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, v. NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, Defendant.	Civil Action No. 18-CV-00368 **MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARD**

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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
Counsel	Class Counsel and Local Counsel, together
EFME	Expectations as to future mortality experience
FMI	Future mortality improvement
Gibson Supp. Report	The Supplemental Expert Report of North American's Expert Jack Gibson dated May 31, 2023
Intrepido-Bowden Decl.	Declaration of Gina Intrepido-Bowden, filed contemporaneously with this memorandum
Surrency Decl.	Declaration of Chandler Surrency, filed contemporaneously with this memorandum
Local Counsel or H&H	Hopkins & Huebner
PHT	Class Representative PHT Holding II LLC
North American	Defendant North American Company for Life and Health Insurance
Settlement	Joint Stipulation and Settlement Agreement
SG or Class Counsel	Susman Godfrey L.L.P.
STOLI	Stranger-owned life insurance

INTRODUCTION

After nearly five years of hard-fought litigation, and seventy-two hours before trial, Class Counsel settled this highly complex case for $59 million, which represents approximately ***36%*** of all COI overcharges collected by North American 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). Each of these numbers 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's 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").

Given these tremendous results, Class Counsel respectfully applies for an attorneys' fee award equal to 1/3 of the $59 million settlement. This figure is consistent with the range approved in similar COI cases, *see, e.g.*, *Rogowski v. State Farm Life Ins. Co.*, 2023 WL 5125113, at *5 (W.D. Mo. Apr. 18, 2023) ("*Rogowski COI*") (approving fee award of 33⅓ percent of $325 million settlement); *Vogt v. State Farm Life Ins. Co.*, No. 16-CV-04170-NKL, Dkt. 458 (W.D. Mo. Jan. 25, 2021) ("*Vogt COI*") (approving fee award of 33⅓ percent of $34 million judgment), as well as other class actions in the Eighth Circuit, *see, e.g., Karg v. Transamerica Corp.*, 2021 WL 9440635, at *1–2 (N.D. Iowa Nov. 22, 2021) (awarding attorneys' fees of 33⅓ percent of the total monetary and non-monetary benefit to the class); *Karg*, No. 18-CV-00134-CJW-KEM, Dkt. 92-1, at 8 n.2 (N.D. Iowa Oct. 4, 2021). The Eighth Circuit has noted "courts have frequently awarded attorneys'

fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017).

In the Eighth Circuit, the reasonableness of a requested fee is measured by a multi-factor analysis (the "*Johnson* factors"). *See League of Women Voters of Mo. v. Ashcroft*, 5 F.4th 937, 941 (8th Cir. 2021) (noting that the Eighth Circuit has adopted the factors in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). These factors, including consideration of the results achieved in the case, the skill required to achieve these results, and fee awards in similar cases, support the requested fee.

First, the results achieved are excellent. The settlement compares well to other COI settlements such as the *Hancock COI* case, where the court praised a settlement covering 42% of the COI overcharges as a "quite extraordinary" result. *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, No. 15-cv-9924 (PGG), Dkt. 164 at 20:10 (S.D.N.Y. Apr. 18, 2019). And as explained above, the cash recovery alone, as a percentage of COI overcharges, far exceeds the median settlement-to-damages ratio obtained in other class actions in this Circuit. *See Beaver Cnty. Emps.' Ret. Fund*, 2017 WL 2574005, at *3. Payment will be sent directly to Class Members in the form of a check or a deposit to their account value, without a need to fill out any claim form, and without any reversion to North American. Further, the release is a historical release only and does not release any Claims arising out of COI deductions made after the Final Approval Date.

This recovery is especially impressive in light of the substantial risks that the Class faced at every stage of this litigation. 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). That case involved similar 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. North American aggressively litigated this case, opposing class certification and filing two rounds of *Daubert* motions, a motion for a court-appointed expert, and a summary judgment motion that attacked all aspects of the case: contract interpretation, timeliness, expert analysis, and the alleged misdeeds of Plaintiff's predecessors in interest. Although Class Counsel overcame all of this, North American made clear that it was prepared to try this case. At trial, North American's actuaries and experts would have testified 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 defeated Plaintiff's claim for breach. *See* Dkt. 210 at 30.

Even if Plaintiff prevailed on liability, the Class still faced enormous risks on damages. North American intended to present multiple alternative damages numbers, most that were substantially lower than $59 million. For example, a heavily contested issue was whether North American used FMI in pricing the policies. Had North American won just that one issue, and its related arguments, damages would have plummeted to just $367,668. Gibson Supp. Report ¶ 211.

These risks are real. In a recent COI class action trial within the Eighth Circuit, the jury found for the class on liability but awarded **just 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. The Settlement obviates these substantial risks and delays, and recovers for the Class substantial payments likely distributed by the end of the year.

Second, a high degree of skill was required to achieve these results. 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. This was not a case where Class Counsel

piggybacked off of a prior governmental investigation, whistleblower, or news exposé. Instead, Class Counsel performed the initial factual and legal investigation before filing this lawsuit, worked thousands of hours thereafter, and spent over a million dollars in expert fees and other expenses, all with no assurance that it would receive payment for its services. This hard work paid off—not only did Class Counsel defeat all of Defendants' attempts to scuttle the case, Class Counsel also successfully excluded nine North American fact witnesses and partially excluded North American's economics expert.

Class Counsel achieved this outstanding settlement result by pushing this class action to the brink of trial, which heightened the risk but increased the reward for the Class. *See Fleischer v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *21 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*") ("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.").

Third, the requested fee award of 33⅓ percent of the common fund is at the low end of the range commonly approved in this Circuit. *See, e.g.*, *Huyer*, 849 F.3d at 399; *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Courts in this Circuit and this District have frequently awarded attorney fees of 33 1/3%–36% of a common fund.").[1] And in at least two other COI cases in this Circuit, courts have awarded Class Counsel 33⅓ percent of the common fund obtained after considering the *Johnson* factors. *See Rogowski COI*, 2023 WL 5125113, at *5; *Vogt*

[1] *See also In re US. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (36% fee award was reasonable); *City of Farmington Hills v. Wells Fargo Bank*, No. 0:10-cv-04372-DWF-HB, Dkt. 686 ¶¶ 14–15, 17 (D. Minn. Aug. 18, 2014) (approving award of 33⅓ percent of $62.5 million fund); *Meller v. Bank of the W.*, 2018 WL 5305562, at *9 (S.D. Iowa Sept. 10, 2018) ("An award of 33 1/3% of the maximum settlement amount is in line with other awards in the Eighth Circuit."), *report and recommendation adopted*, 2018 WL 5305556 (S.D. Iowa Oct. 1, 2018).

COI, Dkt. 458. Further, although a lodestar cross-check is not required, the 2.61 multiplier here is far below what the Eighth Circuit has found reasonable. *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019) (finding a 5.3 multiplier to be within "the bounds of reasonableness").

In addition, Plaintiff agreed to cap Class Counsel's expense request at $1.7 million, despite the fact that total expenses, including settlement administration costs, are projected to exceed $1.9 million. Class Counsel will absorbed the unreimbursed litigation and administration expenses, effectively reducing the requested fee below 33.3%. Further, Class Counsel's calculation of its fee request only considers the cash component of the Settlement in isolation, and does not seek a percentage of the value conferred by the Settlement's Validity Stipulation and STOLI Waiver, although courts routinely award fees as a percentage of the combined monetary and non-monetary benefits. *See, e.g.*, *Karg*, 2021 WL 9440635, at *1–2 (awarding attorneys' fee of 33⅓ percent of the total monetary and non-monetary benefit to the class).

The requested award and reimbursement—$19,666,666.67 in fees, reimbursement of $1.7 million in expenses, and a $25,000 service award for the Class Representative—are warranted by the tremendous results Class Counsel achieved, and the huge risks taken in this years-long litigation brought on a full contingency fee basis.

BACKGROUND

I. Plaintiff Challenges COI Overcharges and Litigates this Case for Nearly Five Years

Plaintiff's predecessor-in-interest, ATLES, filed this lawsuit almost five years ago, on October 30, 2018. 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. Dkt. 1; *see* Dkt. 29 (amended complaint). On March 22, 2022, the Court certified the Class, appointed ATLES as class representative, and appointed SG as Class Counsel. Dkt. 148. SG is highly experienced in representing classes seeking

recovery of COI overcharges against insurers. Ard Decl. ¶ 3-4. ATLES' successor-in-interest, PHT, was substituted in as plaintiff and class representative on March 3, 2023. Dkts. 246-47.

Class Counsel has vigorously prosecuted this case for nearly five years, through fact and expert discovery, motions to compel, class certification, a motion for a court-appointed expert under Federal Rule of Evidence 706, 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. ¶ 5.

These extensive discovery efforts bore fruit. Class Counsel uncovered 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. ¶ 5. Likewise, Class Counsel took six fact depositions (including multiple 30(b)(6) corporate representatives), which yielded numerous important admissions. Class Counsel further defended corporate representative depositions for ATLES and PHT II and deposed the original owner of PHT's policy. Ard Decl. ¶ 7.

Expert Discovery. 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. 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. Ard Decl. ¶ 8. All four experts were deposed. *Id*. These depositions were central to Class Counsel's successful

motion practice, including defeating North American's summary judgment motion and winning a *Daubert* motion excluding a substantial portion of defense expert Craig Merrill's opinions.

Motion Practice. Class Counsel succeeded on the numerous critical motions in this case:

- Class Counsel successfully moved for class certification, even though this very court had recently denied class certification in the *Taylor* case.
- Class Counsel defeated North American's two *Daubert* motions at class certification.
- Class Counsel successfully moved to strike four undisclosed "agent" witnesses.
- Class Counsel 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.
- Class Counsel defeated North American's motion for summary judgment (in a set of motions totaling nearly 350 pages of briefing).
- Class Counsel defeated North American's *Daubert* motions at summary judgment.
- Class Counsel struck additional undisclosed witnesses at summary judgment.
- Class Counsel briefed and won critical motions *in limine*, including striking three more undisclosed witnesses from North American.

See Dkts. 148, 221, 294, 296; Ard Decl. ¶¶ 9-17, 20.

Trial Preparation. The Court set trial for June 20, 2023. After the Court denied North American's late-breaking requests for a continuance and to extend the discovery period, Dkts. 260 & 286, the parties prepared intensely for trial, including readying trial 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 Court's ruling on summary judgment and *Daubert* motions). Dkts. 276, 278, 279, 280, 281, 282, 297, 298, 299, 303; Ard Decl. ¶ 19. In addition to briefing 15 motions *in limine,* Class Counsel 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. ¶ 20. Before this, on April 13, 2023, Plaintiff conducted a mock trial in Des Moines, involving dozens of local residents acting as jurors. Ard Decl. ¶ 18. 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. Dkts. 306, 308 at 12:12–13, 31:14–21; Ard Decl. ¶ 21. Because the case was so close to trial, the Court also provided important information to the parties about the potential jurors, enabling the parties to consider information about the jury pool in settlement negotiations.

II. Class Counsel Engaged in Settlement Negotiations Through the Eve of Trial

The parties held an in-person mediation session on December 9, 2022 in Corona Del Mar, California, with mediators Hon. Layn R. Phillips, Jeffrey Mishkin, and Clay Cogman of Phillips ADR. Ard Decl. ¶ 22. The parties submitted mediation statements, draft term sheets, and summary judgment and *Daubert* briefs that had already been filed, and Plaintiff also provided an updated damages estimate. *Id*. The parties were unable to reach an agreement but continued to work through six months of extensive mediator-facilitated settlement negotiations as trial approached. *Id.* The parties ultimately executed a term sheet with trial less than 72 hours away, with the assistance of Judge Phillip's office. *Id.* These negotiations were hard-fought and conducted at arm's length by highly qualified and experienced counsel. *Id.* Those negotiations were fruitful only after the parties had extensively litigated key issues in the case and were days from trial. *Id.*

The Settlement has two main components:

1. **CASH:** A Settlement Amount of **$59,000,000.00**, 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.[2]

Upon final approval, the Settlement Administrator will distribute to Final Class Members their *pro rata* share of the Final Class Member Settlement Benefits. Checks will be mailed directly to Final Class Members whose policies have terminated, using the addresses in North American's files, while Final Class Members with in-force policies will receive payments directly in the accumulation values of their policy accounts, all without requiring any Final Class Member to submit claim forms. Settlement § 2.2. In return, Class Members will release only claims for past overcharges. In other words, the release is a historical release only and does not release any Claims arising out of COI deductions made after the Final Approval Date. *Id.* § 1.49.

ARGUMENT

I. Class Counsel's Fee Request Is Reasonable

A. Class Counsel Is Entitled to Fees from the Common Fund

"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). The Supreme Court has long recognized that a lawyer who obtains a recovery "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."

[2] "STOLI" is a term of art for "stranger originated life insurance," which is frequently a basis for insurers to challenge the validity of life insurance policies. The last few years have seen a resurgence of STOLI litigation. *See, e.g, Pacific Life Ins. Co. v. Wells Fargo Bank, N.A.*, C.A. No. 8:21-cv-737 (PJM) (D. Md.), *Columbus Life Ins. Co. v. Wilmington Trust, N.A.*, C.A. No. 20-735-MN-JLH (D. Del); *Sun Life Assurance Co. of Canada v. Bank of Utah*, Case No. 21-CV-3973-LMM (N.D. Ga.).

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

B. The Requested Fee Is Reasonable

1. The Percentage-of-the-Benefit Approach Is Favored

Courts in this Circuit typically use the percentage-of-the-benefit method to award attorney's fees from a common fund. *See, e.g.*, *Rawa*, 934 F.3d at 870. "It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement." *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1157 (8th Cir. 1999). Courts have noted that the percentage method is "preferable" to the lodestar method for determining reasonable fees where fees and class benefits come from one fund. *Barfield v. Sho-Me Power Elec. Co-op.*, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015). This is because the percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the class's recovery. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he [Third Circuit] Task Force recommended that the percentage of the benefit method be employed in common fund situations.").[3]

2. A Fee of 33⅓ Percent of the Monetary Benefits Is Reasonable

Class Counsel respectfully requests a fee award of $19,666,666.67, which is 33⅓ percent of the $59 million Settlement Amount, and does not include the value of the Validity Stipulation and STOLI waiver. Courts regularly approve fee awards between 33⅓ percent and 36 percent of the common fund. *See, e.g.*, *Huyer v. Wells Fargo & Co.,* 314 F.R.D. 621, 629 (S.D. Iowa 2016) *("*The Court finds an award of 33 1/3% of the settlement fund to be in line with other awards in the Eighth Circuit."), *aff'd*, *Huyer*, 849 F.3d at 399 ("Indeed, courts have frequently awarded

[3] "In contrast, the lodestar creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (cleaned up).

attorneys' fees ranging up to 36% in class actions.).[4] The fee awards in other COI-related cases in this Circuit confirm the reasonableness of the request. *See, e.g.*, *Rogowski COI*, 2023 WL 5125113, at *5 (approving fee award of 33⅓ percent of $325 million settlement); *Vogt COI*, Dkt. 458 (approving fee award of 33⅓ percent of $34 million judgment).

C. A Lodestar "Cross-Check" Confirms the Fee Request Is Reasonable

When courts award a percentage of the benefit, they may—but are not required to—perform a lodestar "cross-check." *See In re CenturyLink Sales Pracs. & Sec. Litig.*, 2020 WL 7133805, at *13 (D. Minn. Dec. 4, 2020) ("When the Court uses the percentage-of-the-benefit method, it is not required to cross-check it against the lodestar method." (citing *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017))).[5] "The lodestar cross-check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case." *In re Pork Antitrust Litig.*, 2022 WL 4238416, at *9 (D. Minn. Sept. 14, 2022) (cleaned up). This includes "the contingent nature of success" and "the quality of the attorneys' work." *Anderson v. Travelex Ins. Servs.*, 2021 WL 4307093, at *4 (D. Neb. Sept. 22, 2021) (citing *Jorstad v. IDS Realty Tr.*, 643 F.2d 1305, 1312–13 (8th Cir. 1981)).

The lodestar method involves "multipl[ying] the number of hours worked by the prevailing hourly rate." *Vines v. Welspun Pipes Inc.*, 9 F.4th 849, 855 (8th Cir. 2021) (cleaned up). The Court

[4] *See also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017) (affirming award of 1/3 of $60 million settlement fund); *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285-86 (D. Minn. 1997) (awarding 33⅓ percent of $86 million fund); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming award of 36% of $3.5 million settlement fund); *Meller*, 2018 WL 5305562, at *9 ("An award of 33 1/3% of the maximum settlement amount is in line with other awards in the Eighth Circuit."); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061–62 (D. Minn. 2010) (awarding 33⅓ percent).

[5] Courts in the Eighth Circuit have used the percentage method without reference to a lodestar cross-check. *See, e.g.*, *Baldwin v. Nat'l W. Life Ins. Co.*, 2022 WL 16709706, at *3 (W.D. Mo. June 16, 2022) (calculating and approving attorneys' fees by using the percentage method without reference to a lodestar cross-check); *Massey v. Shelter Life Ins. Co.*, 2006 WL 8457745, at *2 (W.D. Mo. Oct. 17, 2006) (same).

then considers the multiplier that would result from the requested fee using the percentage-of-the-benefit method. "The resulting multiplier need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases." *Yarrington*, 697 F. Supp. 2d at 1065. The Eighth Circuit has noted that a 5.3 lodestar multiplier is within "the bounds of reasonableness." *Rawa*, 934 F.3d at 870; *see also In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *18 (E.D. Mo. Jun. 30, 2005) (finding a 5.61 cross-check multiplier to be reasonable)).

In this entirely contingent action, Class Counsel spent 8,856.40 hours representing a lodestar of $7,248,950, and advanced $1,785,634.28 in expenses. *See* Ard Decl. ¶¶ 24-25, 30. Local Counsel spent 778.8 hours, representing a lodestar of $271,100, and advanced $1,094.05 in expenses. *See* Surrency Decl. ¶¶ 8, 12. Together, Counsel spent 9,635.2 hours, representing a lodestar value of $7,520,050, and advanced $1,786,728.33 in expenses. *See* Ard Decl. ¶¶ 25, 30.[6]

The resulting 2.61 multiplier, Ard Decl. ¶ 29, is far below the 5.3 lodestar the Eighth Circuit has said is within "the bounds of reasonableness," *Rawa*, 934 F.3d at 870, and well within the range of cross-check multipliers approved in other COI cases obtaining outstanding results, *see, e.g.*, *Rogowski COI*, 2023 WL 5125113, at *5 & n.8 (approving fee award of 33⅓ percent of $325 million, with lodestar multiplier of 5.75); *Phoenix COI*, 2015 WL 10847814, at *18 (approving 4.87 multiplier); *Hancock COI*, Dkt. 164 at 19:14–20:11 (approving 6.92 multiplier).

Counsel's hourly rates are reasonable. These rates, and the rates of the members of their

[6] The lodestar is calculated at current hourly rates. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rates); *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 325 (8th Cir. 1993) ("[I]n setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." (cleaned up); *White v. Martin*, 290 F. Supp. 2d 986, 991 (D. Minn. 2003) (holding that it was "appropriate to apply current rates rather than historical ones").

staff, are lower than peer firms litigating matters of similar magnitude. While courts in this Circuit generally determine whether an hourly rate is reasonable by looking at the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984), where, as here, "particular legal specialization is required, courts may consider a national billing rate," *ResCap Liquidating Tr. v. Primary Residential Mortg., Inc.*, 2021 WL 1668013, at *12 (D. Minn. Apr. 28, 2021) (citing *Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1992)), *aff'd*, 59 F.4th 905 (8th Cir. 2023).

In a June 2023 nationwide survey of AmLaw 50 law firms, the median standard billing rate for equity partners was $1,463, the first quartile standard billing rate was $1,655, and the third quartile standard billing rate was $1,371. Ard Decl. ¶ 27. The median standard billing rate for associates was $933, the first quartile standard billing rate was $1,018, and the third quartile standard billing rate was $838. *Id.* Many of the SG partners working on this matter have billing rates of $800—below the 2022 median standard billing rate for *associates*. *Id*. ¶ 28. Thus, courts routinely find SG's rates reasonable. *See, e.g.*, *Hancock COI*, Dkt. 164 at 19:6–20:11 (accepting SG's rates as reasonable); *Phoenix COI*, 2015 WL 10847814, at *18 (finding SG's rates "reasonable" and "comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude").

D. The *Johnson* Factors Support Class Counsel's Fee Request

Under either the percentage or lodestar approach, courts in the Eighth Circuit "consider relevant factors from the twelve factors listed in *Johnson*." *Keil*, 862 F.3d at 701. They are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

In re Target Corp. Customer Data Sec. Breach Litig., 892 F.3d 968, 977 n.7 (8th Cir. 2018).[7]

1. Time and Labor Required (*Johnson* Factor 1)

The first *Johnson* factor supports approval of the requested fee. Class Counsel spent almost 10,000 hours prosecuting this case over almost five years, and that figure will increase as Class Counsel prepares for final approval proceedings and administers the Settlement.

2. Novelty and Difficulty of the Questions (*Johnson* Factor 2)

The second *Johnson* factor also strongly supports approval of the requested fee. This was, to Class Counsel's knowledge, the first-ever case challenging COI overcharges by North American, and North American even asserted as a defense that Plaintiff's claims were barred by laches because North American had been engaging in the disputed conduct for so long without being sued. The claims themselves "presented some difficult and novel factual and legal issues, including with respect to interpretation of the Policy and the calculation of damages." *Vogt COI*, Dkt. 458 ¶ 8. Indeed, North American aggressively challenged liability and class certification, and the Court issued a detailed opinions in response to those challenges. *See* Dkts. 114, 210, 148, 294.

The risk Class Counsel confronted in this case is exemplified by this Court's decision in *Taylor*, which denied class certification in a case asserting similar claims against North American's sister company and was issued while this case was in fact discovery. A similar result here would have doomed this case. Policyowners have lost other COI cases on the pleadings, *see, e.g.*, *Slam Dunk I, LLC v. Conn. Gen. Life Ins. Co*., 853 F. App'x 451, 455 (11th Cir. 2021); on summary judgment, *see e.g.*, *Norem v. Lincoln Ben. Life Co*., 737 F.3d 1145, 1155 (7th Cir. 2013); and have

[7] The seventh *Johnson* factor is not relevant to the circumstances of this contingent class action. *Cf. Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020) (Rose, J.) (finding seventh Johnson factor "not applicable here").

been awarded only a fraction of requested damages at trial despite prevailing on liability (and then had those damages further reduced post-trial), *Meek*, No. 19-CV-472 (Dkts. 309-4-6). Trial is especially risky where it is, as here, a "battle of experts." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y. 1985) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited."), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

Class Counsel faced additional hurdles, including an argument that North American's COI rates for the Class Policies were in fact based on its EFME, in which case there would be no breach. *See* Dkt. 210 at 8-10, 18-23. And trial would not have been the end of the road. If Plaintiffs succeeded at trial, this case would still likely be tied up in years of post-trial briefing and appeals. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013) (considering in approving a class settlement "the certainty that resolution under [a] settlement will foreclose any subsequent appeals, and the fear that, unsettled, the ultimate resolution of the action . . . could well extend into the distant future" (citation omitted)).

3. Requisite Skills to Perform the Legal Services (*Johnson* Factor 3)

Class Counsel has significant experience with insurance litigation and class actions, including specific expertise in COI class actions. *See* Ard Decl. ¶ 3. The Class here significantly benefitted—recovering 36%, 107%, or 16,047% of all COI overcharges at issue (depending on which damages model the jury adopted, if liability were found) as well as non-monetary benefits with additional value—from Class Counsel's skill and expertise.

4. Preclusion of Employment (*Johnson* Factor 4)

Class Counsel dedicated a significant amount of time on this case–nearly 10,000 hours—that could have been spent on other matters. This supports approval of the requested award. *See Ewald v. Royal Norwegian Embassy*, 2015 WL 1746375, at *17 (D. Minn. Apr. 13, 2015) (fee approved where counsel "was required to reduce her workload in order to work on this case").

5. Customary Fee and Similar Awards (*Johnson* Factors 5 and 12)

For the fifth "customary fee" and twelfth "awards in similar cases" factors, Eighth Circuit courts look to similar fee awards in class actions within this circuit generally, as well as to fee awards in similar litigation in other circuits. *See In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005).[8] Courts in this Circuit have "frequently awarded fees up to 36% in class actions." *Huyer*, 849 F.3d at 399.[9] Here, Class Counsel seeks a fee of 33⅓ percent of just the Settlement Amount in isolation, excluding the value of the non-monetary benefits also secured for the benefit of the Class—making the request even less than what is awarded in other cases. This factor favors approval of the requested fee.

6. Fixed or Contingent Fee (*Johnson* Factor 6)

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *In re Xcel*, 364 F. Supp. 2d at 994. "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. Class Counsel worked on a fully contingent basis, investing over $1.8 million in expenses and almost 10,000 hours in attorney time, with the real possibility of getting nothing in return. For context, SG regularly takes high-stakes, non-class commercial cases on a contingent fee basis (e.g., patent, legal malpractice,

[8] *See, e.g.*, *Rogowski COI*, 2023 WL 5125113, at *5 (award of 33⅓ percent of $325 million settlement); *Vogt COI*, Dkt. 458 (award of 33⅓ percent of $34 million judgment); *In re: Lincoln Nat'l COI Litig.*, Case No. 2:16-cv-06605-GJP, Dkt. Nos. 256-2, 262 (E.D. Pa. Oct. 5, 2023); *In re: Lincoln Nat'l 2017 COI Rate Litig.*, Case No. 2:17-cv-04150, Dkt. Nos. 136-2, 137 (E.D. Pa. Oct. 5, 2023) (awarding 33% of $109 million common fund).

[9] *See, e.g.*, *Caligiuri*, 855 F.3d at 865-66 (affirming award of 33.33% of $60 million common fund); *Custom Hair Designs by Sandy, LLC v. Cent. Payment* Co., 2022 WL 3445763, at *5 (D. Neb. Aug. 17, 2022) (awarding 33.33% of $84 million common fund); *In re Airline Ticket Comm'*, 953 F. Supp. at 285-86 (awarding 33.3% of $86 million common fund); *cf.* 4 Newberg on Class Actions § 14:6 (4th ed.) ("[E]mpirical studies show that . . . fee awards in class actions average around one-third of the recovery.").

antitrust, etc.). Ard Decl. ¶ 23. When it does so and where, as here, the firm is advancing expenses, the firm typically negotiates contingent fee arrangements starting at 40% of the gross sum recovered, and with further increases tied to the time of settlement and trial. *See id.* Sophisticated parties and institutions regularly agree to these standard market terms. *Id.* Class Counsel undertook enormous risk in taking on this case, including a significant write-off if the case were lost.

7. Amount Involved and Results Obtained (*Johnson* Factor 8)

"In considering a fee award, the 'most critical factor' is 'the degree of success obtained.'" *In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

Here, the degree of success is outstanding. At issue at trial would have been the heavily disputed questions of liability and numerous competing damages methodologies. The chart below shows the three primary approaches, and the settlement-to-damages ratio under each:

Damages Methodology Assuming Liability	Settlement-to-Damages Ratio
Plaintiff's Primary Damage Model	36.2%
North American's "Multiplicative Approach"	107%
Plaintiff's Damage Model with FMI Included	16,047%

Under any measure, this recovery far exceeds the median settlement-to-damages ratio obtained in other class action settlements approved within the Eighth Circuit. *See Beaver Cnty. Emps.' Ret. Fund*, 2017 WL 2574005, at *3.

8. Attorneys' Experience, Reputation, and Ability (*Johnson* Factor 9)

As noted, Class Counsel has significant experience with insurance litigation and class actions. Ard Decl. ¶¶ 3–4. SG has been appointed Class Counsel in numerous cases seeking recovery of COI overcharges against insurers, including cases involving Phoenix Life Insurance Company, AXA Equitable Life Insurance Company, Genworth Life Insurance & Annuity Company, Voya Retirement Insurance and Annuity Company, Lincoln Life & Annuity Company

of New York, Security Life of Denver Insurance Company, John Hancock Life Insurance Company (U.S.A.), and PHL Variable Insurance Company. *Id.* ¶ 3.

SG's results in such COI cases have been lauded by a federal judge as "quite extraordinary." *Hancock COI*, Dkt. 164 at 20:10. SG's experience, reputation, and ability weigh strongly in favor of awarding the requested fee. Moreover, courts often judge class counsel's skill against the "quality and vigor of opposing counsel." *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *17 (E.D. Mo. June 30, 2005). Here, opposing counsel are experienced lawyers who practice in high-stakes, complex matters nationwide, and successfully defeated the similar *Taylor* class action before this Court.

9. Undesirability of the Case (*Johnson* Factor 10)

The undesirability of this case is best demonstrated by the fact that no other law firm was willing to bring the case. That is unsurprising, given the difficulty individual policyholders faced vindicating their rights and the high risk associated with recovery on a class basis, as evidenced by the unsuccessful *Taylor* action.

10. Professional Relationship's Nature and Length (*Johnson* Factor 11)

Class Counsel has a long professional relationship with Plaintiff PHT. *See, e.g.*, *PHT Holding I, LLC v. Security Life of Denver Ins. Co.*, No. 1:18-cv-01897-DDD-SKC (D. Colo.); *PHT Holding I, LLC v. Reliastar Life Ins. Co.*., No. 18-cv-2863 (DWF) (D. Minn.). This factor supports Class Counsel's fee request.

E. The Reaction of the Class Supports the Requested Fee

The reaction of the class has been overwhelmingly positive. Out of 18,585 notices sent, only one class member has opted out of the class. Intrepido-Bowden Decl. ¶ 9. Furthermore, there are currently no pending objections; one class member did submit an objection, but withdrew the objection by a letter to the Clerk dated October 13, 2023, after conferring with Class Counsel and

learning more information about the mechanics of the settlement. Ard Decl. ¶ 35.[10]

II. Class Counsel's Reasonable and Necessary Expenses Should Be Reimbursed

Class Counsel also requests reimbursement of over $1.7 million for out-of-pocket expenses reasonably and necessarily incurred in prosecuting this action. "Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement." *Yarrington*, 697 F. Supp. 2d at 1067.

The expenses are reasonable and necessary and have been spent for the direct benefit of the Class. Ard Decl. ¶¶ 30–31 (describing expenses); *see Tussey*, 2019 WL 3859763, at *5. Class Counsel actually incurred $1,786,728.33 in expenses plus an estimated additional $138,253.27-$153,253.27 for settlement administration expenses, but agreed in the Settlement to cap its expense reimbursement to $1.7 million. Ard Decl. ¶ 31; Settlement § 6.1. Experts and class notice and administration are the largest components of these costs. Ard Decl. ¶¶ 30–31. That Class Counsel was willing to spend its own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary.

III. The Court Should Grant a Class Representative Service Award

Class Counsel seeks a service award of $25,000 for the Class Representative. The relevant factors are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867.

Here, the Class Representative has devoted significant time to working with Class Counsel

[10] This objection was premised on the objector's belief that current policyholders would only benefit if they cashed out their policies before they died. But under the settlement, current policyholders are paid in credits to their accumulation value, which provides multiple benefits to current policyholders even if they don't cash out their policies, including the opportunity to pay less premiums out of pocket as a result of the credit. After Class Counsel spoke with the objector and clarified these factual points, the objector withdrew the objection. Ard Decl. ¶ 35.

to protect the Class's interests. *See* Ard Decl. ¶ 32. PHT's predecessor in interest, ATLES, initially collected and produced documents and made a corporate representative available for a deposition. PHT became familiar with the documentation and took over for ATLES pre-settlement and engaged in significant efforts, on short turnaround, to facilitate a favorable resolution of this matter for the Class, including collecting additional documents, sitting for an additional 30(b)(6) deposition, and preparing for examination at trial. *Id*. ¶ 33; *see also Nunez v. BAE Sys. San Diego Ship Repair Inc.*, 292 F. Supp. 3d 1018, 1058 (S.D. Cal. 2017) (granting service award where class representative, who was substituted in at the time of fee approval, was willing "to do whatever [was] necessary to facilitate the Court granting final approval" of the settlement, reviewed documents and briefing related to the settlement, and provided a benefit to the class in the form of "his informed support" of the settlement). The requested award is lower than those awarded in other class actions. *See Kruger v. Lely N. Am., Inc.*, 2023 WL 5665215, at *6 (D. Minn. Sept. 1, 2023) (awarding $50,000 to class representative); *Terry Bishop, DVM v. Delaval Inc.*, 2022 WL 18542465, at *3 (W.D. Mo. June 7, 2022) (awarding $50,000 to some class representatives).[11]

CONCLUSION

Class Counsel respectfully requests that this Court award (1) attorneys' fees in the amount of $19,666,666.67 plus a *pro rata* share of the interest earned on the Settlement Fund; (2) reimbursement of $1.7 million in litigation and administration expenses; and (3) a $25,000 service award for Class Representative PHT.[12]

[11] *See also Farmington Hills,* No. 0:10-cv-04372-DWF-HB, Dkt. 686 ¶ 16 (awarding $50,000 to class representatives); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018) (awarding $100,000 each to two class representatives and $50,000 to six others); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-52 (S.D. Ohio 1991) (awarding $50,000 to each of six class representatives).

[12] Class Counsel will submit a proposed order including the requested attorneys' fees, costs, and service award in conjunction with the Motion for Final Approval.

Dated: October 16, 2023

/s/ Steven G. Sklaver
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2023, I caused a true and correct copy of foregoing to be served on all counsel of record via the Court's ECF system and email.

/s/ Steven G. Sklaver
Steven G. Sklaver