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 CLASS COUNSEL'S MOTION FOR APPROVAL OF COMMON FUND PAYMENT OF ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

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I. INTRODUCTION

After seven years of tenacious effort, Class Counsel have generated an excellent settlement despite the extraordinary risks presented in the two above-captioned actions ("the Actions"). The Settlement provides up to $117,750,000 in cash payments. Settlement Class Members need not fill out or submit any claim forms; their share of the Settlement proceeds will be sent to them automatically. In addition to the monetary relief, Defendant Lincoln National Life Insurance Company and its parent (collectively, "Lincoln") agree that Lincoln will not impose any further COI increase on Settlement Class Members for a period of five years, notwithstanding a worldwide pandemic that some insurance carriers have pointed to as a reason to further increase rates. Lincoln furthermore agrees under the Settlement not to challenge the validity of any Settlement Class Policy for lack of insurable interest or misrepresentations in the Policy application.

Class Counsel obtained these substantial Settlement benefits despite significant risks that the Lincoln Policy Owners might obtain no relief at all. Indeed, when the Court denied the initial motions for class certification, thousands of Class members who could not afford to pursue individual claims faced the very real prospect of ***zero*** recovery. Class Counsel persevered, however, devising a detailed plan to address the issues identified in the Court's orders, based on the factual record they developed through years of discovery and supported by updated expert reports. Appreciating that Class Counsel refused to be deterred by the initial setback, Lincoln submitted to mediation before The Honorable Diane Welsh (Ret.), and ultimately agreed to afford the Settlement Class the considerable monetary and non-monetary benefits of the Settlement.

Together, Class Counsel and their co-counsel (collectively, "Plaintiffs' Counsel") spent millions prosecuting the Actions on an entirely contingent basis, against an exceedingly well-heeled adversary represented by highly qualified defense counsel. This is not a case where a prior governmental investigation, criminal conviction, whistleblower, or news exposé paved the way. Plaintiffs' Counsel alone performed the initial factual and legal investigation before filing this lawsuit, worked tens of thousands of hours thereafter, and spent over two million dollars in expert fees and other expenses – all with no assurance of receiving payment for their services or the enormous out-of-pocket costs they advanced. Among other work performed, Plaintiffs' Counsel

took or defended more than 50 depositions (including some 22 depositions of Lincoln fact and expert witnesses); reviewed over a million pages of documents; served more than a dozen third-party subpoenas; and briefed numerous discovery disputes before the Special Master in addition to the many motions filed or defended before this Court. All told, Plaintiffs' Counsel spent some 33,675 hours prosecuting these cases.

In short, Plaintiffs' Counsel have in this case unquestionably earned an award of attorneys' fees and reimbursed litigation expenses as compensation for their indefatigable efforts on behalf of the Settlement Class. Accordingly, Class Counsel respectfully move the Court for approval of a fee award of 33% of the Final Settlement Fund, plus $2,345,671.06 in reimbursable litigation expenses. As part of their application, Class Counsel also respectfully seek Court approval of reasonable service awards $15,000 to each Class Representative, all of whom made meaningful and relatively equal contributions toward the success of the Actions.

As shown below, Court approval of Class Counsel's motion is warranted under the multi-factor standard established by the Third Circuit in *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190 (3d Cir. 2000), and is consistent with fee awards approved in comparable class settlements approved by this Court and others within this Circuit. In awarding fees, the most critical factor is the degree of success obtained, and here the Settlement delivers substantial relief to the Settlement Class Members when success during litigation was far from assured.

Class Counsel's motion is supported by the Joint Declaration of the Plaintiffs' Steering Committees ("Joint Declaration" or "Joint Decl."), by the supporting declarations of all Plaintiffs' Counsel ("Supporting Declarations"), by this Memorandum of Law, and by the Court's entire file in this case. Finally, in accordance with the Court's Preliminary Approval Orders (collectively, "PAO"), Class Counsel have filed their application more than sixty days prior to the Final Approval Hearing scheduled for October 4, 2023, affording any Settlement Class Member who wishes to object ample time in which to do so. PAO ¶ 12.

II. PERTINENT PROCEDURAL HISTORY

A. The 2016 Action

Beginning on December 23, 2016, certain Plaintiffs filed putative class actions against Lincoln arising from "cost of insurance" ("COI") rate increases Lincoln imposed on certain universal life insurance policies in the fall of 2016. The cases were consolidated into a single matter entitled *In re: Lincoln National COI Litigation*, Case No. 2:16-cv-6605-GJP (E.D. Pa.) (the "2016 Action"). 2016 Action, ECF 29. On June 8, 2017, Lincoln filed a motion to dismiss the consolidated complaint in the 2016 Action. 2016 Action, ECF 40. Plaintiffs responded on July 28, 2017, and Lincoln replied on August 17, 2017. The Court heard oral argument on the motion to dismiss on August 22, 2017, and denied the motion in substantial part on September 11, 2017. 2016 Action, ECFs 44, 47, 48, 50, 51.

The Parties thereafter engaged in a robust, intensive and protracted discovery process, including – together with discovery in the 2017 Action described below – the production of more than 600,000 pages of documents by Lincoln and its third-party consultants Milliman, Inc., Towers Watson, and Ernst & Young (many of them including complex native files and spreadsheets), procurement of a license allowing Plaintiffs and their experts to operate the MG_ALFA system used to model the COI increases, and the taking or defending of more than 50 fact and expert witness depositions. Joint Decl. ¶¶ 7-18. Plaintiffs in the 2016 Action filed a Second Amended Complaint on February 15, 2018. 2016 Action, ECF 72. Plaintiffs moved for class certification in the 2016 Action on June 25, 2019. 2016 Action, ECF 111-114, 116. While Plaintiffs' class certification motion was pending, the Parties participated in an unsuccessful mediation before The Honorable Barbara Jones (Ret.). Joint Decl. ¶ 5.

B. The 2017 Action

Beginning on September 18, 2017, certain other plaintiffs filed claims against Lincoln related to another COI rate increase imposed on additional universal life policies that Lincoln announced in June and July 2017. Those cases were likewise consolidated into a single matter entitled *In re: Lincoln National 2017 COI Rate Litigation*, Case No. 2:17-cv-04150-GJP (E.D. Pa.) ("2017 Action"). 2017 Action, ECF 17. Lincoln filed an Answer to the Amended Complaint on

May 24, 2018. 2017 Action, ECF 24. After that, the parties negotiated stipulations and pretrial orders that would allow for coordinated discovery between the 2016 Action and the 2017 Action. Plaintiffs in the 2017 Action moved for class certification on November 23, 2020. 2017 Action, ECF 56-63.

C. The Class Certification Proceedings

Plaintiffs' motions for class certification in the Actions were denied on August 9, 2022; however, Plaintiffs were granted leave to file a new class certification motion by February 21, 2023. 2016 Action, ECF 237, 244; 2017 Action, ECF 111, 117, 118. Before Plaintiffs filed their new class certification motions, the Parties agreed to participate in another mediation before The Honorable Diane Welsh (Ret.) on December 13, 2022. That mediation and a series of follow-on discussions and negotiations between the Parties resulted in the proposed Settlement Agreement that is the subject of this Application. 2016 Action, ECF 247-4 (Golan Decl. ¶ 4 & Ex. A Welsh Decl. ¶ 6); 2017 Action, ECF 121-4 (same). The Parties thereafter filed a joint request to stay these proceedings, including the deadline for filing a renewed motion for class certification, while the Court considered approval of the proposed Settlement. 2016 Action, ECF 246; 2017 Action, ECF 120.

D. Terms of the Proposed Settlement

The Settlement Agreement resolves all putative claims arising out of the challenged COI increases alleged at any time in either the 2016 Action or the 2017 Action. Joint Decl. ¶ 22.[1] Under the Settlement Agreement, in exchange for a release of liability from Settlement Class Members, Lincoln has agreed to establish a common settlement cash fund of up to $117,750,000 ("the Settlement Fund"). *Id.* As in settlements reached in other class actions challenging COI rate increases, Lincoln's obligation to fund the Settlement Fund will be reduced based on the value of the Policies of any Policy Owners who elect to opt out of the settlement, *i.e.*, by deducting from the Settlement Fund an amount equal to $117,750,000 multiplied by the sum of the Policy Claim Percentages for all Class Policies that are not Final Settlement Class Policies due to such

[1] Unless otherwise noted, capitalized terms in this memorandum have the same meaning as the corresponding defined terms in the Settlement Agreement.

exclusions.[2] The net Settlement Fund proceeds remaining after those reductions constitute the "Final Settlement Fund." *Id.* After payment of administration costs, attorneys' fees, reimbursed litigation expenses, and service awards, the Settlement Administrator will distribute the net Final Settlement Fund to the Settlement Class Members in proportion to their respective Policy Claim Amounts. *Id.* No portion of the Final Settlement Fund will be returned to Lincoln. *Id.*

In addition to the foregoing monetary relief, under the Settlement Agreement Lincoln also agrees: (i) for a period of five 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 the 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 ("the COI Freeze Benefit"); and (ii) not to take legal action (including asserting an affirmative defense 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 (collectively, the "No Contest Benefit"). Joint Decl. ¶ 23.

Finally, the Settlement Agreement allows for Class Counsel to move for a payment of attorneys' fees not to exceed 33% of the Settlement Fund, as reduced proportionately for any reduction attributable to Policy Owners who opt out of the Settlement Class, plus the reimbursement of litigation expenses. Joint Decl. ¶ 24. The Settlement Agreement also permits

[2] The Settlement Class does not include policies that are the subject of Individual Actions brought by Owners of policies subjected to the COI Increases, including the actions pending in this Court brought by EFG Bank AG, Cayman Branch ("EFG"), Wells Fargo Bank, National Association, as securities intermediary for EFG, DLP Master Trust, DLP Master Trust II, DLP Master Trust III, GWG DLP Master Trust, Greenwich Settlements Master Trust, and Palm Beach Settlement Company (No. 2:17-cv-02592-GJP); LSH CO ("LSH") and Wells Fargo Bank, National Association, as securities intermediary for LSH (No. 2:18-cv-05529-GJP); Conestoga Trust and Conestoga Trust Services LLC (No. 2:18-cv-02379-GJP); and Sarita Kacker, individually and as personal representative of Ashok K. Kacker, deceased (No. 2:22-cv-04302-GJP).

Class Counsel to request the payment of Court-approved service awards to the Class Representatives, not to exceed $15,000 per recipient. *Id.* The Settlement is, however, explicitly not conditioned upon the Court's approval of any such fees, reimbursed expenses, or service awards. *Id.*

III. APPLICABLE LEGAL STANDARD

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h); *McDermid v. Inovio Pharmaceuticals, Inc.* (*"McDermid"*), 2023 WL 227355, at *11 (E.D. Pa. Jan. 18, 2023) (Pappert, J.). The ultimate decision to approve such fees, expenses, and service awards rests within the sound discretion of the court based on the record before it. *See In re Cendant Corp. PRIDES Litig* (*"Cendant I"*), 243 F.3d 722, 727 (3d Cir. 2001); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 256 (3d Cir. 2009). A reduction in the fee award is only appropriate "[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class." *Teh Shou Kao v. CardConnect Corp.* ("*Kao*"), 2021 WL 698173, at * 9 (E.D. Pa. Feb. 23, 2021) (Pappert, J.) (internal quotation marks omitted).

IV. LEGAL ARGUMENT

A. The Requested Percentage Fee Award Should Be Approved

An attorney "who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Courts in this Circuit generally use the percentage of recovery method to calculate the appropriate fee in such common fund cases "on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 821 (3d Cir. 1995); *accord Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022) (stating, "the 'percentage-of-recovery method is generally favored in cases involving a common fund' . . . "). The percentage-of-recovery method is preferred in common fund cases because – consistent with the underlying contingency fee representation – it "rewards counsel for success and penalizes [counsel] for failure." *In re Prudential Co. Am. Sales Prac. Litig.*

Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998) (internal quotation marks omitted); *McDermid*, 2023 WL 227355, at *11 (quoting *In re Prudential*); *In re Ikon Office Sols., Inc., Sec. Litig*., 194 F.R.D. 166, 193 (E.D. Pa. 2000) (noting that "the percentage method … permits courts to reward success and penalize failure more directly").[3]

The percentage fee is typically applicable to the entire common fund generated through counsel's efforts, even where some portion of the fund may ultimately revert to the defendant because some class members chose not to avail themselves of the opportunity to claim a share in it. *See Boeing*, 444 U.S. at 480 ("[The] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel."); *accord In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) (noting that "[c]lass counsel should not be penalized for . . . reasons unrelated to the quality of representation they provided," including that "settlement funds may remain even after an exhaustive claims process"); *Kao*, 2021 WL 698173, at * 9 (quoting *Boeing,* 444 U.S. at 478); *In re Wawa, Inc. Data Sec. Litigation*, 2022 WL 1173179, at * 9-10 (E.D. Pa. April 20, 2022) ("In evaluating the size of the fund created and the number of persons benefitted, courts consider the funds made available to class members rather than the amount actually claimed during the claims process.").

Nevertheless, here Class Counsel have voluntarily agreed to limit their 33% fee request in these Actions to the Final Settlement Fund remaining after the opt-out period has expired, and – as an additional assurance of reasonableness – without including within the Settlement's value the additional benefits of the non-monetary relief afforded to the Class in the form of (a) the COI Freeze Benefit and (b) the No Contest Benefit. Joint Decl. ¶¶ 26-28.

[3] The lodestar method, by contrast, has generally been limited to statutory fee-shifting cases, or cases where the nature of the recovery does not allow the determination of the settlement's value. *Gelis*, 49 F.4th at 379. In addition, the lodestar approach has been criticized in the class action context for incentivizing billing "excessive hours" and drawing out litigation, while failing to incentivize lawyers to seek the largest recovery possible. *See In re Cendant Corp. Litig.* (*"Cendant II"*), 264 F.3d 201, 256 (3d Cir. 2001).

When evaluating proposed fee award percentages, the Third Circuit requires consideration of several factors, including:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the Settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1; *accord McDermid*, 2023 WL 227355, at *11; *Rose v. The Travelers Home and Marine Ins. Co.*, 2020 WL 4059613, at *9 (E.D. Pa. July 20, 2020) (Pappert, J.). These factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Rose*, 2020 WL 4059613, at *9 (omission in original). As shown below, here each *Gunter* factor fully supports the requested 33% fee award, as does the application of a lodestar "cross-check."

1. The Size of the Common Fund Created and the Number of Persons Benefited by the Settlement

In awarding fees, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). To assess this factor, courts consider the fee request in comparison to the size of the fund created and the number of class members to be benefitted. *Harshbarger v. Penn Mut. Life Ins. Co.*, 2017 WL 6525783, at *3 (E.D. Pa. Dec. 20, 2017). Here, Class Counsel have through their efforts generated an undeniably substantial $117,750,000 Settlement Fund on behalf of the Owners of some 50,000 potential Class Policies. As noted above, although not required, Class Counsel's fee request voluntarily takes into account the net reduction in the Settlement Fund attributable to those Owners who for whatever reason decline to participate in the Settlement.

Moreover, the non-monetary benefits afforded by the Settlement are themselves substantial. For example, in *Fleisher v. Phoenix Life Ins. Co*. ("*Phoenix COI*"), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015), on final approval, the court adopted a valuation of similar non-monetary relief as being worth $94.3 million. *Id.* at *10 (adopting valuation of five-year COI rate freeze at $61 million, and a policy validity guarantee at $33.3 million); *see Merola v. Atl.*

Richfield Co., 515 F.2d 165, 172 (3d Cir. 1975) (holding that courts considering non-monetary benefits should apply their "informed economic judgment" and "any probative evidence of the monetary value" of the relief when considering the value of the settlement); *Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (citing *Merola* and affirming award of $13 million where primary form of relief was a price freeze). Although Class Counsel does not seek fees based on the value of the non-monetary relief, the Freeze Benefit and the No Contest Benefit strongly reinforce the appropriateness of the 33% award being sought.

2. Reaction of the Class Members to the Fee Request

"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 . . ." *Cendant II,* 264 F.3d at 235; *see also High St. Rehab., LLC v. Am. Specialty Health Inc.*, 2019 WL 4140784, at *4 (E.D. Pa. Aug. 29, 2019) ("A low number of objectors or opt-outs is persuasive evidence of the proposed settlement's fairness and adequacy.").

Here, the requested fee percentage is clearly stated in the Class Notice disseminated in July, 2023, to Owners of some 50,000 potential Class Policies. Joint Decl. ¶ 25. Class Counsel will update the Court on the final number of objections, if any, prior to the Fairness Hearing. As of August 3, 2023, there are no objections to Class Counsel's 33% fee request. *Id.*

3. The Skill and Efficiency of Class Counsel

Class Counsel's skill, experience, and professionalism in litigating consumer class actions is both (a) well-noted by other courts,[4] and (b) well-demonstrated in these Actions. Joint Decl. ¶¶

[4] *See, e.g.*, *Thompson v. Transamerica Life Ins. Co.*, 2020 WL 6145104, at *3 (C.D. Cal. Sept. 16, 2020) ("Plaintiffs' Counsel are not only highly experienced in class action litigation generally, but also in COI litigation specifically. This enabled Co-Lead Class Counsel to formulate a targeted discovery program that cut to the crux of the dispute in a highly cost-effective manner."); *Feller v. Transamerica Life Ins. Co.*, 2019 WL 6605886, at *13 (C.D. Cal. Feb. 6, 2019) ("The Court has observed the zealousness with which Co-Lead Class Counsel prosecuted the Consolidated Actions in particular, and the exceptionally high quality of Co-Lead Class Counsel's representation of the Settlement Class throughout that time."); *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:10 (S.D.N.Y. April 18, 2019) ("*Hancock COI* Fairness Hearing Transcript") (lauding co-lead counsel's effort in obtaining a settlement that was deemed "quite

4-20, 40-42. Class Counsel's recognized skills and experience were especially needed to achieve a successful result in the Actions, particularly in motion practice before the Special Master and during fact and expert discovery involving highly technical actuarial issues. *Id.,* ¶¶ 7-13, 17-18, 40-42. The skill and efficiency shown by Class Counsel thus both favor approval of the requested fee percentage here. *See McDermid*, 2023 WL 227355, at *12.

4. The Complexity and Duration of the Litigation

The successful prosecution of these Actions required the management of two complex class action cases, involving numerous complicated actuarial issues, over a period of nearly seven years. Joint Decl. ¶¶ 4, 6-13, 17-18, 40-41. The complexity of the legal issues is confirmed by the extensive motion practice before this Court and the Court-appointed Special Master. *Id.*, ¶¶ 4, 6, 9-10. And the complexity of the proof required to support Plaintiffs' claims is confirmed by the extensive data, spreadsheet analyses, and computer modeling produced and conducted in the litigation – including Class Counsel's licensure of the proprietary software necessary to replicate and modify assumptions underlying the challenged COI Increases. *Id.*, ¶¶ 7, 11, 13, 18, 40, 42. Mastering these issues was paramount to the successful prosecution of the Actions. As one example, to effectively depose actuaries employed by Lincoln and third-parties, Class Counsel had to be familiar with esoteric actuarial principles and highly detailed spreadsheets and reports. *Id.* The time and effort needed to master these issues was significant, and it produced enormous benefits for the Class.

Similarly, the longstanding duration of the Actions – vigorously prosecuted at all times through extensive discovery and pretrial motions practice by highly competent counsel on both sides – amply satisfies this *Gunter* factor. *See* Joint Decl. ¶¶ 4-20, 40-42. But for the Settlement,

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extraordinary"); *Phoenix COI,* 2015 WL 10847814, at *8 (speaking of Co-Lead Class Counsel: "To be blunt, on only one other occasion has this court seen a case that settled after such full and thorough preparation. Class counsel could not possibly have been more knowledgeable about the strengths and weaknesses of their case."); *id.* at *22 ("The work that Class Counsel has performed in litigating and settling this case, and the substantial resources they have committed to prosecuting the case, demonstrates their commitment to the Class and to representing the Class's interests. . . . They also, frankly, did very good work." (citation omitted)).

litigation of the Actions would undoubtedly require substantial further motion practice and expert work, a multi-week trial, and then months if not years on appeal. These considerations again strongly support Class Counsel's 33% fee application. *See, e.g., McDermid*, 2023 WL 227355, at *12; *Kao*, 2021 WL 698173, at * 10.

5. The Risk of Non-Payment

"Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval." *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) (citation omitted); *accord High St. Rehab.*, 2019 WL 4140784, at *13 (quoting *Schering-Plough*); *see also Kao*, 2021 WL 698173, at * 10 ("Class counsel undertook representation of Plaintiffs on a contingency fee basis and advanced the costs of litigation. Had they not achieved a recovery, they would have received no compensation for their efforts.").

All class cases are inherently difficult and risky undertakings. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013) ("The complexity and expense of class action litigation is well-recognized."). That is especially true in COI cases, which frequently turn on a battle of the experts. *See Phoenix COI*, 2015 WL 10847814, at *9 (noting, in light of competing expert opinions concerning actuarial concepts in COI case, it was "unclear how a jury would decide these disputed issues at trial"); *see also In re AT & T Corp.*, 455 F.3d 160, 167 (3d Cir. 2006) (risks associated with continued litigation included "the likelihood of a battle of the experts"); *In re Bear Stearns*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured.").

The litigation risks were especially pronounced here. Foremost among those risks was the possibility that the Court might not grant a renewed motion for class certification (or that any order granting the motion could be challenged on appeal), that Lincoln might mount successful *Daubert* challenges to Plaintiffs' expert submissions, and that some or all of Plaintiffs' claims would fail at the summary judgment stage or at trial. Joint Decl. ¶ 38. Even if despite those risks Plaintiffs prevailed on liability, Plaintiffs faced further uncertainty on damages. Indeed, the risk of a lower-

than-expected recovery is real: in one recent COI class trial, *Meek v. Kansas City Life Insurance Co.*, No. 19-CV-472 (W.D. Mo.), the class sought $18 million in damages but the jury only awarded approximately $5 million, an amount that was then reduced even further to less than $1 million by the Court, and the class was partially decertified post-trial. *See* Joint Decl. ¶ 39 & Exs. 1-3.

Class Counsel assumed these myriad risks on a purely contingent basis, fully exposed to the prospect of non-recovery for not only their time but also for their seven-figure commitment to litigation expenses. Joint Decl. ¶¶ 36-38 & Ex. 4. The very real and ever-present risks of non-recovery therefore further support the requested 33% award. *See Schering-Plough*, 2012 WL 1964451, at *7 (noting, in approving a 33.3% fee, that "the risk created by undertaking an action on a contingency fee basis militates in favor of approval"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 745 (E.D. Pa. 2013) (approving 33% attorneys' fee, totaling $50 million, in part because class members could benefit from the $150 million settlement "immediately, and avoid the uncertainties and delay inherent in continuing to litigate this complex class action").

6. Significant Time Devoted to the Actions

As confirmed by the Joint Declaration and the Supporting Declarations, the time Plaintiffs' Counsel devoted to the Actions can safely be described as far more than "significant." Plaintiffs' Counsel collectively devoted more than 33,675 hours of time representing Plaintiffs and the proposed class members in these Actions. Joint 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; see also, 2016 Action, ECF 247-4 (Golan Decl. ¶ 4 & Ex. A Welsh Decl. ¶ 6); 2017 Action ECF 121-4 (same). It is fair to say that Plaintiffs' Counsel devoted far more time and resources litigating these Actions than plaintiffs' counsel in other class cases in which comparable percentage fee awards were approved by the Court. *Compare, e.g., Kao*, 2021 WL 698173, at *10 (expenditure of 2,200 hours and review of over 55,000 pages of documents favored approval of a 33.3% fee award).

7. The Range of Fees Typically Awarded

As this Court recently recognized in *McDermid*, "[i]n common fund cases, fee awards generally range from 19% to 45% of the settlement fund." 2023 WL 227355 at *12 (quoting *Cendant I*, 243 F.3d at 736 (citation omitted); *Ravisent Techs., 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."); *Whiteley v. Zynerba Pharms., Inc.*, 2021 WL 4206696, at *12 (E.D. Pa. Sept. 16, 2021) (noting that 33% fee request "falls in the middle" of the range of fees granted in comparable class actions in the Third Circuit). The 33% percentage requested here is thus fully in line with fee awards in other cases generating significant common fund settlements. *See, e.g., Kao*, 2021 WL 698173, at *10 (approving 33.3% award); *Wood v. Amerihealth Caritas Servs., LLC*, 2020 WL 1694549, at * 9 (E.D. Pa. April 7, 2020) (Pappert, J.) (approving 33.3% award); *High St. Rehab.*, 2019 WL 4140784, at *13 (same, and noting that "Class Counsel's requested percentage of 33.3% is commensurate with customary percentages in private contingent fee agreements").

The requested 33% fee award is no less reasonable in cases – like this one – in which the settlement fund generated by class counsel's efforts exceeds $100 million. *See, e.g., In re Domestic Drywall Antitrust Litig.*, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding 33.3% fee on $190 million settlement fund); *In re Neurontin Antitrust Litig.*, No. 2:02-cv-01830, Final Judgment & Order at 9-10, 12-13 (D.N.J. Aug. 6, 2014) (awarding 33.3% fee on $190 million settlement fund); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, 2014 WL 12738907, at *2-3 (E.D. Pa. July 14, 2014) (awarding 33.3% on $130 million settlement fund); *In re Flonase*

Antitrust Litig., 951 F. Supp. 2d at 756 (awarding 33.3% fee on $150 million settlement fund); *In re Tricor Direct Purchaser Antitrust Litig.*, 2009 WL 10744518, at *5 (D. Del. Apr. 23, 2009) (awarding 33.3% fee on $250 million settlement fund); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *1 (E.D. Pa. Jan. 3, 2008) (awarding 32.6% fee on combined settlement funds totaling $105,750,000); OSB, No. 2:06-cv-00826-PD, Order, Doc. 947, at *3 (awarding 33.3% fee on $120 million settlement fund); *In re Greenwich Pharm. Sec. Litig.*, 1995 WL 251293, at *6 (E.D. Pa. Apr. 26, 1995) (awarding 33.3% fee on $100 million settlement fund).

8. Application of a Lodestar "Cross-Check"

The Third Circuit has "suggested that district courts cross-check the percentage award at which they arrive against the 'lodestar' award method." *Gunter*, 223 F.3d at 195 n.1; *McDermid*, 2023 WL 227355, at *12 (citing *Gunter*); *but see, Moore v. GMAC Mortg.*, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) ("The lodestar cross-check is 'suggested,' but not mandatory."). As the Third Circuit has repeatedly emphasized, the lodestar cross-check calculation "need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (footnote omitted) (citing *In re Prudential*, 148 F.3d at 342).

Here, as noted above, Plaintiffs' Counsel collectively devoted more than 33,675 hours prosecuting Plaintiffs' claims against Lincoln on behalf of the Policy Owners impacted by the COI Increases. Joint Decl. ¶ 31; Supporting Declarations ¶ 3. All of the work performed by Plaintiffs' Counsel was reasonable and necessary for the effective and efficient prosecution and resolution of the Actions. Joint Decl. ¶¶ 30-43; Supporting Declarations, ¶ 2. Plaintiffs' Counsel have reviewed their respective contemporaneous billing records to confirm the accuracy and reasonableness of the reported time entries and to eliminate time that was unnecessary or duplicative. Supporting Declarations ¶ 2.

Based on their respective current hourly rates, the lodestar amount reported by Plaintiffs' Counsel equals $22,976,238, resulting in a risk multiplier of only 1.69 even if the Final Settlement

Fund were the entire $117,750,000. Joint Decl. ¶ 34. To the extent the Final Settlement Fund is reduced by exclusion requests, the multiplier will be ***even lower***, and Class Counsel's 33% request all the more reasonable. *Id.*

The Third Circuit has acknowledged that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential*, 148 F.3d at 341; *accord Kao*, 2021 WL 698173, at * 11; *Wood*, 2020 WL 1694549, at 10; *but see Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (approving multiplier of 6.16; noting that "multiples ranging from 1 to 8 are often used in common fund cases" to "compensate counsel for the risk of assuming the representation on a contingency fee basis"). Accordingly, application of a lodestar cross-check yielding a multiplier of no more than 1.69 confirms that the 33% attorneys' fees award sought by Class Counsel's motion is both reasonable and fully consistent with the range of multipliers approved by courts within this district.

B. The Requested Expense Reimbursement Should Be Approved

"[C]ounsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 226 (E.D. Pa. 2014) (alteration in original) (citation omitted); *Lachance v. Harrington*, 965 F. Supp. 630, 651 (E.D. Pa. 1997) ("[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of his reasonable litigation expenses from that fund.") (alteration in original) (emphasis omitted); *see also, e.g., In re Am. Inv'r Life Ins. Co. Annuity Mktg. & Sales Pracs. Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (approving class counsel's request for reimbursement of expenses including "expert witness fees; mediation fees; . . . legal research; . . . and service of process"); *Cunningham v. Wawa, Inc.*, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (approving class counsel's request for reimbursement of "filing fees, . . . mediation fees, and other similar, ordinary litigation expenses").

Here, Class Counsel have submitted declarations detailing the $2,345,671.06 in aggregate expenses incurred in litigating the Actions and avowing that they were necessarily incurred for the

effective handling of this matter. Joint Decl. ¶ 44-53 & Ex. 4; Supporting Declarations ¶¶ 4-7. The requested expense amount is fully in line with the expenses approved in many other class actions of comparable magnitude. *See, e.g., In re Domestic Drywall*, 2018 WL 3439454, at *20 (approving expenses of $2,925,629 in $190 million settlement); *In re Flonase*, 951 F. Supp. 2d at 756 (approving expenses of $2,069,433 in $150 million settlement fund). Indeed, because these litigation expenses were incurred at the risk of non-payment if the litigation proved unsuccessful, Class Counsel had every incentive to avoid incurring unreasonable, duplicative, or otherwise unnecessary expenditures. Joint Decl. ¶ 52. Reimbursement of $2,345,671.06 in litigation expenses from the Settlement is therefore both appropriate and warranted. *See, e.g., McDermid*, 2023 WL 227355, at *13 (approving expense application); *Wood*, 2020 WL 1694549 at 10 (same).

C. The Requested Service Awards Should Be Approved

Courts regularly approve incentive awards "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n. 65 (3d Cir. 2011) (internal quotation marks omitted); *Wood*, 2020 WL 1694549, at *10 ("Approving contribution or incentive awards is common, especially when the Settlement establishes a common fund."). "Absent the class representatives' participation, there would have been no case, and Settlement Class Members would have had to pursue their claims alone." *Kao*, 2021 WL 698173, at * 11.

Whether to grant service awards (and how much) is discretionary, and the Court "need not employ factors to determine the amount of the class representative awards, as it does when awarding attorneys' fees." *McDermid*, 2023 WL 227355, at *13 (citing *In re Innocoll Holdings Public Ltd. Co. Sec. Litig.,* 2022 WL 16533571, at *12 (E.D. Pa. Oct. 28, 2022)). In the appropriate circumstances, this Court has awarded service awards in excess of $75,000 each. *McDermid*, 2023 WL 227355, at *13.

Here, Class Counsel request approval of much more modest service awards of $15,000 to each Class Representative, all of whom have devoted roughly equivalent time and effort in service

of the Class over the last seven years. Joint Decl. ¶¶ 54-58; *see, e.g.*, *Kao*, 2021 WL 698173, at *11 (approving service awards of $15,000 each). An award of $15,000 is justified here in light of each Class Representative's consistent participation in reviewing and commenting on various pleadings; their efforts involved in written and document discovery; their preparation for and attendance at their depositions; and their ongoing, reliable communication with Plaintiffs' Counsel throughout the life of the Actions. Joint Decl. ¶ 55; *see In re Janney Montgomery Scott LLC Fin. Consultant*, 2009 WL 2137224, at *12 (E.D. Pa. Jul. 16, 2009) (approving of incentive awards of $20,000 where named plaintiffs "provided significant assistance in the prosecution of [the] case," including being deposed, responding to discovery requests, and collaborating with counsel).

The requested service awards are also reasonable when considered in context of the overall relief afforded by the Settlement. Joint Decl. ¶ 59. The aggregate service award to the 17 Class Representatives represents only 0.0022% of the total Settlement Fund. *Id.* Even assuming that the Court grants the full amount of the maximum requested attorneys' fees and expenses and the full amount of the requested service awards, the incentive award would only reduce the payment to other Class members by approximately 0.0033%. *Id*; *see Godshall v. Franklin Mint Co.*, 2004 WL 2745890, at *6 (E.D. Pa. Dec. 1, 2004) (approving incentive awards of $20,000 per class representative where "requested award would reduce the payment to other class members by approximately 5%).

V. CONCLUSION

For the reasons set forth above, and as supported by the Joint Declaration and the Supporting Declarations, the Court should approve as appropriate and warranted the payment of (a) a fee award in the aggregate amount of 33% of the Final Settlement Fund, (b) reimbursed litigation expenses in the aggregate amount of $2,345,671.06, and (c) service awards in the aggregate amount of $255,000.

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