UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

BRIGHTON TRUSTEES, LLC, AS TRUSTEE, *et al.*, Plaintiffs, v. GENWORTH LIFE AND ANNUITY INSURANCE COMPANY, Defendant.	Civil No. 3:20cv240 (DJN)

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND INCENTIVE AWARD

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I. INTRODUCTION

After more than two years of hard-fought litigation and months of negotiations assisted by an experienced mediator, Class Counsel obtained an outstanding result for the class: a $25 million cash settlement (reduced pro rata for any opt-outs) that is higher than the total alleged COI overcharges collected through March 31, 2022, and prospective relief that prohibits Genworth from, among other things, raising COI rates for the next seven years, even amidst a global pandemic. The cash will be sent directly to class members, using their mailing addresses in Genworth's files without any need to fill out claim forms, and no money will revert to Genworth. In view of the intense litigation efforts required and this exceptional result, Class Counsel requests a fee award of $8,333,139.08, equal to 18.6% of the gross settlement benefit (or using a less-accepted and more conservative methodology, 1/3 of the cash component of the settlement viewed in isolation). Class Counsel also requests reimbursement of litigation expenses in the amount of $800,981.03, and an incentive award of $25,000 for each named Plaintiff.[1]

This excellent result for the Class was driven by the efforts and success of Class Counsel in this litigation. In support of Class Certification, Plaintiffs prepared forty-eight pages of briefing, and produced four detailed expert reports from two highly qualified experts, including 123 pages of actuarial and damages analysis, and more than 10,000 pages of exhibits. Declaration of Steven Sklaver ("Sklaver Decl.") ¶¶ 15, 17. After "double readings" of the expert reports, Sklaver Decl., Ex. 4 (February 14, 2022 Status Conference Tr.) at 5:25-6:1, the Court denied Genworth's motion

[1] The Preliminary Approval Order also provides that Settlement Administration Expenses may be paid from the Settlement Fund as they become due. ECF No. 136, ¶ 8. These Settlement Administration Expenses are not included in Class Counsel's request for reimbursement of litigation expenses. Class Counsel seeks the Court's approval to continue making those payments as they become due. Amounts through June 30, 2022 are set forth in the Declaration of Gina Intrepido-Bowden, filed concurrently herewith.

to exclude both experts, finding them both reliable, and concluding among other things that the Court "will rely on [Plaintiffs' actuarial expert] Zail's testimony" for his demonstration "that Genworth used common methods in redetermining the COI Rate." ECF No. 109 at 7. Shortly after that important ruling, the Court held a conference, and announced that "unless something completely unusual happens" at the class certification hearing, "I'm going to certify the class." Sklaver Decl., Ex. 4 at 4:17-21. The Court, by this point very familiar with the evidentiary record marshalled by Class Counsel, also explained that Genworth would not likely prevail on summary judgment because of the genuine disputes of facts at issue. *Id.* at 4:24-5:2 ("[I]t's also clear to me that summary judgment is a waste of time in this case. There's going to be a genuine dispute as to material fact. Just your experts alone is going to create that."). In light of these comments, the Court exhorted the parties to settle. *Id.* at 6:8-10 ("So to me, this is a case that needs to settle, and I'd like to see if you can get something done over the next couple weeks."); *id.* at 5:13-15 ("And you all had engaged in private mediation last year, and I understand it wasn't fruitful. I think this is a case that needs to settle."); *id.* at 9:12-16 ("I really want you to put every effort that you can into settling this case.").

At the hearing, Genworth's counsel noted that previous settlement negotiations had broken down, but the Court correctly emphasized that the "lay of the land" was now different given Plaintiffs' success on *Daubert*, and its likely success on class certification and summary judgment, which the Court correctly foresaw should give the parties "more reason to get in there and get it done."

> GENWORTH'S COUNSEL: … The mediation just finally broke down in the last couple of days, in the afternoon. So I think we –
>
> THE COURT: Yeah, but it's different now because you -- look, class certification plays a big role in this case, right? And so -- you know, this is not my first rodeo. It seems to me now that I'm telling you what the lay of the land is. It gives you, you know, more reason to get in there and get it done.

Id. at 7:25-8:8. Following the Court's directive, the parties promptly resumed settlement negotiations, and achieved this exceptional result only after further hard-fought negotiations facilitated by Rodney Max, a distinguished fellow and past president of the American College of Civil Trial Mediators, who calls the settlement an "excellent result" for the class. ECF No. 132-2, ¶¶ 7, 12, 21 (Max Declaration in Support of Preliminary Approval). By waiting to settle until this time, and by insisting on better results for the Class than Genworth was willing to provide during prior negotiations, Class Counsel achieved the best possible result for the Class.

This Settlement is outstanding by any measure, not least under the "most critical factor" courts consider in awarding fees: the results obtained for the Class. *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 247 (4th Cir. 2010) (quoting *Doe v. Chao*, 435 F.3d 492, 506 (4th Cir. 2006)). The $25 million cash settlement fund is equal to 163% of the COI overcharges accrued through March 31, 2022. Sklaver Decl. ¶ 26. In other words, Settlement Class Members are obtaining more cash relief in the Settlement than they could have achieved through a complete victory at trial. The Settlement also provides significant prospective relief that would not even have been achievable had the Class prevailed at trial. A report prepared by an expert in longevity products attached hereto opines that relief is worth an additional $19.9 million to the Class and includes (a) a guarantee that GLAIC will *not* impose a new, more expensive COI rate scale for seven years even in the face of a worldwide pandemic (or any new variant to come) that some insurance companies claim has caused their costs to skyrocket, and (b) a guarantee that GLAIC will not challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of lack of an insurable interest or misrepresentation in the application for such policies, thereby ensuring that the death benefits will be paid when a policy matures and a proper claim for the policy proceeds is submitted. Declaration of Keith McNally ("McNally Decl."), Ex. A at 1.

This result is even better considering that this case had substantial trial risks, whereby the Class could have recovered nothing. Sklaver Decl., Ex. 4 at 9:12-16 ("This case needs to settle. It's triable from both sides, not a slam dunk for either side. Let's try to get it done."); *see also* Sklaver Decl., Ex. 5 at 10:3-6 ("I also, I think, made clear that this is a 50/50 case, so there were significant risks that were at issue here for the plaintiffs as to both the breach and the damages that would have been heavily contested."). Among other issues, the intrinsically complex, expert-driven nature of Plaintiffs' case made it uncertain how the jury would respond. Sklaver Decl., Ex. 4 at 5:18-6:4 ("[F]or the plaintiffs, nobody is going to have a clue on the jury as to what's going on in this case. It took me double readings, with large degrees of caffeine, to figure this out, and I have a feeling the jury is going to be glazed over."). Further, at the time the parties reached a negotiated settlement, GLAIC filed a motion for summary judgment disputing that it had increased COI rates "in order to" recoup prior losses and argued that Plaintiffs' theories of breach "rely on alleged actuarial meanings or attempts to enforce constraints that are not in the subject policies." ECF No. 119. Although Plaintiffs believed they had strong responses to both these points, the central points remained disputed at the time of settlement.

The percentage of monetary recovery considered alone far exceeds the results in other recent COI litigation that were deemed "extraordinary" by other courts. For example, the Settlement Fund here equal to 163% of the COI overcharges easily bests what Judge McMahon called, in a prior COI overcharge case where the cash fund equaled 68.5% of the overcharges, "one of the most remunerative settlements this court has ever been asked to approve." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 WL 10847814, at *11, *13 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*") (awarding a fee of 33-1/3% of the cash fund). *Id.* And in a COI case against John Hancock, the Court remarked that a settlement providing for 42% of the COI overcharges

was "quite extraordinary." *37 Besen Parkway, LLC v. John Hancock Life Insurance Co.*, 15-cv-9924 (PGG), Dkt. 164 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI I*") (approving the requested fee equal to 30% of the monetary fund, with a lodestar cross-check multiplier of 6.92).

The Settlement achieved here is a result of the tenacious prosecution of the case by Class Counsel. All told, Class Counsel invested more than $3.5 million in time and money into this case on a fully contingent basis, representing 3650.6 hours of work, with the real possibility of getting nothing in return. Sklaver Decl. ¶¶ 32, 40, 41; *see also* Declaration of Andrew Friedman ("Friedman Decl.") ¶¶ 9, 11; Declaration of Kathleen Holmes ("Holmes Decl.") ¶¶ 9, 12. Among other things, Class Counsel:

- Obtained and reviewed the production of more than 435,800 pages of documents and data sets, including detailed policy-level historical data for the class policies and repeatedly pressed GLAIC on data and production issues;
- Served twenty-three interrogatories, twenty requests for production of documents, and sixty-nine requests for admission;
- Responded to thirty-six interrogatories and forty-two requests for production of documents;
- Issued subpoenas to thirteen reinsurers, three actuarial consultants, and one auditor, including Milliman Inc., Willis Towers Watson, Oliver Wyman, and KPMG;
- Served Freedom of Information Act requests on state regulators;
- Prepared and served a 30(b)(6) deposition notice with thirty-six topics on multiple subparts, including topics on technical data issues;
- Prepared and filed a joint discovery letter with the Court requesting that the Court order GLAIC to produce a 30(b)(6) witness in response to Plaintiff's deposition notice, and repeatedly met and conferred with GLAIC for over two months on the topics to secure a deposition of a GLAIC corporate representative;
- Deposed ten highly technical witnesses, including six current and former Genworth employees, two third-party actuarial consultants, Genworth's actuarial expert, and Genworth's corporate representative;
- Prepared for and defended depositions of the Class Representatives;

- Prepared for and defended the depositions of all Plaintiffs' experts;
- Worked with subject-matter experts to produce eight expert reports, including 123 pages of actuarial and damages analysis, and more than 10,000 pages of exhibits in support of class certification, and 235 pages of actuarial and damages analysis, and more than 9,950 pages of exhibits on the merits of Plaintiffs' claims;
- Prepared 37 pages of briefing in opposition to Defendant's motion to exclude Plaintiffs' experts. The Court denied both of Defendant's motions.
- Prepared 48 pages of briefing and 45 exhibits in support of class certification.
- Analyzed and processed class-wide policy-level data refreshed and current through March 31, 2022 as a condition of the settlement;
- Assisted the Notice Administrator in providing notice of the class action settlement to policyowners;
- Participated in one in-person and two remote mediation sessions with GLAIC. Class Counsel also repeatedly met and conferred with GLAIC during the life of the case, exchanging numerous offers and counter-offers, which ultimately resulted in the Settlement Agreement with the assistance of an experienced mediator, Rodney Max.

Sklaver Decl. ¶¶ 10-24; Friedman Decl. ¶¶ 3-4; Holmes Decl. ¶ 11.

For these reasons, Class Counsel respectfully moves this Court for an award of attorneys' fees, reimbursement of litigation expenses, and incentive awards. The attorneys' fee, equaling 18.6% of the total benefits made available to the Class (or a third of the cash settlement fund considered in isolation from all the other non-cash benefits including the 7-year COI freeze), is well within the range approved by Courts in this Circuit. *See, e.g.*, *Dickman v. Banner Life Ins. Co.*, Case No. 1:16-cv-00192-RDB, 2020 WL 13094954, at *5 (D. Md. May 20, 2020) (approving fee award equal to 39.5% of the common settlement fund after reduction of opt outs and 20.6% of the total value of the relief obtained for the class), *aff'd* 28 F.4th 513 (4th Cir. 2022); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 685 (D. Md. 2013) (describing a range of awards between 15 and 40 percent of the settlement fund that have been deemed fair and reasonable by Courts within the Fourth Circuit). The requested award is warranted by the outstanding results

achieved for the Class through the efforts of Class Counsel, and the risks taken and overcome in litigation that lasted more than two years brought entirely on a contingency fee basis.

II. BACKGROUND

A. Class Counsel Investigated the COI Increase and Promptly Filed the Detailed Complaint.

The Class consists of owners of Gold and Gold II universal life policies ("Class Policies") issued by First Colony Life Insurance Company, now GLAIC, between 1999 and 2007. Each Class Policy contains a section titled "Changes in Rates, Charges, and Fees," with limitations on when and how monthly risk rates used to calculate the monthly COI charges can be adjusted. Plaintiffs' policies, which are representative of the language included in all Class Policies, state in relevant part:

> The Company will base any change on its expectations as to future investment earnings, mortality, persistency, expenses and taxes. The Company will not make any change in order to recoup prior losses. Any change in the monthly risk rates will apply to all insured with the same combination of the following: attained age; number of years of insurance in force; net amount at risk; and premium class.

See Sklaver Decl., Ex. 3 at 14. In 2019 and 2020, GLAIC adjusted COI rates on the Class Policies.

Prior to filing the complaint, Class Counsel conducted a comprehensive investigation of publicly available information concerning the COI rate changes and whether they were made in compliance with the provisions described above. *See* Sklaver Decl. ¶¶ 7-8. In consultation with industry experts, Class Counsel studied the language of the GLAIC policy forms, the trends in actuarial assumptions from the time the policies were issued as detailed in GLAIC's filings with insurance regulators, and the information GLAIC provided about the COI rate changes to its policyholders to assess whether the COI changes were permitted by the policies and other applicable laws. *Id.* As a result of this investigation, Class Counsel drafted and filed the highly

detailed Complaint on April 6, 2020. ECF No. 1; Sklaver Decl. ¶¶ 8-9. GLAIC did not move to dismiss the full and well-pleaded complaint. *See* ECF No. 35 (GLAIC's Answer).

B. Class Counsel Engaged in Extensive Fact and Expert Discovery.

Class Counsel thoroughly and aggressively pursued this case against GLAIC on behalf of Class Members in discovery. Class Counsel deposed six fact witnesses for GLAIC, which covered highly technical data and actuarial concepts, including deficiency reserves and statutory reserving guidelines. *See* Sklaver Decl. ¶ 11. Class Counsel's depositions included GLAIC's vice president and actuary for life projections and valuations, illustration actuary, and senior project manager, as well as the COI actuary responsible for day-to-day operations on the COI project. *Id.* Plaintiffs also submitted and won a discovery dispute before the Court that allowed them to depose a GLAIC corporate representative on more than twenty Federal Rule of Civil Procedure 30(b)(6) topics. *See* ECF Nos. 87, 89.

Class Counsel also conducted extensive third-party discovery. Plaintiffs served subpoenas on entities that worked with GLAIC, including Milliman, Willis Towers Watson, Oliver Wyman, and KPMG, as well as thirteen of GLAIC's reinsurers. These subpoenas resulted in the production of important documents relating to GLAIC's work on and analysis of the 2019 COI rate changes. *See id.* For example, Plaintiffs' subpoena to Milliman secured Plaintiffs' access to Milliman's proprietary actuarial software, MG-ALFA. Plaintiffs' experts have been trained to use MG-ALFA, and so used it to analyze GLAIC's actuarial models in the same software used by GLAIC's own actuaries. Plaintiffs also obtained internal emails from GLAIC's consultants at Willis Towers Watson who questioned GLAIC's COI methodology, including GLAIC's treatment of statutory reserves. One of the core issues in this case was the way GLAIC accounted for its statutory reserves. Plaintiffs argued GLAIC's handling of its statutory reserves rendered the COI increase

improper because it recouped prior losses. Plaintiffs also deposed corporate representatives from Milliman and Willis Towers Watson. Sklaver Decl. ¶ 13.

GLAIC's document productions also included detailed policy-level data for each of the universal life insurance policies in the putative class. *See* Sklaver Decl. ¶ 12. The policy-level data included historical payments and credit history for all putative class members. *See id.* Class Counsel and its experts expended significant effort to process, analyze, and understand this data. *See id.* As part of these efforts, Class Counsel worked extensively with counsel for GLAIC over data issues and the parties exchanged significant additional information that provided important information about the data that was not apparent from the previously produced information. *See id*.

After the close of fact discovery of December 17, 2021, the parties conducted expert discovery on the merits. Sklaver Decl. ¶ 16. Discovery necessitated significant work with top-notch actuarial, financial modeling, regulatory, and damages experts that were identified and retained by Class Counsel. Class Counsel worked with two experts—actuarial expert Howard Zail and damages expert Robert Mills. *See id.* GLAIC also designated two experts: Lisa Kuklinski and Professor Craig Merrill, both for actuarial issues. *See id.* Class Counsel deposed Ms. Kuklinski in connection with the declaration that she filed in support of GLAIC's opposition to class certification, and GLAIC deposed Messrs. Zail and Mills in connection with their class certification declarations. The parties collectively produced eleven expert reports, including more than 500 pages of actuarial and damages analysis, and nearly 20,000 pages of exhibits.

C. Class Counsel Overcame GLAIC's Hard-Fought Efforts at the Class Certification Stage.

In August 2021, Plaintiffs moved for class certification. ECF No. 49. Plaintiffs' certification motion included three declarations from Class Representatives, two expert reports,

and forty-five exhibits. Sklaver Decl. ¶ 17. GLAIC opposed certification, and Plaintiffs filed a reply. *See id.*; ECF No. 68, 100. At the same time, GLAIC moved to exclude Plaintiffs' experts in support of class certification, and the parties fully briefed those motions as well. Sklaver Decl. ¶ 18.

The Court denied GLAIC's motions to exclude plaintiff's experts. ECF No. 109. It also convened a conference call with the parties on February 14, 2022 to discuss class certification. *See* Sklaver Decl. ¶ 20. On the call, the Court indicated it had reviewed the extensive briefing and was inclined to certify the class, "unless something completely unusual happens" at the forthcoming certification hearing. *Id.*, Ex. 4 at 4:17-21. Without prohibiting the parties from filing dispositive motions or pre-judging the issues, the Court further stated that summary judgment would be "a waste of time in this case," given the genuine disputes of material fact made plain in the expert declarations related to class certification. *Id.*

D. Class Counsel Negotiated a Highly Successful Settlement.

The parties first conducted an in-person mediation session with experienced mediator Rodney Max in Miami on October 17, 2021. The parties reopened the settlement dialogue and scheduled additional mediations with Mr. Max after the February 14, 2022 telephone conference with the Court. Those remote mediation sessions took place on March 12, 2022, and March 25, 2022 by Zoom. The parties reached an agreement in principle after the last remote session. The parties informed the Court about the development, and the Court convened a telephone conference to discuss the schedule for preliminary approval. *See* ECF No. 126.

After the parties agreed to a settlement in principle, GLAIC produced updated COI data and actuarial modeling from its administrative systems. Plaintiffs reviewed the updated data and complex modeling with their experts and confirmed their intent to proceed with the Settlement. A long-form settlement agreement was heavily negotiated and agreed to on May 6, 2022.

On June 3, 2022, the Court filed the Order Preliminarily Approving Class Action Settlement. ECF No. 136. The Order stated that Class Counsel "had provided the Court with information sufficient to enable it to determine whether to give notice of the proposed settlement to the Class pursuant to Rule 23(e)(1)(A)." *Id.* ¶ 2. Using this information, the Court determined that it "will likely be able to approve the Settlement under Rule 23(e)(2)." *Id.* ¶ 4. In the hearing on preliminary approval, the Court further noted, "I previously appointed plaintiffs and found lead counsel to adequately lead this case and their litigation conduct has confirmed the wisdom of my decision." Sklaver Decl., Ex. 5 (Tr. of May 26, 2022 Preliminary Approval Hrg.) at 8:3-10.

For the Class, the Settlement confers the following monetary and non-monetary benefits:

- **CASH**: A cash Settlement Fund of up to $25,000,000.
    - The cash fund is equal to 163% of all overcharges collected by GLAIC through March 31, 2022. Sklaver Decl. ¶ 26.
    - For any policy that timely and validly opts out during the Federal Rule of Civil Procedure 23(e)(4) period, the Settlement Fund decreases on a *pro-rata* basis calculated by multiplying the amount of the Settlement Fund (*i.e.*, $25,000,000) by a fraction where (i) the numerator is the combined Specified Amount, as of March 31, 2022 (as that term is defined in the Policies) of the Policies that opt out of the Settlement Class and (ii) the denominator is the total Specified Amount, as of March 31, 2022, of all Policies owned by members of the Class. *Id.* ¶ 2. As of July 1, 2022, there was one opt out. The Final Settlement Fund as of July 1, 2022 after the *pro rata* reduction for this policy is $24,999,417.50. No portion of the Settlement Fund will revert back to GLAIC, and checks will be mailed directly to Class Members without having to fill out claim forms.
- **CLASS COI RATE SCHEDULE INCREASE FREEZE**. A total and complete freeze on any cost of insurance increase for Class Policies for seven years. Thus, even if GLAIC has a future change in enumerated factors that would otherwise permit a COI rate increase under the terms of the Class Policies—including any cost factors that may have increased due to any surge in mortality due to the COVID-19 pandemic—GLAIC will not increase COI rates for seven years. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for a substantial period of time.
- **VALIDITY STIPULATION & STOLI WAIVER**. As part of the Settlement, GLAIC has agreed not to challenge the validity and enforceability of any eligible

> policies owned by participating Class members on the grounds of lack of an insurable interest or misrepresentations in the application for such policies. Class members now have the assurance that a death benefit will be paid if an otherwise valid claim for the policy proceeds is submitted.

Sklaver Decl. ¶ 25. An eminently qualified expert with extensive experience in the life insurance industry and with longevity-based products has opined that these non-monetary forms of relief are worth $19.9 million to the Settlement Class, with the vast majority of that amount resulting from the enormous benefits created by the COI freeze, *see* McNally Decl. ¶ 9, Ex. A (Report), especially given what insurance companies claim is a huge spike in mortality that allegedly justifies, in their view, new and additional COI increases due to surging mortality costs.

III. ARGUMENT

A. Class Counsel's Fee Request is Reasonable.

1. Class Counsel is Entitled to Fees from the Common Fund.

The Settlement creates a $25 million common fund. As is customary when class counsel aids in the creation of a common fund, Class Counsel seeks and is entitled to a reasonable fee from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Kelly v. Johns Hopkins Univ.*, No. 16-cv-2835, 2020 WL 434473, at *6 (D. Md. Jan. 28, 2020) (awarding counsel a percentage of the total value of the settlement, including future tax deferral and fee savings that would benefit the class).

Courts also consider the value of prospective relief in assessing the reasonableness of a percentage fee award. For example, in *Phoenix COI*, 2015 WL 10847814 (S.D.N.Y Sept. 9, 2015), class counsel reached a settlement in a COI case that included a 5-year COI freeze and a non-contestability benefit comparable to the 7-year COI freeze and non-contestability Benefit provided by the Settlement here. The *Phoenix COI* court noted that, based on expert reports, "[t]he non-monetary relief provided by the Settlement is also substantial and has an estimated value of over

$93.4 million." *Id.* at *10. The court concluded that it is appropriate to take the value of such prospective relief into account when determining a settlement's value, for the purpose of calculating attorney's fees. *Id.* at *15 ("In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of the both the monetary and non-monetary benefits conferred on the Class." (citing cases)).

2. The Requested Fee is Reasonable under the Percentage Method.

a. The Percentage Approach is Favored.

"[B]oth in the Fourth Circuit and across the country . . . the favored method of calculating attorneys' fees in common fund cases is the percentage of the fund method." *Skochin v. Genworth Financial*, No. 19-cv-49, 2020 WL 6536140, at *4 (E.D. Va. Nov. 5, 2020) (citing *Brown*, 318 F.R.D. at 575); *see also Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017) ("District Courts within this Circuit have also favored the percentage of the fund method."), *report & recommendation adopted*, No. 3:13-cv-825, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017). The percentage of the fund method "is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation . . . ." *In re LandAmerica 1031 Exch. Serv. Inc. IRS 1031 Tax Deferred Exch. Litig.*, No. 3:09-cv-52, 2012 WL 5430841, at *2 (D.S.C. Nov. 7, 2012). By rewarding counsel for the result achieved, rather than hours billed, the percentage method is "advantageous because it ties the attorneys' award to the overall result achieved rather than the number of hours worked." *McClaran v. Carolina Ale Operating Co., LLC*, No. 3:14-cv-3884, 2015 WL 5037836, at *2 (D.S.C. Aug. 26, 2015). This is especially true where, like here, counsel prosecuted the case on a contingency fee basis. *See, e.g.*, *Brundle ex. rel. Constellis Employee Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 785-86 (4th Cir. 2019), as amended (Mar. 22, 2019) (explaining that awarding fees as a percentage of the common fund "hold[s] the beneficiaries of judgment responsible for

compensating the counsel who obtained the judgment or settlement for them"). Use of the percentage method also facilitates comparing Class Counsel's request to awards in other cases. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260-61 (E.D. Va. 2009).

b. The Requested Percentage Fee Is Reasonable

As detailed further in the Declaration of Kristi Cahoon Kelly, who opines as an expert on fees in this Circuit, Class Counsel's requested fee, equaling 18.6% of the total benefits and a third of the monetary fund considered in isolation, is reasonable. Declaration of Kristi Cahoon Kelly ("Kelly Declaration"), ¶ 16. The requested percentage fee is well within the 25-to-40 percent range that Courts within the Fourth Circuit have routinely held appropriate. *See, e.g.*, *Dickman v. Banner Life Ins. Co.*, Case No. 1:16-cv-00192-RDB, 2020 WL 13094954, at *5 (D. Md. May 20, 2020) (approving fee award equal to 39.5% of the common settlement fund after reduction of opt outs and 20.6% of the total value of the relief obtained for the class), *aff'd Banner COI*, 28 F. 4th 513 (4th Cir. 2022); *Singleton*, 976 F. Supp. 2d at 685 (describing a range of awards between 15 and 40 percent of the settlement fund that have been deemed fair and reasonable by courts within the Fourth Circuit); *Hooker v. Sirius XM Radio, Inc.*, No. 4:13-CV-003, 2017 WL 4484258 (E.D. Va. May 11, 2017) (awarding 35 percent of the $35 million cash fund); *Sims v. BB&T Corp.*, No. 1:15-cv-732, 2019 WL 1993519, at *1 (M.D.N.C. May 6, 2019) (awarding 33 percent of $24 million common fund); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-00318 (RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding 33.3% in reasonable attorneys' fees from a $163.5 million in settlement funds); *Jernigan v. Protas, Spivok & Collins, LLC*, Case No. ELH-16-03058, 2017 WL 4176217, at *5 (D. Md. Sept. 20, 2017) (awarding 40% of a common fund); *Veiga v. Suntrust Bank*, No. 1:09-cv-02815-PWG, 2011 WL 9362390, at *4 (D. Md. Feb. 23, 2011), *aff'd*, 450 F. App'x 269 (4th Cir. 2011) (awarding 40% of a $703,000 common fund).

Moreover, as this Court recognized in a different class action case, *Turner v. ZestFinance, Inc.*, Class Counsel must continue to work on behalf of the Class post-approval, so Plaintiffs' request for attorney's fees as a percentage of the common fund will continue to fall as Class Counsel continues to work with the Settlement Administrator to give effect to the Settlement Agreement. *ZestFinance, Inc.*, No. 3:19-cv-293, ECF No. 116 at 16:1-5 (E.D. Va. Aug. 4, 2020) ("I am going to approve that. It represents 33 percent of the monetary value. The lodestar multiple is 3.86, but believing that number is going to fall for the reasons you just said about the continuing work.").

c. A Lodestar Cross-Check Confirms Class Counsel's Request is Reasonable.

When Courts award a percentage of the fee, they may perform a "lodestar crosscheck" to determine whether the proposed fee is reasonable. Manual for Complex Litigation (Fourth) § 21.724. "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Galloway v. Williams*, No. 3:19-cv-470, 2020 WL 7482191, at *11 (E.D. Va. Dec. 18, 2020). For the cross-check, the lodestar multiplier here is 3.04, which is well within the cross-check range approved by courts in this District and Circuit. *See, e.g.*, *ZestFinance, Inc.*, No. 3:19-cv-293-DJN, ECF No. 116 at 16:1-5 (E.D. Va. Aug. 4, 2020) (approving fee of 33%, with lodestar cross-check multiple of 3.86).

In this entirely contingent action, Class Counsel spent 3,650.6 hours, representing a lodestar of $2,737,564.50 and advanced $800,981.03 in expenses. *See* Sklaver Decl. ¶¶ 32, 40, 41; Friedman Decl. ¶¶ 9, 11; Holmes Decl. ¶¶ 9, 12. As required by the Court, Class Counsel retained an expert, Kristi Cahoon Kelly, who reviewed Class Counsel's hourly rates, detailed time records, and work product generated in this case. *See* ECF No. 39, ¶ 22. Ms. Kelly concluded that Class Counsel's hourly rates are reasonable. Kelly Decl. ¶¶ 18-20.

The rates for Class Counsel and its staff who billed significant amounts of time to this case (ranging from $350 to $1,200 per hour) are comparable to peer law firms litigating matters of similar magnitude. *See* Kelly Decl., ¶¶ 18-20. In a survey of AmLaw 50 law firms performed by PwC Product Sales, LLC and issued in October 2021, the median standard billing rate for equity partners was $1,253 and for associates was $819. *Id.* ¶ 12. Here, all of the partners working on this matter are equity partners who have billing rates under the median rate for equity partners. *See id*. The associate working on this matter billed below even the 3rd quartile standard billing rate of $709. *See id.* ¶ 19; Sklaver Decl. ¶¶ 35-36. Further, these hourly rates are within the range for rates charges by attorneys with similar levels of experience and credentials in the Eastern District of Virginia. Kelly Decl. ¶¶ 19-20. Courts routinely find Susman Godfrey's rates reasonable. *See, e.g.*, *Hancock COI II*, ECF No. 164 at 19:6-13 (accepting Susman Godfrey's rates as reasonable, including rates of Seth Ard and Steven Sklaver); *Phoenix COI*, 2015 WL 10847814, at *18 (finding Susman Godfrey's rates "reasonable" and "comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude"); *In re Auto. Parts Antitrust Litig.*, 2017 WL 3525415, at *4 (E.D. Mich. July 10, 2017) (finding Susman Godfrey's rates "justified" and "well in line with market").

The hours Class Counsel spent prosecuting this case are also reasonable. *See* Kelly Decl. ¶ 18. Counsel coordinated their work to prevent duplication of effort, as well as assigned work to associates and paralegals whenever possible and appropriate. For example, an associate deposed each of GLAIC's fact and expert witnesses. Counsel investigated and drafted the Complaint, engaged in robust discovery, briefed a motion for class certification, and defended two *Daubert* motions. When no agreement was reached after the first mediation session, Counsel continued to

engage with the mediator and opposing counsel. The hours Counsel spent litigating this action reflect the effort required to achieve a satisfactory result.

Taking into account the single opt out as of July 1, 2022, 33 1/3% of the Final Settlement Fund's monetary value is $8,333,139.08, which is equal to a multiplier of 3.04. *See* Sklaver Decl. ¶ 40. This cross-check confirms the reasonableness of the award requested given the singular result obtained in this case, and is well within the range of crosscheck multipliers approved by courts in this Circuit. *See, e.g.*, *Skochin*, 2020 WL 6708388 at *10 (finding 9.05 multiplier not unreasonable in lodestar cross-check analysis); *ZestFinance, Inc.*, No. 3:19-cv-293-DJN, ECF Nos. 115, 116 at 16:1-5 (E.D. Va. Aug. 4, 2020) (approving fee request with a multiplier of 3.86); *Kruger v. Novant Health, Inc.*, No. 1:14-cv-208, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (observing that "courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorney's fee"). Recent COI class settlements in other districts further confirm the reasonableness of this crosscheck multiplier. *See, e.g*, *Hancock COI II*, ECF No. 164 at 19:14-20:11 (approving lodestar multiplier of 6.92 in light of what the district judge described as a "quite extraordinary" result); *Phoenix COI*, 2015 WL 10847814, at *18 (approving lodestar multiplier of 4.87).

The fee award requested here, cross-checked for reasonableness by a lodestar multiplier of 3.04, is easily within (and below) the range of multipliers awarded by courts within this Circuit. More importantly, extraordinary results should be rewarded, and the fee requested here is justified in light of the extraordinary settlement Class Counsel achieved for the Class.

d. The *Barber* Factors Support Class Counsel's Fee Request

In the Fourth Circuit, the *Barber* factors determine the reasonableness of a common fund attorney's fee. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). The *Barber* factors, which the Court weighs in its discretion, 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 other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client; (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.

Id. As described below, the *Barber* factors support Class Counsel's requested fee of 33 1/3 percent of the Settlement Fund.

(1) Class Counsel's Time and Labor (*Barber* Factor 1)

Class Counsel have spent 3,650.6 hours prosecuting this Action, so far.[2] As detailed in the attached declaration and the bullet-point list in the introduction, this included time spent reviewing 435,800 pages of GLAIC documents; taking ten depositions, including a GLAIC vice president, a court-ordered 30(b)(6) deposition, an expert deposition, and two consultant depositions; conducting extensive third-party discovery, including subpoenas to thirteen reinsurers, three actuarial consultants, and one auditor; helping prepare and respond to eleven expert reports, totaling nearly 500 pages of actuarial and damages analysis, and nearly 20,000 pages of exhibits; preparing and responding to *Daubert* motions and class certification briefing, and conducting extensive settlement negotiations. *See* Sklaver Decl. ¶¶ 10-19; Friedman Decl. ¶¶ 3-4; Holmes Decl. ¶ 11. The time and labor will also increase as Class Counsel prepared for final-approval proceedings and administers the Settlement.

[2] This figure is through May 31, 2022. See Sklaver Decl. ¶ 40. Class Counsel will need to spend additional hours through the conclusion of this case to respond to any objections to the Settlement, prepare for and attend the final approval hearing, respond to Class Members' questions about the Settlement, and to administer the settlement.

(2) The Novelty and Difficulty of the Issues (*Barber* Factor 2)

The second *Barber* factor, which addresses "the novelty and difficulty of the issues" in a case also strongly supports approval of the requested fee. *Barber*, 577 F.2d at 226. To call this litigation complex would be an understatement. In *Banner Life COI*, recently decided by the Fourth Circuit, the panel opined that COI litigation, like this one, is "chock-full of the most esoteric principles of life insurance accounting imaginable . . . ." *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 524 (4th Cir. 2022). The Fourth Circuit is not alone in making this observation. In *Phoenix COI*, Judge McMahon of the Southern District of New York found another similar COI case "indisputedly complex," explaining:

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

2015 WL 10847814, at *6 (granting final approval of a COI class action settlement).

The exact same things can be said of this case. The expert discovery alone testifies to the complexity and hard-fought nature of this case: the parties collectively produced eleven expert reports and took three expert depositions. Sklaver Decl., ¶¶ 15-16. And as explained in more detail below, GLAIC aggressively challenged liability, damages, and certification throughout this case. As a result, the Court issued a detailed, complex opinion in response to GLAIC's motions to exclude (ECF No. 109), and addressed difficult issues in analyzing Plaintiffs' class certification motion and GLAIC's summary judgment motion, both of which were pending at the time a settlement was reached.

(3) The Skill Required to Perform the Work Properly (*Barber* Factor 3)

The third *Barber* factor, the "skill required to perform the work properly," strongly supports Class Counsel's fee request. As courts in this Circuit have recognized, the "prosecution and management of a complex national class action requires unique legal skills and abilities." *Phillips v. Triad Guaranty, Inc.*, No. 09-cv-7, 2016 WL 2636289, at *5 (M.D.N.C. May 9, 2016). Few law firms have the knowledge, experience, and resources to litigate such a complex case and negotiate such a lucrative Settlement for the Class. In this case, Class Counsel not only navigated the difficulties of pursuing a national class action, but also mastered highly technical actuarial principles and methodologies. At the preliminary approval hearing, the Court recognized the substantial work that Class Counsel put into this case, and stated: "I think I previously appointed plaintiffs and found lead counsel to adequately lead this case and their litigation conduct has confirmed the wisdom of my decision." Sklaver Decl., Ex. 5 at 8:3-8. The skill required to reach such a successful result for the Class merits a substantial fee award.

(4) Class Counsel's Opportunity Costs (*Barber* Factor 4)

Class Counsel spent two years, more than 3,650 hours, and more than $800,000 in expenses prosecuting this case. *See* Sklaver Decl. ¶¶ 40-41, Friedman Decl. ¶¶ 9, 11; Holmes Decl. ¶¶ 9, 12. These investments of time and resources are significant, and impact Class Counsel's work on their existing cases and their ability to pursue new cases. And by insisting on the best settlement possible for the class, Class Counsel risked obtaining nothing and losing its entire investment. Accordingly, this factor strongly supports Class Counsel's fee request. *See, e.g.*, *In re LandAmerica 1031*, 2012 WL 5430841, at *3.

(5) The Customary Fee (*Barber* Factor 5)

The fifth *Barber* factor, which addresses the "customary fee for like work," also strongly supports approval of the requested fee. As discussed above, Class Counsel's fee request equaling 18.6% of the total benefits (or 33 1/3 % of the common fund viewed in isolation) is well within the 25-to-40 percent range that Courts within the Fourth Circuit have held appropriate.[3] *See, e.g.*, *Dickman v. Banner Life Ins. Co.*, Case No. 1:16-cv-00192-RDB, 2020 WL 13094954, at *5 (D. Md. May 20, 2020) (approving fee award equal to 39.5% of the common settlement fund after reduction of opt outs and 20.6% of the total value of the relief obtained for the class), *aff'd Banner COI*, 28 F. 4th 513 (4th Cir. 2022)..

(6) The Contingent Nature of the Class Counsel's Representation (*Barber* Factor 6)

The Fourth Circuit has recognized that the "contingent nature" of Class Counsel's representation is a relevant circumstance that supports "substantial attorneys' fees." *George v. Duke Energy Retirement Cash Balance Plan*, No. 8:06-cv-00373-JMC, 2011 WL 13218031, at *6 (D.S.C. May 16, 2011); *see also Comer v. Life Ins. Co. of Alabama*, No. 08-cv-228-JFA, 2011 WL 1319627, at *5 (D.S.C. Mar. 31, 2011). Here, Class Counsel represented the Class on a contingency basis, working for two years without payment and spending more than $3.5 million in fees and expenses to prosecute this action. Sklaver Decl. ¶¶ 10-19; Friedman Decl. ¶¶ 3-4; Holmes Decl. ¶ 11. In doing so, Class Counsel risked "walking away with no payment at all" for their work and not being reimbursed for the expenses they incurred. *George*, 2011 WL 13218031, at *6. This contingent nature of Class Counsel's work strongly supports this fee request.

[3] "[E]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." 4 Newberg on Class Actions § 14:6 (4th ed.).

The risks that Plaintiffs and Class Counsel faced here were high, especially where Plaintiffs would have faced a "battle of the experts"—a battle in which no party is ever assured to prevail. *See Mills Corp. Securities Litig.*, 265 F.R.D. at 256 (describing "battle of experts at trial, with no guarantee of the outcome in the eyes of the jury"); *In re Microstrategy, Inc. Securities Litig.*, 148 F. Supp. 2d 654, 667 (E.D. Va. 2001) ("These risks, inherent in the divergent expert testimony reasonably anticipated in a case of this sort, further support the adequacy of the partial settlement."). The Court itself recognized that Plaintiffs' case was not a sure winner. Sklaver Decl., Ex. 4 at 5:18-25. This Court understood that trial was "mainly going to be a battle of these experts," and Plaintiffs would have to work hard to present a digestible case to jurors. *Id.* Victory on liability issues was far from guaranteed.

Class Counsel and the Class also faced significant risks on the damages side of this case. GLAIC mounted challenges to Plaintiffs' damages model, arguing that, even if Plaintiffs prevail on liability, only a portion of the Incremental COI Deductions are properly awardable on damages. *See* ECF No. 67 at 26-28. Indeed, GLAIC even moved to strike Plaintiffs' expert reports in support of class certification on the grounds that Plaintiffs had not quantified the portion of the overcharges that were directly attributable to each alleged breach. *See* ECF No. 58 at 8-10. Although the Court denied those motions to strike, it concluded that GLAIC had raised this challenge "prematurely" and opined that "whether any decrease should offset the damages constitutes a merits question for the Court to address at a later stage." ECF No. 109 at 7.

Class Counsel undertook enormous risk in taking on this case—all of which could have resulted in a write-off and no compensation had the case been lost. The risk was also high because Class Counsel sought large damages against a deep-pocketed insurance company with essentially limitless resources, which hired two of the country's best-known law firms to defend it. *See In re*

Abbott Labs. Sec. Litig., 1995 WL 792083, at *10 (N.D. Ill. July 3, 1995) (explaining that given "the formidable and nearly limitless resources of the opposition's nationally prominent law firms, and the amount of economic and personnel investment required to sustain the momentum of massive litigation, it is difficult to conceive of a more undesirable piece of litigation for any attorneys considering undertaking contingent fee litigation"). And the risk to Class Counsel was compounded because it spent more than two years litigating this case. The only certainty from the outset of this litigation was that there would be no fee or expense award if the case were lost.

(7) Time Limitations Imposed by the Action (*Barber* Factor 7)

The seventh *Barber* factor is the time limitations imposed by the action. Prosecuting this action in the Eastern District of Virginia's "rocket docket" necessitated extensive effort by Class Counsel to, among other things, draft, negotiate, and analyze Defendant's discovery responses, depose Defendant's fact and expert witnesses, brief class certification, and engage in settlement negotiations, within the schedule set by the Court. Class Counsel were often required to work intensively and quickly to best represent the Class. Accordingly, this factor supports Class Counsel's fee request.

(8) The Results Obtained (*Barber* Factor 8)

"[T]he most critical factor in determining the reasonableness of the fee award is the degree of success obtained." *Abrams & Abrams*, 605 F.3d at 247 (quotation omitted). This factor strongly supports Class Counsel's requested fee because the Settlement is truly an excellent result for the class. Class Counsel was able to negotiate a Settlement with a cash component covering 163% of the overcharges through March 31, 2022. *See* Sklaver Decl. ¶ 26. The Settlement Agreement also provides two forms of significant non-cash relief, valued at more than $19.9 million. Combined, the cash and non-cash relief represents an even better result for the Class than Class Counsel could have obtained for the Class as of the trial date. This recovery compares very favorably to the

monetary relief in other COI settlements. *See Phoenix COI*, 2015 WL 10847814, at *11, *18 (approving settlement that provided the class with 68.5% of COI overcharges plus non-monetary benefits); *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924 (PGG), ECF No. 164, at 20:10 (S.D.N.Y. Mar. 18, 2018) (approving settlement that provided the class with 42% of COI overcharges). It also compares favorably to the average recovery in class action litigation. *See George*, 2011 WL 13218031, at *6 (noting that the "typical recovery in most class actions generally is three to six cents on the dollar"). The higher percentage of recovery for the Class in this case strongly supports the fee request.

(9) The Experience, Reputation, and Ability of Class Counsel (*Barber* Factor 9)

The ninth *Barber* factor is the "experience, reputation, and ability of Class Counsel." Here, the skill that Class Counsel demonstrated in this Action supports their requested fee. *See Hooker v. Sirius XM Radio, Inc.*, No. 13-cv-3, 2017 WL 4484258, at *6 (E.D. Va. May 11, 2017).

Class Counsel are highly experienced attorneys with substantial background in COI litigation. Lead counsel Susman Godfrey have national reputations for enforcing consumer rights, particularly in nationwide COI class actions. *See* Sklaver Decl., Ex. 2 (Susman Godfrey firm resume). Lead counsel at Susman Godfrey have been appointed to represent plaintiffs in several significant COI class actions. *See, e.g.*, *TVPX ARS Inc. v. Lincoln Nat'l Life Ins. Co.*, No. 18-cv-2989, Dkt. 37 (E.D. Pa. Oct. 31, 2018) (same); *Iwanski v. First Penn-Pac. Life Ins. Co.*, No. 18-cv-1573, Dkt. 37 (E.D. Pa. Oct. 31, 2018) (same); *Brach Family Fund, Inc. v. AXA Equitable Life Ins. Co.*, No. 16-cv-740-JMF, Dkt. 145 (S.D.N.Y. Nov. 13, 2017) (same); *Phoenix COI*, 2013 WL 12224042, at *12 (in appointing Susman Godfrey as class counsel in Phoenix COI, noting that "[c]ounsel for plaintiffs is more than capable of representing the interests of the proposed Classes in this case, and defendant does not contend otherwise").

Lead Counsel also affiliated the law firms Holmes, Costin & Marcus, LLC, as local counsel, and the national law firm Bonnett Fairbourn Friedman & Balint ("BFFB"), which has also had past success in challenging COI increases. BFFB filed a different case against GLAIC on behalf of Plaintiff Ronald Daubenmier, and after learning of the earlier action commenced by Brighton Trustees, LLC, agreed with Lead counsel that the firms would work collaboratively throughout the proceedings. Friedman Decl., ¶ 3. BFFB took the lead only in preparing written discovery responses for Plaintiff Daubenmier and in preparing and defending for Mr. Daubenmier's deposition. *Id.* ¶ 4.

Class Counsel were uniquely qualified to prosecute this case, as they had the technical understanding and relationships with industry experts, to decipher the actuarial models and memoranda developed by GLAIC's actuaries and third-party consultants. Throughout the case, Class Counsel demonstrated their skill, deposing witnesses and experts on highly technical matters and successfully navigating challenges to class certification and the merits that threatened the full recovery for the class. Accordingly, this factor strongly supports Class Counsel's fee request.

The quality of opposing counsel can also be important when evaluating the quality of plaintiffs' counsel's work. *See Brown v. Charles Schwab & Co., Inc.*, No. 2:07-cv-3852, 2011 WL 13199227, at *4 (D.S.C. July 26, 2011) (quoting *Schwartz v. TXU Corp.*, No. 3:02-cv-2243-K, 2005 WL 3148350, at *30 (N.D. Tex. Nov. 8, 2005) (weighing standing of opposing counsel when determining attorneys' fees "because such standing reflects the challenges faced by plaintiffs' attorneys")). Defendants were represented by Alston & Bird and McGuireWoods, large firms with extensive experience in complex litigation matters. The ability of Class Counsel to obtain a favorable settlement for the Class Members in the face of such significant opposition confirms the quality of its representation. *See In re LandAmerica 1031*, 2011 WL 5430841, at *3 (counsel

demonstrated their ability by effectively litigating against "experienced, capable, and relentless counsel from highly reputable law firms, who zealously defended the matter.").

(10) The Undesirability of the Case (*Barber* Factor 10)

The risks that class counsel faces of "receiving little or no recovery is a major factor in awarding attorney fees." *In re LandAmerica 1031*, 2012 WL 5430841, at *4. The risk of not being paid is "not merely hypothetical" because "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and costs advanced, but lost the case despite their advocacy." *Id.*; *see also Millsap v. McDonnell Douglas Corp.*, No. 94-cv-633, 2003 WL 21277124, at *12 (N.D. Okla. May 28, 2003) ("This case is . . . undesirable, in the way that all contingent fee cases are undesirable, because it produced no income, but has required significant expenditures . . . ."). As more fully explained under *Barber* Factor 6 above, this case presented several challenges that Class Counsel was only able to overcome because of their ample COI and class action litigation experience and dedication. Class Counsel's ability to take on these significant risks, and overcome them, supports their request to receive 18.6% of the total benefits (or 33 1/3% of the settlement fund alone) as compensation for their work.

(11) The Nature and Length of the Attorney-Client Relationship (*Barber* Factor 11)

The eleventh *Barber* factor is the "nature and length of the attorney-client relationship." "The meaning of this factor, however, and its effect on the calculation of a reasonable fee has always been unclear . . . . Courts applying the [*Barber*] factors typically state that this particular standard is irrelevant or immaterial." *Bruner v. Sprint/United Mgmt. Co.*, Nos. 08-2133-KHV, 08-2149-KHV, 2009 WL 2058762, at *9 (D. Kan. July 14, 2009). Here, Class Counsel represented Plaintiffs Brighton Trustees, as Trustee, and Bank of Utah on one prior occasion. *See Hancock COI II*, Case No. 1:18-cv-04994-AKH (S.D.N.Y.). Class Counsel also pursued that representation

on a contingency basis. Class Counsel had not represented Plaintiff Ronald Daubenmier before this Action. If this factor is considered at all, it weighs slightly in favor of Class Counsel's request for a fee award because it suggests that Counsel would be motivated to perform high-quality work for clients, particularly repeat clients like Brighton Trustees LLC.

(12) Fee Awards in Similar Cases (*Barber* Factor 12)

Class Counsel's request for a fee of 18.6% of the gross benefits (or 33 1/3% of the cash fund viewed in isolation of all the other benefits achieved) is consistent with the attorneys' fees awarded in COI class actions and other complex litigation. The *Kelly* and *Kruger* decisions in the Fourth Circuit recently found that "a one-third fee is the market rate," while the courts in *Clark* and *Sims* stated that attorneys' fees of 33.3% were "customary" in class actions. *Kelly*, 2020 WL 434473, at *3; *Kruger*, 2016 WL 6775855; *Clark*, 2019 WL 2579201, at *3; *Sims*, 2019 WL 1993519, at *2. Class Counsel's fee request is in line with these recent decisions.

e. The Class's Reaction Confirms that Class Counsel's Request is Reasonable.

The Notice informed Class Members that Class Counsel would move the Court for an award of attorneys' fees of up to 33 1/3% of the Settlement and that Class Members could object to this request. *See* ECF No. 138. As of July 1, 2022, no Class Member has told Class Counsel that they oppose a 33 1/3% fee award or filed an objection to Class Counsel's fees. *See* Sklaver Decl. ¶ 37. The lack of objections, at least to date, weighs in favor of the requested award. *See, e.g.*, *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 668 (E.D. Va. 2021) (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). Class Counsel will update the Court as to any objections in its Reply Brief.

B. Class Counsel Should Be Reimbursed for the Expenses They Incurred.

Attorneys whose work creates a common fund are routinely reimbursed for the reasonable expenses they incurred to bring the case. *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 576 (D.S.C. 2015). "Reimbursable expenses include court costs, transcripts, travel, contractual personnel, document duplication, [and] expert witness fees." *Kelly*, 2020 WL 4334473, at *7. Counsel is reimbursed for these expenses "in addition to the fee percentage." *Id.*

Here, Class Counsel incurred $800,981.03 in expenses to prosecute this case. Sklaver Decl. ¶¶ 10-19; Friedman Decl. ¶¶ 3-4; Holmes Decl. ¶ 11. Most of these expenses were expert fees, but Class Counsel also incurred various other expenses necessary for successful prosecution of this case. *See* Sklaver Decl. ¶¶ 10-19; Friedman Decl. ¶¶ 3-4; Holmes Decl. ¶ 11. Each expense was actually incurred, and was both reasonable and necessary to prosecute this action. They are the sort of expenses that attorneys in non-contingency cases generally charge to their paying clients. Moreover, as with attorneys' fees, no Class Member to date has objected to reimbursement of these litigation expenses. *See* Sklaver Decl. ¶ 37. Accordingly, these expenses should be reimbursed.

C. The Court Should Grant Plaintiff's Request for a Case Contribution Award.

The intent of "case contribution awards" is to "reimburse and compensate Named Plaintiffs and/or Class Representatives for their time and efforts expended on behalf of the Class." *George*, 2011 WL 13218031, at *10; *see also Savani*, 121 F. Supp. 3d at 577 ("Serving as a class representative is a burdensome task and it is true that without class representatives, the entire class would receive nothing."). Although the Fourth Circuit has not provided "clear guidance on the factors to use when assessing the reasonableness of the size of an incentive award," "several district courts," including this Court, "have adopted the test used by the Seventh Circuit that instructs courts to examine 'the actions the plaintiff has taken to protect the interests of the class, the degree

to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Burke v. Shapiro, Brown & Alt, LLP*, Civ. No. 3:14cv201 (DJN), 2016 WL 2894914, at *6 (E.D. Va. May 17, 2016) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) and collecting cases)); *see also Manuel v. Wells Fargo Bank, N.A.*, Civ. No. 3:14cv238 (DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016).

Plaintiffs request a Case Contribution Award of $25,000 for each Plaintiff. Plaintiffs communicated regularly with Class Counsel about the case; gathered and reviewing documents to respond to Defendant's discovery requests; prepared and then appeared for deposition; and participated in the settlement process. *See* Sklaver Decl. ¶¶ 44-47; Friedman Decl. ¶¶ 2, 12. These actions required substantial time and effort, and the Class benefitted significantly from these actions, as they are now receiving compensation, both monetary and non-monetary, that they would not have otherwise received had the Class Representatives not pursued this case on their behalf. No class member has objected to these Case Contribution Awards. *See* Sklaver Decl. ¶ 37.

Plaintiffs' request is also within the range of awards approved by courts in the Fourth Circuit. *See, e.g.*, *McCurley v. Flowers Foods, Inc.*, No. 16-cv-00194, 2018 WL 6650138, at *8 (D.S.C. Sept. 10, 2018) (approving a $25,000 service award); *Loudermilk Servs., Inc. v. Marathon Petroleum Co. LLC*, 623 F. Supp. 2d 713, 727 (S.D. W. Va. 2009) (awarding each of the five class representatives a $25,000 service award); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (approving a service award of $25,000 to each of the three class representatives). Accordingly, the Court should grant Plaintiffs' request for a Case Contribution Award of $25,000 for each Plaintiff.

IV. CONCLUSION

For the foregoing reasons, the Court should award Class Counsel $8,333,139.08, which is

18.6% of the total settlement benefits provided (or 33 1/3% of the Settlement Fund viewed in isolation of the 7-year COI freeze and non-contestability benefits achieved), as attorneys' fees, reimburse Class Counsel for the $800,981.03 in expenses they incurred to prosecute this case, and grant Plaintiffs' request for a Case Contribution Award of $25,000 for each Plaintiff.

Dated: July 8, 2022

Respectfully submitted,

/s/ Kathleen J.L. Holmes

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CERTIFICATE OF SERVICE

I certify that on this 8th day of July 2022, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/ Kathleen J.L. Holmes

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