UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PHT HOLDING II LLC, on behalf of itself and all others similarly situated, Plaintiff, vs. NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, Defendant.	Civil Action No. 18-CV-00368

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

TABLE OF DEFINED TERMS

Term	Definition
ATLES	Advance Trust & Life Escrow Services, LTA
Ard Decl.	Declaration of Seth Ard, filed contemporaneously with this memorandum
Class Members or Class	Owners of the Class Policies
Class Policies	Policies that fall within the COI Class
COI	Cost of insurance
EFME	Expectations as to future mortality experience
FMI	Future mortality improvement
Intrepido-Bowden Decl.	Declaration of Gina Intrepido-Bowden Regarding Settlement Administration, filed contemporaneously with this memorandum
North American	Defendant North American Company for Life and Health Insurance
Plaintiff, Class Representative, or PHT	Class Representative PHT Holding II LLC
Rouse Rpt.	Report of James Rouse, filed contemporaneously with this memorandum as Ex. 2 to the Ard Decl.
Settlement or Agreement	Joint Stipulation and Settlement Agreement, Dkt. 309-3
SG or Class Counsel	Susman Godfrey L.L.P.
STOLI	Stranger-owned life insurance

INTRODUCTION

After nearly five years of hard-fought litigation, the Settlement provides an outstanding result for the owners of the 18,583 Final Class Policies. The $59 million settlement fund considered alone accounts for ***36.2%*** of all COI overcharges collected by North American through March 31, 2023 under Plaintiff's maximum damages model, over ***107%*** of the COI overcharges under North American's alternative "Multiplicative Approach," Gibson Supp. Report ¶ 211 ("adjusted alleged overcharges" of $54,888,640); and ***160 times*** the overcharges had North American prevailed on the hotly-disputed question of whether it assumed FMI at pricing, *id.* ("adjusted alleged overcharges" of $367,668). In other words, the Class is receiving more than it would have received even assuming the jury had found for Plaintiff on every factual dispute, but decided that the COI redetermination methodology proposed by North American's expert was more reasonable.

The Settlement is a superb result under any metric. Each of the numbers cited above vastly exceeds the settlement-to-damages percentage of the median class action settlement in this Circuit. *See Beaver Cnty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 2017 WL 2574005, at *3 (D. Minn. June 14, 2017) ("[A] recovery of approximately 6.8% to 9.5% of Class Representatives' damages expert's estimate of the Class' maximum provable damages . . . exceeds the median recovery of estimated damages in similar securities class actions settled in 2016, as well as the median settlement as a percentage of estimated damages in the Eighth Circuit"). And—with an average recovery of more than $2,000 *per policy*, after the requested fees, expenses, and incentive award—this settlement is well in line with (or better) than other major COI settlements approved by courts. *See, e.g.*, *Rogowski v. State Farm Life Ins. Co.*, 2023 WL 5125113, at *2, *4-5 (W.D. Mo. Apr. 18, 2023) ($217.5 million net COI settlement across 760,000 policies, averaging less than $300 per policy); *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:8–10 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI I*") (approving "quite extraordinary" COI

settlement providing for 42% of the alleged overcharges); *see* Ard Decl. ¶ 31.

The Settlement also prohibits North American from trying to invalidate any Class Policies, or avoid paying death benefits, by claiming fraud, misrepresentation, or a lack of insurable interest. In *Fleisher v. Phoenix Life Insurance Co*., 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*"), the Court adopted an expert analysis valuing this type of non-monetary relief. 2015 WL 10847814, at *15. Here, an expert with experience in the insurance industry, and with longevity-based products specifically, using North American's own data, has applied a similar methodology as in *Phoenix COI* and opined that this non-monetary relief is worth $2.3 million. *See* Rouse Rpt. at 1, 6 (Ex. 2 to Ard Decl.); Ard Decl. ¶ 27. Furthermore, unlike many COI settlements, the Class is providing a release for historical conduct only, and retains the right to pursue all claims related to any COI charges imposed after the Final Approval Date. Dkt. 309-3 §§ 1.23, 1.49 (Agreement).

After the Court granted preliminary approval, the Court-appointed Settlement Administrator mailed the Settlement Notice to the Class Members, using the addresses that North American keeps in its files used for correspondence about its policies. Intrepido-Bowden Decl. ¶¶ 6–7. The notice program was highly effective. 98.8% of Class Members were directly reached. The Settlement Notice, among other things, described the monetary and non-monetary relief and releases; disclosed that Class Counsel may seek up to 33⅓ percent of the gross benefits provided to the Class; specified that the amount of requested fees, expenses, and settlement administration expenses would not exceed $21,366,666.67, combined; explained that Class Members have the right to object to the Settlement or opt-out by October 30, 2023; and directed Class Members to the toll-free number and class action website for answers to any additional questions and for updates. *See id.* ¶ 6 & Ex. A. The deadline to object to or opt-out of the Settlement passed on October 30, 2023, Dkt. 310 ¶ 15, two weeks after Class Counsel filed its Motion for Attorneys'

Fees, Reimbursement of Litigation Expenses, and Service Award, Dkt. 312. Among the 18,585 Class Policies, only 2 policies made an opt-out request – an extraordinarily low number. Intrepido-Bowden Decl. ¶ 16. Likewise, only 2 objections (representing 3 policyholders) were submitted, both of which were ***withdrawn*** after Class Counsel reached out to the objectors and further explained the benefits of the Settlement. *See* Dkt. 311; Ard Decl. ¶¶ 45–47. For example, two policyholders mistakenly believed that the Settlement only benefited them upon their death, when in fact, the Settlement benefits will allow those owners to skip paying numerous quarterly premium payments.[1] *Id.* ¶ 45. The other policyholder likewise withdrew his objection after he understood that his net settlement recovery was more than $9,000 in accumulation value credits. *Id.* ¶ 46.

This overwhelmingly positive reaction from owners of the 18,585 Class Policies is powerful evidence that the Settlement, plan of distribution, and fee, expense, and service award requests should be granted and approved as fair, adequate, and reasonable. *See, e.g.*, *Simerlein v. Toyota Motor Corp.*, 2019 WL 2417404, at *19 (D. Conn. June 10, 2019) (reaction of class "strongly supports approval" where the only two objections to the settlement were both withdrawn and only a small number of class members opted out); *see also Keil v. Lopez*, 862 F.3d 685, 698 (8th Cir. 2017) (affirming settlement where 14 objections out of a class of approximately 3.5 million members were "small in number, which speaks well of class reaction to the Settlement").

[1] For policy L011808340, the owner had paid premiums of $525.50 per quarter for many years. The net premium is $509.73 after the policy's 3% premium charge is deducted. The estimated accumulation value increase for this policy is $3,323.32, which is equivalent to 6.5 quarterly net premium payments that, as a result of the Settlement, if approved, the owner no longer has to pay. For policy L011808350, the owner has paid premiums of $332.50 per quarter for many years. The net premium is $322.52 after the policy's 3% premium charge is deducted. The estimated accumulation value increase for this policy is $1,478.09, which is equivalent to 4.5 quarterly net premium payments that, as a result of the Settlement, if approved, the owner no longer has to pay. Ard Decl. ¶ 45. The owners of those policies withdrew their objections, once they understood these economic benefits conferred by the Settlement.

The Settlement is particularly outstanding in light of the substantial risks that the Class faced at trial. Establishing liability and damages in this case was far from certain. The trial would have largely turned on a battle of the experts, *see In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited."), as well as a highly complicated fact question about North American's pricing assumptions. A finding in North American's favor on that latter point would have wiped out virtually all damages, even if the Class prevailed on every single other issue. *See* Gibson Supp. Report ¶ 211 (calculating total overcharges at $367,668 if FMI were assumed at pricing). North American's actuaries were also prepared to opine that the COI rates were in fact *lower* than they should have been if based on EFME; an argument that, if accepted by the jury, would have resulted in Class members receiving nothing. *See* Dkt. 210 at 30. The risk of the Class recovering far less than the overcharges sought was real. In a recent COI class action trial within the Eighth Circuit, the jury found for the class on liability but awarded just 28% of damages, an amount later reduced to **5%** of claimed damages. *See* Dkts. 309-4–6. And even if the Class succeeded at trial, this case would likely be tied up in years of post-trial briefing and appeals, with no guarantee of success. *See Myers v. Iowa Bd. of Regents*, 2023 WL 7102158, at *10 (S.D. Iowa June 22, 2023) (noting that absent settlement, "the parties would continue to litigate complex, as well as uncertain, factual and legal questions" at trial, post-trial, and on appeal). The Settlement obviates these substantial risks and delays, and recovers for the Class substantial benefits likely distributed early next year, ***plus*** non-cash benefits that the Class could not have obtained even if it prevailed at trial.

Plaintiff was able to achieve this extraordinary result only through Class Counsel's tenacious, high-quality work for nearly five years, and pushing this case to the brink of trial. Class

Counsel drew on its extensive COI experience and dedicated almost 10,000 hours to this case to achieve this outstanding result in the face of high litigation risks.

One example of that risk surfaced early in the case. Just six months into this litigation, this Court denied class certification in *Taylor v. Midland National Life Insurance Co.*, 2019 WL 7500238 (S.D. Iowa May 3, 2019). *Taylor* involved similar COI claims against North American's sister company Midland, represented by the same defense counsel representing North American here. But Class Counsel was undeterred and devoted enormous efforts to address the issues raised in *Taylor*. Those efforts paid off when the Court certified the Class in this case, distinguishing its prior decision in *Taylor* because Class Counsel had done the work that had been missing in that case. But the risks didn't stop there. Class Counsel invested an enormous amount of time and expense into litigating this case, including over a million dollars in expert fees and other expenses, all with no assurance that it would receive payment for its services. Ard Decl. ¶¶ 34–35, 40. Over the course of this case, Class Counsel obtained, reviewed, and pushed for tens of thousands of documents that consisted of more than 100,000 pages; took and defended nine depositions; and served six subpoenas. This persistence paid off and led to the discovery of key documents that were prominently featured in the summary judgment resistance and would have been featured at trial. Dkt. 231 at 22 (MSJ Res.) 22–23, 37; *see* Ard Decl. ¶ 6.

Plaintiff also achieved this result through continued success on critical motions. Plaintiff obtained class certification and defeated a summary judgment motion that attacked all aspects of the case, including contract interpretation, timeliness, expert analysis, and the alleged misdeeds of Plaintiff's predecessors in interest. Dkts. 148, 294. Class Counsel defeated two rounds of *Daubert* motions and a motion for a court-appointed expert. Class Counsel also successfully moved 3 times to strike North American's untimely disclosure of 9 fact witnesses and obtained partial exclusion

of North American's economics expert. Dkts. 148, 221, 294. And by litigating until the eve of trial, Plaintiff's counsel put everything on the line to get the best result for the Class. *Phoenix COI*, 2015 WL 10847814, at *21 ("The risk of no recovery in complex cases of this type is real, and is heightened when Class Counsel opt to fight up to the eve of trial, in order to achieve the very best result for the class, rather than reaching a less attractive settlement early in the litigation.").

In parallel with these litigation efforts, Plaintiff engaged in settlement negotiations over the course of six months, which included a formal mediation session under the supervision of highly experienced mediators, Hon. Layn R. Phillips, Jeffrey Mishkin, and Clay Cogman of Phillips ADR, followed by extensive mediator-facilitated settlement negotiations as trial approached. *See* Ard Decl. ¶¶ 23–24. As the three mediators have confirmed, these negotiations were "at arm's length," with each party acting "carefully, deliberately and in good faith to advance the best interests of their clients." Dkt. 309-9, Cogman Decl. ¶ 10. These efforts culminated in this outstanding result for the Class. For all these reasons, Plaintiff respectfully requests that the Court grant final approval of the Settlement.

BACKGROUND

I. The Class Action Litigation

Plaintiff PHT's predecessor-in-interest, ATLES, filed this lawsuit almost five years ago, on October 30, 2018. PHT was substituted in as plaintiff and class representative on March 3, 2023, Dkts. 246–47, and took an active role in the litigation leading up to trial, Ard Decl. ¶¶ 42–43. PHT is the owner of universal life insurance policy number L011936710. Dkt. 29 ¶ 13 (amended complaint). The policy contains language stating that the COI rates used to calculate the COI charges under the policy "are determined by us, based on our expectations as to future mortality experience." *Id.* ¶ 6. Over the past several decades, mortality expectations, including North American's mortality expectations, have improved significantly nationwide. *Id.* ¶ 9. Still,

North American never reduced its COI rates. *Id.* ¶ 10. The complaint alleged that North American was breaching the terms of the Class Policies by failing to lower COI rates to reflect mortality improvement, and that North American was overcharging policyholders as a result. Dkts. 1, 29.

Plaintiff and Class Counsel have prosecuted this case for half a decade, through fact and expert discovery, class certification, a motion for a Rule 706 court-appointed expert, summary judgment, *Daubert* motions, deposition designations, exhibit lists, witness lists, motions *in limine*, and proposed *voir dire*, jury instructions, and verdict forms—to the eve of trial.

Fact discovery. Fact discovery closed on March 4, 2021. *See* Dkts. 74, 96. Class Counsel and its experts analyzed over 17,600 documents spanning more than 115,000 pages, which included extensive actuarial tables, policy-level data reflecting the historical credits and deductions for all Class Members' policies, and thousands of complex spreadsheets. Ard Decl. ¶¶ 6–7. Plaintiff took and defended nine fact and 30(b)(6) depositions, including the corporate representative depositions for ATLES and PHT II and the original owner of PHT's policy. *Id.* ¶ 8.

Through these extensive discovery efforts, Class Counsel uncovered key admissions and documents that would have featured prominently at trial. *See* Dkt. 231 at 22 (MSJ Res.) 22–23, 37; *see* Ard Decl. ¶ 6. These key discoveries included: (1) an internal email from 2004 that Plaintiff said contradicted North American's reading of the disputed policy language, *see* Dkt. 231 (MSJ Res.) at 15 (MSJ Res.); (2) a memorandum North American submitted to the New Jersey insurance regulator documenting what Plaintiff said were North American's pricing assumptions for the Classic Term UL products without any FMI, *id.* at 30; and (3) a communication with the New Jersey regulator in which North American said that it could only adjust COI rates based on EFME, and not on other factors such as investment earnings, persistency and expenses, *id.* at 15–16.

Expert Discovery. The superb result in this case was also driven by a tremendous amount

of expert work, including the analysis of hundreds of decades-old mortality tables, pricing models, and actuarial memoranda. Ard Decl. ¶¶ 6–9. Between class certification, merits reports, and supplemental pretrial reports, the parties produced 18 expert reports that totaled more than 583 pages, not including voluminous tables and appendices totaling thousands of additional pages. *Id.* ¶ 9. The parties designated four experts: Plaintiff's actuarial expert Howard Zail and damages expert Robert Mills, and North American's actuarial expert Jack Gibson and financial expert Craig Merrill. All four experts were deposed. *Id*. These depositions were central to Class Counsel's successful motion practice, including defeating summary judgment and succeeding on a *Daubert* motion excluding a substantial portion of Merrill's opinions. *Id.* ¶¶ 8, 18.

Motion Practice. This excellent result would not have been possible without Plaintiff's repeated successes on critical motions. Class Counsel successfully moved for class certification, even though this very court had recently denied certification in the *Taylor* case, defeated North American's two *Daubert* motions, and successfully moved to strike four undisclosed "agent" witnesses. Class Counsel then defeated North American's novel motion for appointment of a Rule 706 expert—an issue which had never before been briefed in a COI case. Next, Class Counsel defeated North American's motion for summary judgment (in a set of motions totaling nearly 350 pages of briefing), again defeated North American's *Daubert* motions, and again struck additional undisclosed witnesses. In the pre-trial phase, Class Counsel briefed and won critical motions *in limine*, including striking three more undisclosed witnesses from North American's trial witness list. *See* Dkts. 148, 221, 294, 296; Ard Decl. ¶¶ 10–13, 15–18, 21.

Trial Preparation. The Court set trial for June 20, 2023. After the Court denied North American's requests for a continuance and to extend the discovery period, Dkts. 260 & 286, the parties prepared intensely for trial, including readying examinations, deposition designations,

exhibit lists, witness lists, stipulations, jury instructions, verdict forms, and the proposed joint pretrial order (which the parties revised substantially following the rulings on summary judgment and *Daubert* motions). Dkts. 276, 278, 279, 280, 281, 282, 297, 298, 299, 303; Ard Decl. ¶ 20. Class Counsel briefed 15 motions *in limine* and filed more than 30 pages of single-spaced briefing on hotly contested jury instructions relating to *contra proferentem*, statutes of limitations, laches, and damages. Dkts. 252, 253, 263, 266, 281-2, 292, 293, 297-2; Ard Decl. ¶ 21. Before this, on April 13, 2023, Class Counsel conducted a mock trial in Des Moines, involving dozens of local mock jurors. Ard Decl. ¶ 19. The Court held a final pretrial conference on June 16, 2023, during which the Court granted Plaintiff's request for certain preliminary jury instructions and stated the Court would adopt Plaintiff's proposed final jury instructions on *contra proferentem* and laches.

II. The Class, Notice, and Opt-Out Period After Class Certification

The Court certified the following Class in its March 22, 2022 order (Dkt. 148): "All current and former owners of Classic Term UL I or II issued or insured by North American Company for Life & Health Insurance, or its predecessors, during the Class Period."

The Court appointed JND as notice administrator and approved the form and manner of notice consisting of direct mail to all members of the Class. *See* Dkt. 188 at 2–3. JND administered the notice plan. Dkt. 220 at 1; Dkt. 309-10 ¶ 13. Of the 18,592 policies then in the Class, JND received only seven opt-out requests. *Id.* ¶ 14.

III. Settlement Negotiations and the Settlement Agreement

The parties held an in-person mediation session on December 9, 2022, which was followed by six months of extensive mediator-facilitated settlement negotiations leading up to the trial—all under the supervision of Judge Phillips, Mr. Mishkin, and Mr. Cogman. Ard Decl. ¶ 23. Though the parties did not reach agreement at that the in-person mediation session, they continued to negotiate through the mediators as trial approached. The parties ultimately executed a term sheet

with trial less than 72 hours away (after the parties had extensively litigated key issues in the case and were preparing for opening statements), under the guidance and with the assistance of Mr. Cogman. A long-form settlement agreement was negotiated and agreed to thereafter. *Id.*; Dkt. 309-3 (Agreement). Mr. Cogman, Mr. Mishkin, and Judge Phillips all agree that the proposed Settlement is a "fair and reasonable result" for the Class. *See* Dkt. 309-9, Cogman Decl. ¶ 11.

A. Monetary and Non-Monetary Relief for Class Members

The Settlement awards relief worth **$61.3 million** to the Class, with two main benefits:

1. **CASH:** A Settlement Amount of **$59 million**, which is equal to approximately 36.2% of all overcharges collected by North American from the Class Policies through March 31, 2023 under Plaintiff's maximum damages model, 107% of overcharges under North American's "Multiplicative Approach," and 160 times the overcharges had North American prevailed on whether it assumed FMI at pricing, and

2. **VALIDITY STIPULATION AND STOLI WAIVER:** An agreement that North American will not challenge the validity and enforceability of any eligible policies owned by participating members of the Class on the grounds of lack of an insurable interest or as being STOLI. Plaintiff's expert values this agreement as conferring another **$2.3 million** in benefits to the Class.

See Ard Decl. ¶ 25 & Dkt. 309-3 §§ 1.56, 2.1, 2.4 (Agreement);[2] Rouse Rpt. at 1, 6.

B. Release

Once the Settlement becomes final, the Releasing Parties will release "all Claims that were asserted or could have been asserted in the Action related to the Policies from the beginning of time through the Final Approval Date." Dkt. 309-3 § 1.49 (Agreement). The Class will not, however, release "(a) any Claims arising out of COI deductions made after the Final Approval Date, (b) any Claims that relate to any policies other than Class Policies owned by Class Members, (c) any claims to complete or enforce the Settlement, (d) any claims to enforce a death benefit, and

[2] Because the Class is the class the Court already certified, *see* Dkt. 148, the Court does not need to recertify a class. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999) (affirming final approval under the same circumstances).

(e) any claims arising from any change to the COI rate scales that were in effect on June 17, 2023." *Id.* § 1.23; *see id.* § 1.49 ("[T]his is a historical release only and the release does not release any Claims arising out of COI deductions made after the Final Approval Date.").

C. Preliminary Approval, Class Notice, and the Second Opt-Out Period

The Court preliminarily approved the Settlement on August 25, 2023, concluding that "it will likely be able to approve the Settlement under Rule 23(e)(2)." Dkt. 310 ¶ 2. The Court ordered a second opt-out period. *Id.* ¶ 12. The appointed Settlement Administrator, JND, sent Settlement Notices to the Class Members on September 15, 2023, and subsequently sent additional notices to certain Class Members at updated addresses. Intrepido-Bowden Decl. ¶¶ 6–7. Notice was sent to the addresses on file in North American's records. **98.8%** of Class Members were successfully reached by mail. *Id.* ¶ 8. JND also posted the Long Form Settlement Notice on the public website created during the class notice period and operated a toll-free number for information by phone. *Id.* ¶¶ 9–14. The deadline to file objections to the Settlement or to opt out was October 30, 2023. *Id.* ¶ 15; *see* Dkt. 310 ¶ 15. JND received opt-out requests from two policyowners and received two objections for three other policyowners by that deadline. Intrepido-Bowden Decl. ¶¶ 16–18. However, the objections simply required clarification about the settlement terms and benefits, and were later withdrawn after the class members received additional information about the Settlement from Class Counsel. Dkt. 313 & Ard Decl. ¶¶ 45–47. "An objector should be free to withdraw on concluding that an objection is not justified." 2018 Adv. Comm. Notes to Rule 23.

The first (since withdrawn) objection, submitted by a married couple who each own a Class Policy, was premised on their mistaken belief that current policyholders would only benefit if they cashed out their policies before death. But under the Settlement, current policyholders are paid in credits to their accumulation value, which provides multiple benefits that do not require a policy cash out before death, including the benefit of paying less out-of-pocket premiums to keep the

policy in force. *See also supra* note 1. The couple withdrew their objection after Class Counsel clarified these factual points. Ard Decl. ¶ 45; *see* Dkt. 313. The second (since withdrawn) objection sought more information about the Settlement, including how much North American overcharged policyholders and the settlement benefits available to each policyholder. Ard Decl. ¶ 46. The second objector withdrew his objection after Class Counsel explained the terms of the Settlement and provided him with an estimate of his damages and net settlement recovery (approximately $9,000). *Id.* Pursuant to Rule 23(e)(5)(B), no payment or other consideration was provided (or requested) in connection with those class members' withdrawal of their objections. *Id.* ¶ 47.

D. Awards, Costs, and Fees

The Settlement Notice informed Class Members that Class Counsel would seek an attorneys' fee award of up to 33⅓ percent of the gross benefits provided to the Class, and specified that the amount of requested fees, expenses, and settlement administration expenses would not exceed $21,366,666.67, combined. Dkt. 309-12 at 2. It also explained that Class Counsel would seek a service award for the Class Representative not to exceed $25,000. *Id.* It further stated that Class Members could object to any part of this request. *Id.* at 3. Consistent with the Settlement Notice, Class Counsel filed its Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Award on October 16, 2023. *See* Dkt. 312. Class Counsel sought $19,666,666.67 in fees, which equals 33⅓ percent of the total cash value of the Settlement, litigation expenses capped at $1.7 million, and a $25,000 service award for PHT. Dkt. 312-1 at 5.

IV. Distribution Plan

The proposed plan of distribution, as set forth in the notice papers and described in the Sklaver Declaration in support of Preliminary Approval (Dkt. 309-1), which are available on the website established for this Action, distributes proceeds directly to Class Members on a *pro rata* basis without the need for a claim form. *See* Dkt. 309-1, Sklaver Decl. ¶ 32 & Ex. 7 (Plan of

Allocation) (Dkt. 309-8). Under this methodology, each Class Member's *pro rata* share is calculated by dividing the sum total of alleged damages for that Class Member by the sum total of alleged damages for the Class, as calculated under expert Robert Mills's methodology, through March 31, 2023. *Id.* The resulting percentage will be used to calculate each Class Member's respective share of the Net Settlement Fund. *See* Dkt. 309-3 § 2.2 (Agreement). The Settlement Administrator will send money to Class Members automatically in the mail, using the addresses that North American maintains on file, or distribute benefits directly to in-force policyholders' account accumulation values. Dkt. 309-1, Sklaver Decl. ¶ 32; Ard Decl. ¶ 30.[3] As with the rest of the Settlement, no Class Member has objected to any aspect of this plan.

ARGUMENT

I. Legal Standard

Federal courts strongly favor and encourage settlements, particularly in class actions. *See Beaver Cnty.*, 2017 WL 2574005, at *2 ("The policy in federal court of favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." (internal quotation marks omitted)). Approval of a class action settlement "is entrusted 'to the sound discretion' of the district court," *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 570 (S.D. Iowa 2011) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)), and is governed by Federal Rule of Civil Procedure 23(e)(2) (as revised in 2018). Rule 23(e)(2) provides:

> 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:

[3] The proposed notice and distribution plan also accounts for *pro rata* redistribution of any unclaimed amounts among in-force and terminated policies, subject to the economic and administrative feasibility of making such redistribution. Dkt. 309-8 ¶ 5; *see* Dkt. 309-3 § 2.2(e). If any funds remain, Class Counsel will file a motion with the Court to address the final disposition of those funds. Dkt. 309-8 ¶ 6.

> (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.

Courts in this Circuit evaluate the fairness and reasonableness of class action settlements using these factors, as well as the four factors set forth in *Van Horn v. Trickey*, 840 F.2d 604 (8th Cir. 1988). *See* 2018 Adv. Comm. Notes to Rule 23(e)(2) (confirming Rule 23(e)(2) amendments do not "displace" circuit case-law factors); *Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019) (2018 revision does not displace *Van Horn* factors but rather "focus[es] the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal").

The four *Van Horn* factors are: (1) the merits of the plaintiff's case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. 840 F.2d at 607. No one factor is determinative; however, "[t]he single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015).

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

A. Rule 23(e)(2)(A): Adequacy of Plaintiff and Class Counsel

Adequacy involves two questions: whether "(1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Kelly*, 277 F.R.D. at 569. The Court

has already recognized that Plaintiff and Class Counsel adequately represent the Class Members. *See* Dkt. 148 at 20–23, 28–29; *see also* Dkt. 247 (order granting substitution of PHT for ATLES).

Because Plaintiff shares the same injury (improper overcharges) and an overriding common interest with all other Class Members in maximizing their recovery, Plaintiff's interests are aligned with the Class. *See Grove v. Principal Mutual Life Ins. Co.*, 200 F.R.D. 434, 440 (S.D. Iowa 2001) (finding that plaintiffs' interests aligned with the class when the plaintiffs were class members, suffered the same injury, and did not have interests antagonistic to the class); *Myers*, 2023 WL 7102158, at *6 (common interest satisfied where class representatives "suffered the exact same injuries as class members"). Moreover, Plaintiff and Class Counsel have vigorously and competently litigated this case. *See* Ard Decl. ¶¶ 6–22; *see also* Dkt. 148 at 28–29 (finding that Class Counsel "satisfies the requirements of Rule 23(g)," noting its "extensive experience" litigating similar class actions and the "substantial time" it invested in this case).

B. Rule 23(e)(2)(B): Arm's-Length Negotiation

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." Here, as the Court already found, the Settlement "was entered into at arm's length by highly experienced counsel." Dkt. 310 ¶ 3. The Settlement is the product of a hard-fought negotiation process that spanned six months, including an in-person mediation session under the supervision of highly experienced, respected, and neutral mediators, one of whom, Hon. Layn R. Phillips, used to be a United State District Judge. *See* Ard Decl. ¶ 23; *Myers*, 2023 WL 7102158, at *7 (mediation before a "retired federal judge" supported finding that settlement was negotiated at arm's length); *Kelly*, 277 F.R.D. at 570 ("extensive arm's-length negotiations" supported fairness finding).

C. Rule 23(e)(2)(C): Adequacy of Relief Provided to the Class

Rule 23(e)(2)(C) requires that "the relief provided for the class is adequate, taking into account" four subfactors: "(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)."

i. Rule 23(e)(2)(C)(i) Subfactor: Costs, Risks, and Delay

Rule 23(e)(2)(C)(i) requires courts to consider "the costs, risks, and delay of trial and appeal." This inquiry overlaps with *Van Horn* factors one ("the merits of the plaintiff's case, weighed against the terms of the settlement") and three ("the complexity and expense of further litigation"). 840 F.2d at 607. *First*, the costs, risks, and delay of trial and appeal that were avoided by the Settlement were significant. North American, represented by experienced and reputable counsel, would no doubt have raised a vigorous defense at trial. *See, e.g.*, *Kelly*, 277 F.R.D. at 570 (considering that the defendant had "capable counsel at its disposal" who "intended to challenge nearly every aspect of Settlement Class Members' case" as a factor that supported approving the settlement). The Court left numerous questions critical to proving breach for the jury, including which factors North American could consider in setting COI rates, and what were North American's pricing assumptions. Dkt. 294 at 10, 19–23. Even if Plaintiff prevailed on all contractual interpretation issues, there would have been no guarantee of any recovery at trial, let alone a recovery of over $60 million in total value to the Class. The *Meek* litigation in the Western District of Missouri—where the class sought $18 million in damages but the jury only awarded $5 million, an amount that the court reduced post-trial to less than $1 million—is case in point. *See* Dkt. 309-5 (*Meek* verdict form), Dkt. 309-6 (*Meek* final judgment). Here, for example, if North American prevailed on its argument that it already expected FMI at original pricing, damages would have been reduced to $367,668, even if Plaintiff prevailed on every single other issue. *See* Gibson Supp. Rpt. at 121, *id.* at 76 ¶ 134 (May 31, 2023); *see also* Dkt. 235-1 at 8–9 (Defendant

arguing that correcting for a purported error in Plaintiff's model would reduce damages by 98.5%). And even if the jury agreed that FMI was not assumed at pricing, and also fully agreed with Plaintiff's interpretation of the policy language, it could have nonetheless endorsed Mr. Gibson's "multiplicative approach," under which damages would total only $54,888,640.

Even if Plaintiff fully prevailed on both liability and damages at trial, it would then be tied up in lengthy appeals. North American would appeal the class certification order, the summary judgment order, and the jury's verdict, which would likely delay any distributions to Class Members for years—or, if North American were successful, eliminate them altogether. *See Myers*, 2023 WL 7102158, at *10 (in granting preliminary approval, considering that absent settlement, "the parties would continue to litigate complex, as well as uncertain, factual and legal questions" through "trial, post-trial motions, and appeals," at "enormous cost" to the parties all while the class "would contain no benefit while the matter continued to be litigated"); *see also Murphy v. Harpstead*, 2023 WL 4034515, at *6 (D. Minn. June 15, 2023) (considering same factors).

Second, given all of these risks, the recovery here is an exceptional result. The Settlement Amount accounts for **36.2%** of the historical COI overcharges through March 31, 2023 under Plaintiff's damages model; over **107%** of the damages under North American's multiplicative approach; and over **160 times** the damages if the jury found that FMI was assumed at pricing. Ard Decl. ¶ 26. Courts routinely approve settlements with substantially lower percentage recoveries, *see Beaver Cnty.*, 2017 WL 2574005, at *2, *4 (recoveries below 10% of maximum damages model exceed "the median settlement as a percentage of estimated damages in the Eighth Circuit"); and laud the success of similar percentage recoveries, *see Hancock COI*, Dkt. 164 at 20:10 (cash fund amount equal to 42% of COI overcharges was "quite extraordinary").

Third, the "complexity and expense of further litigation" supports final approval. The Eighth Circuit has recognized that "[c]lass actions, in general, place an enormous burden of costs and expense upon parties. Here, the application of numerous states' laws made this a particularly complex case." *Keil*, 862 F.3d at 698 (internal quotation marks omitted). This nationwide class action case was no exception. Trial would have featured dueling actuarial experts testifying about technical actuarial standards, assumptions, documents, and data. *See* Dkt. 294 at 24 ("disagreement between experts is a paradigmatic factual dispute"). Post-trial briefing and appeals would have only added to the complexity and expense. *See Myers*, 2023 WL 7102158, at *10 (recognizing "enormous cost" and "extensiveness" of trial through appeal stages supported approval).

ii. Rule 23(e)(2)(C)(ii) Subfactor: Effectiveness of Distribution Method

The second Rule 23(e)(2)(C) subfactor looks to "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Here, under the detailed and specific plan of allocation, Class Members will be distributed the Net Settlement Fund in proportion to their share of the overall damages, without the need for any action on their part. Dkt. 309-8. "This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable." *Phoenix COI*, 2015 WL 10847814, at *12 (collecting cases); *Carroll v. Flexsteel Indus., Inc.*, 2022 WL 4002313, at *3 (N.D. Iowa Sept. 1, 2022) (finding "equitable" a "pro rata" "proposed distribution formula").

iii. Rule 23(e)(2)(C)(iii) Subfactor: Proposed Award of Attorneys' Fees

The third Rule 23(e)(2)(C) subfactor requires the Court to consider "the terms of any proposed award of attorney's fees." Here, Class Counsel seeks an award of 33⅓ percent of the monetary benefits of the Settlement after a nearly five-year litigation campaign. Dkt. 312; Ard Decl. ¶¶ 6–22, 44. Class Counsel filed its Motion for Attorneys' Fees filed on October 16, 2023, Dkt. 312, which was posted to the class website the next day, Intrepido-Bowden Decl. ¶ 10. There

are no pending objections to the requested fee. *See Beaver Cnty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 2017 WL 2588950, at *3 (D. Minn. June 14, 2017) ("The lack of objections is strong evidence that the requested amount of fees and expenses is reasonable.").

iv. Rule 23(e)(2)(C)(iv) Subfactor: Agreements Required to be Identified

The final subfactor, which considers "any agreement required to be identified under Rule 23(e)(3)," supports approval because there are no such agreements here beyond the Settlement. *See Murphy*, 2023 WL 4034515, at *6.

D. Rule 23(e)(2)(D): The Proposal Treats All Class Members Equitably

The final Rule 23(e)(2) factor requires the Court to assess whether "the proposal treats class members equitably relative to each other." The proposed plan of allocation treats Class Members equitably by distributing damages on a *pro rata* basis using each Class Member's share of the total damages. Dkt. 309-8. Courts have repeatedly approved *pro rata* allocation plans. *See, e.g.*, *Myers*, 2023 WL 7102158, at *9 ("The implementation of a pro rata structure for award payouts, which correlates recovery amount to the scope of the injury, supports a settlement being equitable."); *see also Rogowski*, 2023 WL 5125113, at *3 (approving COI settlement allocating proceeds *pro rata* "primarily in proportion to the Monthly Deductions paid by each [policyowner]"). The releases are also narrowly tailored and equitable, as they treat Class Members equally. *See* Ard Decl. ¶ 29.

E. The Remaining *Van Horn* Factors Support Final Approval

The two remaining *Van Horn* factors, which do not directly overlap with the Rule 23(e)(2) factors, are: (1) the defendant's financial condition, and (2) the amount of opposition to the settlement. The first is neutral; and the second strongly favors approval. Because North American is "in good financial standing, which would permit it to adequately pay for its settlement obligations or continue with a spirited defense in the litigation," the "defendant's financial condition" factor is "neutral." *Marshall*, 787 F.3d at 512.

The "amount of opposition" factor strongly supports approval because ***there is no opposition***. *See Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1080 (D. Minn. 2009) (lack of objections "strongly supports" final approval). JND mailed 18,585 notices to the addresses maintained in North American's records on September 15, 2023, and an additional 68 notices because of address updates on September 15, 2023. Intrepido-Bowden Decl. ¶¶ 6–8. JND also established a toll-free hotline and a public website (https://www.coiclassaction-na.com), which hosts important case documents, answers frequently asked questions, and provides important information about Settlement deadlines and options. *Id.* ¶¶ 9–12.

As stated in the Settlement Notice and on the website, the deadline to object to or opt out of the Settlement was October 30, 2023. Dkt. 310 ¶ 15; *see also* Intrepido-Bowden Decl. ¶¶ 15, 17. Only two Class Members (.01% of the Class) opted out. Intrepido-Bowden Decl. ¶ 16. And only three—out of 18,585—Class Members submitted objections to the Settlement, all of which have been withdrawn after receiving additional information concerning the settlement from Class Counsel, *id.* ¶ 18; *see* Ard Decl. ¶¶ 45–47. *See Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 879 (S.D. Iowa 2020) ("insignificant amount of opposition" of 26 objections and 3,682 opt-outs amounting to .02% of class supported final approval). Aside from these withdrawn objections, no other Class Members objected to either the Settlement or the attorneys' fees request by the October 30 deadline—or as of the filing of this Motion. Intrepido-Bowden Decl. ¶ 18.

CONCLUSION

Because the Rule 23(e) and *Van Horn* factors support finding that the Settlement is fair, reasonable, and adequate, the Court should grant final approval of the Settlement; approve the notice program as complying with Rule 23 and due process; and approve the plan of distribution.

Dated: November 13, 2023

/s/ Seth Ard

SUSMAN GODFREY L.L.P.
Seth Ard (*Pro Hac Vice*) (Lead Counsel)
Ryan C. Kirkpatrick (*Pro Hac Vice*)
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Phone: (212) 336-8330
sard@susmangodfrey.com
rkirkpatrick@susmangodfrey.com

Steven Sklaver (*Pro Hac Vice*)
Krysta Kauble Pachman (*Pro Hac Vice*)
Glenn Bridgman (*Pro Hac Vice*)
Nicholas N. Spear (*Pro Hac Vice*)
Halley W. Josephs (*Pro Hac Vice*)
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Phone: (310) 789-3100
ssklaver@susmangodfrey.com
kpachman@susmangodfrey.com
gbridgman@susmangodfrey.com
nspear@susmangodfrey.com
hjosephs@susmangodfrey.com

Class Counsel

/s/ Robin G. Maxon
R. Ronald Pogge (AT0006374)
Robin G. Maxon (AT0005005)
Chandler M. Surrency (AT0012332)
HOPKINS & HUEBNER, P.C.
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Phone: 515-244-0111
Fax: 515-697-4299
rpogge@hhlawpc.com
rmaxon@hhlawpc.com
csurrency@hhlawpc.com

Attorneys for Plaintiff