for a *pro rata* distribution of proceeds without any claim form or process. *See* Ard Decl., Ex. 4. "This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable." *Fleisher*, 2015 WL 10847814, at *12 (collecting cases); *see also In re Lloyd's Am. Tr. Fund Litig.*, 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("[*P*]*ro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to be the fairest method of allocating the settlement benefits.").

iii. The terms of any proposed award of attorneys' fees.

The third Rule 23(e)(2)(C) subfactor takes into account "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Here, the Settlement Agreement provides that "Plaintiff will move for attorneys' fees not to exceed 33% of the gross benefits provided to the Settlement Class" and "reimbursement for all expenses incurred

or to be incurred," which will be deducted from the Final Settlement Fund. *See* Settlement Agreement § 56. The payment will be made "immediately upon entry of an order approving such fees and expenses, or at a later date if required by the Court." *Id.* Awards of this magnitude have been deemed reasonable in comparable class actions. *See, e.g.*, *Sykes v. Harris*, 2016 WL 3030156, at *17 (S.D.N.Y. May 24, 2016) (Chin, J.) ("District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." (quoting *Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010))); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (approving 33.3% of $510 million settlement fund).

iv. Agreements required to be identified under Rule 23(e)(3).

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

v. Other Grinnell *adequacy factors.*

The remaining *Grinnell* factors also weigh in favor of determining that notice is appropriate and preliminary approval should be granted.

The third *Grinnell* factor—"the stage of the proceedings and the amount of discovery completed," *see Grinnell*, 495 F.2d at 463—addresses "whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). As described above, the parties have completed fact and expert discovery, class certification, summary judgment, and pretrial motions, and were on the eve of trial, at the time the Settlement Agreement was executed. *See* Ard Decl. ¶¶ 4–17. Plaintiff and Class Counsel therefore

had an extensive understanding of the strengths and weaknesses of the case at the time of Settlement. This is sufficient to satisfy the third *Grinnell* factor. *See, e.g.*, *Fleisher*, 2015 WL 10847814, at *7–8 (finding that a settlement 45 days before trial satisfied the third factor because "Class Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of the strengths and weaknesses of the Class's claims and Defendants' defenses, and the likelihood of obtaining a larger recovery for the Class if this litigation continued").[13]

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

The eighth and ninth *Grinnell* factors—"the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," *see Grinnell*, 495 F.2d at 463—are typically combined. These factors look at the settlement in light of the "best possible recovery" and the "uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion" to determine whether the settlement falls within the range of reasonableness. *Wal-Mart Stores*, 396 F.3d at 119; *see also Godson v.*

[13] Indeed, courts frequently find that much less extensive discovery satisfies this factor. *See, e.g.*, *Guippone v. BH S&B Holdings LLC*, 2016 WL 5811888, at *6 (S.D.N.Y. Sept. 23, 2016) (finding this factor satisfied where the parties had engaged in written and deposition discovery and briefed class certification).

Eltman, Eltman, & Cooper, P.C., 328 F.R.D. 35, 58 (W.D.N.Y. 2018); *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *1 (S.D.N.Y. May 14, 2004).

Here, the $92.5 million cash payment, the waiver of policy validity defenses, and the 5-year COI rate increase freeze are a very substantial recovery for Class Members. Apart from contesting liability, Voya also contested Plaintiff's damages estimate and argued that even if Voya was liable, only a small subset of the Policies were damaged. *See* Dkt. 202 (Def. Damages MIL) at 1–11. Under Voya's theory, damages for many class members would be far less than amounts estimated by Plaintiffs' damages expert or would be wiped out completely, resulting in total potential damages of $50 million or less. *See* Dkt. 233 (Pltf. Damages MIL Opp.) at 1; Ard Decl., Ex. 5 (5/12/21 FPTC Transcript) at 26:23–27:9 (Voya's counsel arguing that the jury would potentially find that 95% of the increase was proper even if a breach occurred). The $92.5 million award therefore is therefore many multiples of potential damages under the theories presented by Voya, which would have been at issue in any trial.

The non-monetary relief — the 5-year COI freeze and the policy validity agreement — adds significant value to the already substantial monetary recovery. *See* Ard Decl. ¶ 18. The freeze on COI increases for five years has substantial value. Policyholders now can predict with certainty what their COI obligations will be for a substantial period of time. This is an important feature of the Settlement given that COI charges are the largest charges on these policies. The promise of policy validity also provides substantial benefit to the Class. Voya and Lincoln are giving up their right to challenge the validity of policies for misrepresentations or alleged lack of insurable interest (what is commonly known as the "stranger-originated life insurance" or STOLI defense), thereby helping ensure that the death benefits otherwise owed to members of the Class upon the occurrence of a maturity event will be paid.

This settlement easily falls with the range of reasonableness, particularly in light of the significant litigation risks discussed above. Plaintiff "cannot be certain that [she] will induce a jury to award the best possible recovery." *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008). Here, the recovery to the Class is outstanding, especially when compared against the risks inherent in this case as well other settlements in COI litigation. For example, in Phoenix COI, Judge McMahon held that a settlement with a cash award amount equal to 68.5% of past damages was "one of the most remunerative settlements this court has ever been asked to approve." *See Fleisher*, 2015 WL 10847814, at *11. This settlement is in line with that on Plaintiff's numbers and a multiple of that on Voya's damages theory. Similarly, in other types of cases, courts routinely approve settlements with substantially lower-percentage awards. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement value that was 10.5% of total damages); *In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (approving settlement cash award that was 10–15% of total damages); *Grinnell*, 495 F.2d at 455 & n. 2 (in theory, a fraction of one percent of the overall damages could be a reasonable and fair settlement); *Cagan v. Anchor Sav. Bank FSB*, No. 88-cv-3024, 1990 WL 73423, at *12 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million").

Furthermore, settlement "assures immediate payment of substantial amounts to Class Members," "even if it means sacrificing speculative payment of a hypothetically larger amount years down the road." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) (quotation marks omitted). And Class Counsel's certification of the reasonableness of the settlement, *see* Ard Decl. ¶¶ 3, 23, is given considerable weight because they are closest to the

facts and risks associated with the litigation. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *5 (S.D.N.Y. Dec. 19, 2014) ("[Lead Counsel's] opinion is entitled to great weight." (quotation marks and citation omitted)).

The final two *Grinnell* factors are neutral. The second factor—"the reaction of the class to the settlement," *see Grinnell*, 495 F.2d at 463—is premature. *See In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Since no notice has been sent, consideration of this factor is premature."). The seventh factor looks at "the ability of the defendants to withstand a greater judgment." *See Grinnell*, 495 F.2d at 463. Although Voya and Lincoln could potentially withstand a greater judgment, "[t]his factor, standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). "[A] defendant is not required to empty its coffers before a settlement can be found adequate. The mere fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Fleisher*, 2015 WL 10847814, at *9 (citations and internal quotation marks omitted).

* * *

Rule 23(e)(2)(C) therefore supports approval.

d) The Proposal Treats All Settlement Class Members Equitably

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

Here, the proposed plan of allocation equitably treats class members by distributing damages on a *pro rata* basis using each Class Members' share of the total damages. *See* Ard Decl., Ex. 4; *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) ("This plan of allocation has an obvious rational basis, appears to treat the class members equitably, faced no objections from class members, and has the benefit of simplicity."); *Fleisher*, 2015 WL 10847814, at *12 (referring to a similar plan of allocation as "straightforward and equitable"). The releases are also equitable, as they treat all Class Members equally and do not affect the apportionment of damages.

Rule 23(e)(2)(D) therefore supports approval.

3. The Proposed Settlement Satisfies the Other Relevant Factors

Rule 23(e)(1)(B)(ii) conditions preliminary approval and the direction of notice on a showing that the Court will likely be able to "certify the class for purposes of judgment on the proposal." "If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted." Fed. R. Civ. P. 23, Advisory Note 2018, Subdivision (e)(1); *accord* Rubenstein, *supra*, 4 Newberg on Class Actions § 13:18 ("If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes."). Here, the sole change related to certification is the post-settlement opt-out period pursuant to Rule 23(3)(4), which gives Class members a second chance to opt out. *See* Settlement Agreement §§ 27, 34, 44–45.

The scope of the release is also appropriate. The Settlement Class would release "all Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Action

arising out of the facts alleged in the Action," but not "new claims that could not have been asserted in the Action because they are based upon a future rate schedule increase in Voya's COI charges that occurs after October 20, 2021." Settlement Agreement §§ 13, 28. These releases are appropriate. *See Wal-Mart Stores*, 396 F.3d at 107 ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.").

B. The Proposed Form and Manner of Notice is Appropriate

Rule 23(e)(1)(B) requires that notice be directed "in a reasonable manner to all class members who would be bound by the proposal." "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores*, 396 F.3d at 113. "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." *Pinnacle Grp.*, 874 F. Supp. 2d at 191 (internal citations and quotation marks omitted); *accord Wal-Mart Stores*, 396 F.2d 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)).

Plaintiff's proposed notice plan is substantially the same as the notice plan the Court previously approved, and should be approved here for the same reasons. *See* Dkt. 118 (Memorandum of Law in Support of Motion to Approve Form and Manner of Notice); Dkt. 122 (Order Approving Notice). *First*, Plaintiff's two forms of notice—the short-form and long-form

notices attached as Exhibits B and C to the Keough Declaration—apprise Class Members, in plain English, of the general terms of the settlement, the plan of distribution, the allocation of attorneys' fees, and specific information about the opt-out process and the final approval hearing. *See* Keough Decl., Ex. B (Short-Form Notice); Ex. C (Long-Form Notice).

Second, Plaintiff proposes the appointment of JND as Settlement Administrator, who the Court previously approved as the Notice Administrator, *see* Dkt. 122, and who adequately discharged its duties in that role, *see* Keough Decl. ¶ 9.

Third, direct mailing of the notice to Class Members via U.S. Mail is appropriate. *See In re Doria/Memon Disc. Stores Wage & Hour Litig.*, 2017 WL 4541434, at *9 (S.D.N.Y. Oct. 10, 2017) ("Although Plaintiffs did not propose a manner in which to deliver the notice, delivery by first class mail is proper."); *United States v. New York*, 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)). Direct mailing is a particularly effective method because in-force policyholders are expected to maintain their current address with their policy administrator. A website will also be maintained so that anyone can read about the settlement and easily find all documents pertinent to the Settlement. *See* Ard Decl. ¶ 28; Keough Decl. ¶ 14. An automated toll-free number will also be available. *See* Ard Decl. ¶ 28; Keough Decl. ¶ 15.

Finally, the opt-out period of 45 days is the same as previously approved by the Court after class certification and is reasonable. *See* Dkt. 122.

The Court should therefore approve the proposed form and manner of notice as described in paragraphs 24–29 of the Ard Declaration and paragraphs 11–17 and Exhibits B and C of the

Keough Declaration because as, the Court held previously after class certification, it is the "best notice practicable under the circumstances" *See* Dkt. 122; *see also* Fed. R. Civ. P. 23(c)(2)(B).[14]

C. Proposed Schedule for Notice, Objections, and Final Approval

Plaintiff proposes the following schedule under the proposed Preliminary Approval Order, paragraphs of which are referenced in the chart, subject to the approval of the Court. This schedule provides due process for Class Members related to their rights concerning the Settlement.

Event	Days from Preliminary Approval
Deadline for Voya/Lincoln to provide Class Member addresses to JND	7 days
Deadline for JND to send notice to Class Members	30 days
Deadline for JND to file proof of mailing	45 days
Deadline to file motion for award of attorneys' fees, expenses, and service awards	60 days
Deadline to request exclusion from the Settlement Class or object to the Settlement	75 days
Deadline to file motion for final approval	90 days
Deadline to serve any reply brief in support of any motion	103 days
Final Approval Hearing	110 days

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (i) preliminarily approve the proposed Settlement, Plan of Allocation, and the form and manner of notice; (ii) direct

[14] Although a settlement notice program does not need to satisfy the more stringent Rule 23(c)(2) standards where, as here, the class is already certified, *see* Rubenstein, *supra*, 3 Newberg on Class Actions § 8:17 (the form and manner of notices in this situation is solely controlled by Rule 23(e)(1)(B)'s "reasonable manner" standard), Plaintiff's proposed notice program satisfies both Rule 23(c)(2)(B) and Rule 23(e)(1)(B).

notice to the Class under Rule 23(e)(1); and (iii) schedule a date and time for a hearing to consider final approval of the Settlement and related matters.

Dated: January 6, 2022

/s/ Seth Ard

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on the following counsel, this January 6, 2022.

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