**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| 37 BESEN PARKWAY, LLC, on behalf of itself and all others similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.),<br><br>Defendant. | ) | Civil Action No. 15-cv-9924 |

**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND INCENTIVE AWARDS**

## INTRODUCTION

The response by the Class to the Settlement, Plan of Distribution, and Fee and Expense motions has been extraordinary. No Class member objected, and only six opt-outs have been filed, which represents less than one one-hundredth of a percent (< .01%) of the 79,000+ policies in the Settlement Class. The positive reaction by this large Class is powerful evidence that the relief requested for final approval, attorneys' fees, and expenses is fair, adequate, reasonable and should be granted. *See, e.g.*, *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) ("Not one person, company, or institution [out of 2,086 notices sent] has filed an objection to the fee request or the expense reimbursement sought. . . . [T]his overwhelmingly positive response by the Class attests to the approval of the Class with respect to the Settlement and the fee and expense application.").

Notice was distributed through an exceptionally robust program. Notice was sent directly to members of the Class at the addresses maintained in John Hancock's life insurance policy administration systems. Where John Hancock had multiple addresses in its records, notice was sent to each of those addresses rather than just one address. When a notice was returned as undelivered, the Settlement Administrator ran traces to identify alternative addresses for that Class member, and mailed out additional notices. All told, the Settlement Administrator mailed out 87,511 notices to the Settlement Class. The Settlement Class includes individuals, institutional investors, hedge funds, and other sophisticated entities. This wide-ranging notice program has, in turn, led to vigorous engagement by members of the Class. The website set up by the Settlement Administrator, www.JohnHancockCOIClassAction.com, has received over 13,600 hits since notice was mailed. The call center and Class Counsel have likewise received hundreds of calls and correspondence from members of the Class. *See* Declaration of Steven G. Sklaver In Support of Reply (Sklaver Decl.), ¶¶ 2-3.

The challenges faced in meeting the burdens in this highly complex and risky case were formidable. Class Counsel litigated the case without pay for years at enormous expense with the real chance of recovering nothing, and achieved extraordinary results, confirmed by the fact that no Class Member objected to any of the relief requested. As a result, Plaintiff and Class Counsel respectfully request that the motions for final approval, distribution, fees, expense reimbursements, and incentive awards should be granted.

**A. The Class's Favorable Response Confirms the Fairness of the Settlement**

In this District, "[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Stinson v. City of New York*, 256 F. Supp. 3d 283, 289 (S.D.N.Y. 2017). Because of the importance of the class's reaction, the Second Circuit has observed that "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (quoting 4 Newberg on Class Actions § 11.41); *see also Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *7 (S.D.N.Y. Sept. 9, 2015) (granting final approval where "[t]he overwhelming response of Class members is in favor of the Settlement, as evidenced by the complete lack of any objections and only three requests for exclusion by Class members . . . ."); *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 312 (E.D.N.Y. 2006) (settlement approval warranted where "not a single objection to the settlement" was received). Here, there were no objections. Sklaver Decl. ¶ 4.

It is also worth noting that Class Counsel successfully negotiated, as part of the Settlement, that the Settlement Fund be paid by John Hancock into an interest-bearing escrow account shortly after preliminary approval was granted—rather than, as in some other class action settlements, only after final approval. *See* Settlement Agreement, Dkt. 133-2, ¶ 2.1 (settlement funded within 5 business days after preliminary approval). As a result and as of

February 11, 2019, the Settlement Fund has *increased* due to interest earned to approximately $91.45 million. Sklaver Decl. ¶ 6.

**B. The Class's Favorable Response Confirms the Fairness and Reasonableness of the 30% Fee Award**

The Class was advised in the Notice that Class Counsel may apply for fees up to one-third of the Settlement Fund, which would have equaled, at the time the Settlement was funded, $30.417 million. *See* Settlement Agreement, Dkt. 133-2 Ex. C (the "Notice") ¶ 15. An application for $30.417 million as provided for in the Notice would be fair and reasonable in light of all the risks and circumstances. No Class member objected to a fee award in that amount. This is particularly significant where, as here, the Class is both large in numbers and contains many sophisticated life insurance investors. *See* Sklaver Decl. ¶ 3; *see also* May 5, 2016 H'rg Tr., Dkt. 29 at 10 (Counsel of John Hancock: "These are investors who are out there trying to make a buck off the policy."); *In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008) ("That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable."); *Fleisher*, 2015 WL 10847814, at *13 (S.D.N.Y. Sept. 9, 2015) ("No Class member objected to a fee award in that amount. This is particularly significant where, as here, the Class contains many large and sophisticated investors."); *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir. 2005) ("We agree with the District Court [that] such a low level of objection is a 'rare phenomenon.' Moreover . . ., a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive.").

Despite these facts, Class Counsel only applied for a fee equal to 30% of the Settlement Fund, or $27.375 million. The Class's unanimous non-opposition strongly supports the reasonableness of a request for 30% of the Settlement Fund under the governing standards. In *In*

*re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007), for instance, Chief Judge McMahon noted that, although notice had been sent to that class notifying them that "Plaintiffs' Counsel would apply for a fee award of 30%," there were no objections to "either the Settlement or to Plaintiffs' Counsel's request for an award of attorneys' fees." Chief Judge McMahon concluded that "[t]his response suggests that the fee request is fair and reasonable." *Id.*; *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) ("[N]umerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee.")

### C. The Class's Positive Reaction Was Prompted by the Unique, Complex, and Challenging Circumstances of this Case and the Substantial Recovery Secured

The favorable reaction of the Class to this Settlement and fee and expense application can be explained by the fact that the Settlement is an outstanding result reached in the face of the substantial risks in this unusually complex case. This result was achieved due to Class Counsel's unceasing efforts to unearth, analyze, and understand a labyrinth of technical materials that included John Hancock's pricing memoranda, mortality tables, underwriting classifications, pricing calculations, loading factors, original COI rates, policy-level data, and MY Experience System, all in order to develop and present a theory of liability and damages in support of class certification that ultimately was dependent upon millions of pieces of data that John Hancock initially claimed did not exist or could not produce. *See, e.g.*, June 22, 2017 H'rg Tr., Dkt. 62, at 6 (Counsel for John Hancock: "This is a case where there are over 83,000 potential policies at issue, and essentially we have been asked to provide a statement of cash flows in and out of policies since inception. This covers a period of over 20 years, and the systems that John Hancock maintains are not designed to provide that kind of output. We spent over 2,000 IT hours

trying to respond to the requests that we have received, and essentially I think [Class Counsel] said we requested that they come to our offices."); Oct. 5, 2017 Order, Dkt. 83, at 3 (order by Magistrate Judge Pitman explaining that "Defendant has provided a sample of the data underlying the JH14 mortality study. Defendant's sample is comprised of 10 rows of data; the entire study contains 195,000 rows of data. Each row has 57 columns each of which contains various pieces of data. Thus, in total, the study contains more than 11 million pieces of data.").

Plaintiff ultimately submitted two alternative damages models in support of class certification, one of which estimated damages at $217 million, and the other estimated damages at $61 million. *See, e.g.*, Dkt. 133 ¶ 13; Dkt. 114 at 3, 24. The $91.25 million settlement is 42% and 151% of those estimates, respectively, and an outstanding result by any measure. This recovery rate is far higher than the "one-third of their damages," which Judge Rakoff found to be "a very significant amount" in contrast to the "more typical recovery rate in class actions [of] between 5% and 6%"; Judge Rakoff cited this recovery rate in approving a fee award of 30%—the same percentage requested here. *See In re Bisys Sec. Litig.*, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007). These percentages also compare favorably to much lower rates of recovery which have been endorsed by courts in this District, when, even in the face of objections, awarding fees greater than thirty-percent. *See, e.g.*, *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 621 (S.D.N.Y. 2012) (overruling objection that settlement of 38% of estimated value of the case "is too low" and awarding "one-third of the settlement fund" in fees because "one-third of the Fund is reasonable and consistent with the norms of class litigation in

this circuit" and "reasonable, paying client[s], typically pay one-third of their recoveries under private retainer agreements.") (quotations and citations omitted).[1]

## CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court grant the motions for Final Approval, Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards.

Dated: February 12, 2019

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[1] Some courts apply a "sliding scale" for fee awards, depending on the size of the award. Judge Gleeson, for example, created a "sliding scale" fee table, grounded in empirical studies, which, if used in this action, would equate to a fee award of 28.11%. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) (33% for first $10 million; plus 30% for next $40 million; plus 25% of next $50 million). That analysis also supports the reasonableness of the unopposed 30% fee request here.

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I, Glenn C. Bridgman, declare:

1. I am over eighteen years of age, I am not a party to this action, and I am an employee with the law firm of Susman Godfrey L.L.P., in the Los Angeles, California office.

2. My business address is 1900 Avenue of the Stars, Suite 1400, Los Angeles, California 90067.

3. On February 12, 2019, I served a copy of the aforementioned document via the court's CM/ECF system upon the following:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 12, 2019, at Los Angeles, California.

*/s/ Glenn C. Bridgman*
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