UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PHT HOLDING I LLC, and ALICE CURTIS, on behalf of themselves and all others similarly situated, Plaintiffs, v. RELIASTAR LIFE INSURANCE COMPANY, Defendant.	Civ. No.: 18-cv-2863 DWF/TNL **MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS**

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TABLE OF DEFINED TERMS

Term	Definition
ATLES	Advance Trust & Life Escrow Services, LTA
Ard Decl.	Declaration of Seth Ard, filed contemporaneously with this memorandum
Class Members or Class	Owners of the Class Policies
Class Policies	Policies that fall within the COI Class and the Rider Class, together
COI	Cost of insurance
COI Class	The nationwide breach-of-contract class related to COI charges, as defined in Dkt. 211 at page 31
Counsel	Class Counsel and Local Counsel, together
EFME	Expectations of future mortality experience
EY	Ernst & Young
Gibraltar	Gibraltar Life Services, Ltd.
Keough Decl.	Declaration of Jennifer M. Keough, filed contemporaneously with this memorandum
Leach Decl.	Declaration of Thomas J. Leach, filed contemporaneously with this memorandum
Local Counsel or M&G	Merchant & Gould, P.C.
McNally Decl.	Declaration of Keith McNally, Dkt. 261
Mills Decl.	Declaration of Robert Mills, filed contemporaneously with this memorandum
Pfeifer Decl.	Declaration of Timothy Pfeifer, Dkt. 90-2
PHT	Class Representative PHT Holding I LLC
Plaintiffs or Class Representatives	Class Representatives PHT and Alice Curtis, together
Rider Class	The nationwide breach-of-contract class related to rider charges, as defined in Dkt. 211 at page 32
RLIC or ReliaStar	Defendant ReliaStar Life Insurance Company
Settlement	Joint Stipulation and Settlement Agreement, Dkt. 259-2
SG or Class Counsel	Susman Godfrey L.L.P.
Sklaver Decl.	Declaration of Steven Sklaver, Dkt. 259
STOLI	Stranger-owned life insurance

TABLE OF EXHIBITS

Ard Decl.	Declaration of Seth Ard in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards
Leach Decl.	Declaration of Thomas J. Leach in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards
Mills Decl.	Declaration of Robert Mills in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards
Keough Decl.	Declaration of Jennifer M. Keough Regarding Settlement Administration Expenses

INTRODUCTION

After nearly five years of hard-fought litigation—after prevailing on class certification and a Rule 23(f) petition, after the close of all fact and expert discovery, after defeating a motion for summary judgment, and after participating in two mediations—Class Counsel settled this highly-complex case for over **$47.7 million** in settlement benefits, including $39 million in cash and $8.75 million in non-monetary benefits. *See* McNally Decl. ¶ 11 & Ex. I (expert valuation of the Settlement's non-monetary benefits). The cash component alone represents approximately **57%** of all COI and rider overcharges collected by RLIC through May 31, 2023 under Plaintiffs' maximum damages model, and **106%** of the overcharges under Plaintiffs' alternative Historical Mortality Improvement ("HMI") damages model. Mills Decl. ¶ 12. Both numbers vastly exceed 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) (holding that "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"). And the non-cash benefits provide enormous additional value that the Class could not have obtained at trial, including a guarantee by RLIC—notwithstanding a global pandemic that some insurance companies claim caused their costs to skyrocket—not to increase COI rates on the Class Policies for a period of seven years.

Given these tremendous results, Class Counsel respectfully applies for an attorneys' fee award equal to 1/3 of the $47,757,089 million value of the 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). Indeed, as 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"). The *Johnson* factors include consideration of the results achieved in the case, the skill required to achieve these results, and fee awards in similar cases. *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974); *League of Women Voters of Mo. v. Ashcroft*, 5 F.4th 937, 941 (8th Cir. 2021) (noting that the Eighth Circuit has adopted the *Johnson* factors). Each of these factors, along with the other *Johnson* factors, supports a fee equal to 33⅓ percent of the settlement value.

First, the results achieved are superb. The settlement is better than comparable COI settlements in terms of the percentage of the overcharges recovered, including 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-0024 (PGG), Dkt. 164 at 20:10 (S.D.N.Y. Apr. 18, 2019) ("*Hancock COI*"). The cash recovery alone, as a percentage of COI overcharges, also 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. Payment will be sent directly to Class Members, without any need to fill out any claim forms, and with no reversion to RLIC.

This recovery is especially impressive when viewed in light of the substantial risks that the Class faced in proceeding with this case through trial and appeal. At trial, RLIC's actuaries and experts would have testified that the COI rates for the Class Policies were in fact based on its EFME, an argument that would have defeated Plaintiffs' claim for breach. *See* Dkt. 165 at 7 (RLIC noting that its actuary "confirmed that the rates currently being charged reflect ReliaStar's current expected mortality experience"). The risk of losing on liability in these types of cases is substantial. 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 (11th Cir. 2021); at class certification, *see, e.g.*, *Taylor v. Midland Nat'l Life Ins.*, 2019 WL 7500238 (S.D. Iowa May 3, 2019); and on summary judgment, *see e.g.*, *Norem v. Lincoln Ben. Life. Co.*, 737 F. 3d 1145 (7th Cir. 2013). Even if Plaintiffs prevailed on liability, they still faced significant risks on damages. RLIC intended to argue at trial that the Class's damages were substantially lower than Class Counsel calculated due to a release of claims in prior class action litigation, an argument RLIC pressed on summary judgment. *See*

Dkt. 165 at 7–10, 18–23. The risk of the Class recovering far less than the overcharges sought was very real. In a recent COI class action trial within the Eighth Circuit, for example, the jury found for the plaintiffs on liability but the plaintiffs ended up with **just 5%** of the damages they sought. *See* Sklaver Decl. (Dkt. 259) ¶ 23, Ex. 3 (Dkt. 259-3), & Ex. 4 (Dkt. 259-4) (showing $5 million jury verdict where the plaintiffs sought $18 million and a final judgment awarding only around $900,000 after post-trial proceedings). And trial would not have been the end of the road. If Plaintiffs 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 more than half of the alleged overcharges with payments likely distributed before the end of the year, ***plus*** non-cash benefits that the Class could not have obtained even if it prevailed at trial.

The settlement is all the more extraordinary given the substantial non-cash benefits. RLIC is agreeing to a **complete freeze** on any new COI rate schedule increase for **seven years**, at a time when many insurance companies—and RLIC's actuarial expert in this case—have claimed that mortality costs have increased and could lead to COI increases in the future.[1] The Settlement also prohibits RLIC from trying to invalidate any Class Policies, or avoid paying death benefits, by claiming fraud, misrepresentation, or lack of insurable interest. In *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*"), the Court adopted an expert analysis valuing similar types of non-

[1] For instance, RLIC's expert, Timothy Pfeifer, has argued here and elsewhere that COVID-19 has led to deterioration in mortality expectations. *See e.g.*, Pfeifer Decl. ¶ 54; *Meek v. Kan. City Life Ins. Co.*, No. 19-cv-472 (W.D. Mo.).

monetary relief, and included that amount in the gross settlement value: "In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and nonmonetary benefits conferred on the Class." 2015 WL 10847814, at *15. Here, an eminently qualified expert, with experience in the insurance industry and with longevity-based products specifically, using RLIC's own data, has opined that this non-monetary relief is worth $8,757,089 to the Class, with the vast majority of that amount resulting from the benefits created by the seven-year COI freeze ($7,178,941). *See* McNally Decl. ¶ 11 & Ex. I.

Second, a high degree of skill was required to achieve these results. Class Counsel drew on its extensive COI experience and dedicated almost 7,000 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 that paved the way. 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. Over the course of this case, Class Counsel defeated a motion for summary judgment, obtained class certification, and overcame a Rule 23(f) petition to the Eighth Circuit. *See* Dkt. 211; *see also ReliaStar Life Ins. Co. v. Advance Tr. & Life Escrow Servs.*, et al., No. 22-08006 (8th Cir. 2022). A loss on any one of those motions would have effectively ended this litigation, resulting in no recovery to the Class.

This case also involved unusual complexities and extensive sleuthing by Plaintiffs' counsel to uncover the extent of the breach. One example illustrates the skill and effort

required. Many of the Class Policies were not administered by RLIC, but by a third party, Gibraltar. To prove the amount of damages, and the extent of the breach, Plaintiffs had to obtain data from Gibraltar's third-party systems. In that process, Class Counsel uncovered irregularities in what those systems showed that even RLIC was unaware of. Just obtaining Gibraltar's records took many months and the extension of several production deadlines. *See, e.g.*, Dkts. 78, 80. Making sense of Gibraltar's records required extensive investigation and perseverance. As recounted in Judge Wright's 27-page order granting Plaintiffs leave to amend their complaint, RLIC first identified the monthly COI rate tables used by Gibraltar in a sworn interrogatory response in March 2019. Dkt 131, at 3–4 n.4. Rather than simply relying on that sworn response, Plaintiffs pressed for more information and persuaded RLIC to amend its responses to identify supporting documents. *Id.* Plaintiffs then analyzed those documents, and worked with their experts to reconcile the documents identified with the COI charges deducted from the Class, and this effort proved there were unexplained discrepancies. *Id.* at 4. In response to Plaintiffs' extensive correspondence describing these discrepancies, RLIC agreed to provide a spreadsheet showing exactly how the monthly charges were calculated. This hard work paid off. The spreadsheet proved something that RLIC itself said it was unaware of: RLIC had secretly increased COI *and* rider charges by 15% decades earlier, expanding the scope of the claims in this case. *Id.* The Gibraltar data, once reconciled, contained key policy-level data reflecting the historical credits and deductions to the account value of Class Members' policies, which was used to prove the extent of the COI and rider damages in this case. Sklaver Decl. ¶ 13.

Class Counsel achieved this outstanding result by pushing this class action to the brink of trial, which heightened the risk and increased the reward: the parties settled only after the Court certified the Class, denied RLIC's summary judgment motion, and set a trial date for later this year. *See* *Phoenix COI*, 2015 WL 10847814, at *21 ("The risk of no recovery in complex cases of this type is real and is heightened when Class Counsel opt to fight up to the eve of trial, in order to achieve the very best result for the class, rather than reaching a less attractive settlement early in the litigation."). This settlement was reached after two mediations conducted by two highly experienced mediators, Judge Sidney I. Schenkier (Ret.) of JAMS and H. Jeffrey Peterson, and over three years of settlement discussions. *See* Sklaver Decl. ¶¶ 6, 8–9. Class Counsel was able to avoid the risks inherent with trial only by virtue of years of tireless, creative, and high-quality work.

Third, 33⅓ percent of the total settlement value is a commonly awarded percentage in class actions in this Circuit. Courts in this Circuit have acknowledged that "the benefit should be based on both the monetary and the non-monetary value of the settlement," *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019), and have awarded 33⅓ of the total settlement value, *see* *Karg*, 2021 WL 9440635, at *1–2 (awarding attorneys' fee of 33⅓ percent of the total monetary and non-monetary benefit to the class). 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 COI*, Dkt. 458. Courts in this Circuit, including this Court, have done the same in many other class action cases, and even awarded in excess of 33⅓ percent. *See, e.g.*, *Huyer*, 849 F.3d at 399; *In re US. Bancorp Litig.*, 291 F.3d 1035,

1038 (8th Cir. 2002) (36% fee award was reasonable); *Tussey*, 2019 WL 3859763, at *4 ("Courts in this Circuit and this District have frequently awarded attorney fees of 33 1/3%–36% of a common fund."); *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) (Frank, J.) (approving award of 33⅓ percent of $62.5 million fund); *Rodney v. KPMG Peat Marwick*, No. 4:95-cv-00800-DWF-RLE, Dkt. 198 ¶ 7 (D. Minn. June 16, 2000) (Frank, J.) (approving award of 33⅓ percent).

The requested award and reimbursement—$15,919,029 in fees, reimbursement of $1,268,065.19 in expenses, ongoing expenses incurred by the Settlement Administrator, including 177,179.45 to date, and a $50,000 service award for each of the two Class Representatives—are warranted by the tremendous results Class Counsel achieved, and the huge risks taken in this years-long litigation brought on a fully contingency fee basis.

BACKGROUND

I. Class Counsel Investigated RLIC's Failure to Reduce COI Rates and Promptly Filed a Detailed Complaint

SG is highly experienced in representing classes of policyowners seeking recovery of overcharges against insurers, *see* Sklaver Decl. ¶¶ 3–4 & Ex. 1, and has represented one of the Class Representatives in this case, PHT, and in other COI-related litigation, *see, e.g.*, *PHT Holding I, LLC v. Security Life of Denver Ins. Co.* ("*SLD COI*"), No. 1:18-cv-01897-DDD-SKC (D. Colo.). PHT is the owner of a policy within the COI Class and Rider Class, universal policy number CBS0143318 ("PHT's Policy"). *See* Dkt. 132, ¶¶ 10, 35, 37.

SG performed the initial factual and legal investigation into RLIC's COI overcharges, and on October 5, 2018, filed this putative class action.[2] Dkt. 1. On February 24, 2020, Plaintiffs filed a First Amended Complaint, adding Alice Curtis, who owns a policy within the COI Class, as a plaintiff. Dkt. 84.

II. Class Counsel Engaged in Extensive Fact and Expert Discovery, Uncovered a New Breach, and Won an Opposed Motion for Leave to Amend the Complaint

Fact discovery in this case lasted nearly three years. *See* Dkt. 145 (closing on September 3, 2021). During the discovery period, Class Counsel reviewed and analyzed over 40,000 documents spanning more than 100,000 pages, which included extensive actuarial tables, complex spreadsheets, and policy-level data reflecting the historical credits and deductions to the account value of all Class Members' policies. Sklaver Decl. ¶ 11. To gain access to this data, particularly the critical policy-level data for all Class Policies for all relevant time periods, Class Counsel exchanged dozens of emails with RLIC's counsel and engaged in myriad rounds of meet and confers. *Id.* ¶¶ 11–13. Accessing the policy-level data proved particularly difficult because a third party, Gibraltar, administers many of the Class Policies for RLIC on a proprietary system. *Id.*

Class Counsel originally issued a subpoena to Gibraltar for the relevant policy-level data before ultimately working with RLIC's counsel for the production of Gibraltar's records. *Id.* Obtaining Gibraltar's records took many months and the extension of several production deadlines. *See, e.g.*, Dkts. 78, 80. Making sense of Gibraltar's records was a

[2] The lawsuit was originally filed by ATLES, the predecessor in interest for PHT's Policy. *See* Dkt. 251 (Joint Stipulation for Substitution of Plaintiff and Class Representative); *see also* Dkt. 254 (Order Granting Substitution of Plaintiff and Class Representative).

whole other endeavor. Starting in January 2019, when Class Counsel served an interrogatory on this question, Class Counsel began asking RLIC for the COI rate scales it used for the Class Policies, including those administered by Gibraltar. Over more than a year that followed, Class Counsel worked to try and make sense of the rate scales RLIC identified with the policy-level records it produced. RLIC's interrogatory response on this question underwent several rounds of revisions and still, the numbers did not add up.

In March 2020, after a year of inquiries by Class Counsel as to the rate scales used for the Class Policies and after a specific request from Class Counsel for a breakdown of the monthly deductions for PHT's Policy, RLIC produced a spreadsheet that allowed Class Counsel, with the help of an expert, to finally make sense of the COI rate scales and also discover that RLIC was overcharging policyholders in a completely different way, and in addition to, the breach alleged in the complaint: it was, and had been for almost three decades, assessing rider charges that were 15% higher than those set forth in the riders themselves. *See* Sklaver Decl. ¶ 12. This discovery prompted numerous rounds of back-and-forth between Class Counsel and RLIC's counsel and ultimately a motion for leave to amend the complaint in May 2020, which RLIC opposed. *Id.* This months-long exchange is detailed in Plaintiffs' memorandum of law in support of its motion for leave to amend the complaint. *See* Dkt. 107 at 4–10.

After full briefing and an oral hearing, in a 27-page opinion, the Court granted Plaintiffs leave to amend the complaint to add the new breach-of-contract claim. Dkt. 131. Class Counsel filed a Second Amended Complaint on September 3, 2020. Dkt. 132. Over several years of discovery, Class Counsel took and defended seven highly technical fact

depositions and one expert deposition. Sklaver Decl. ¶ 14. Class Counsel also issued numerous subpoenas—not just to Gibraltar, but also to RLIC's actuarial consultants and financial auditors—subpoenas that resulted in additional meet and confers with those third parties' attorneys. *See id.* ¶ 13. Class Counsel obtained thousands of pages of valuable documents from these subpoenas, much of which had not been produced by RLIC. *Id.*

One such subpoena was to RLIC's financial auditor, EY. *See* Ard Decl. ¶ 6. After serving the subpoena and responding to EY's litany of objections, Class Counsel reached an agreement for the production of documents with EY and set up recurring calls with EY's counsel to discuss the status of their production and any relevant issues. *Id.* ¶ 7. These calls continued for months, until EY's production was complete. *Id.* The productions resulted in dozens of critical documents, some of which were cited in the Court's eventual order granting class certification and denying summary judgment. *See, e.g.*, Dkt. 211 at 19 (citing Dkt. 151-4 at EY-RELI-000052). To further establish the contents of these documents, Class Counsel also deposed a corporate representative for EY in October 2021. Ard Decl. ¶ 7.

Unsurprisingly, expert discovery in this highly technical case was a herculean task. Collectively, including reports related to class certification, the parties produced 10 expert reports that totaled 658 pages, not including voluminous tables and appendices. *Id.* Plaintiffs designated three experts: liability experts James Rouse and Linley Baker, and damages expert Robert Mills. Sklaver Decl. ¶ 15. Plaintiffs produced opening expert reports from Rouse and Mills on October 14, 2022. *Id.* In response, RLIC designated actuarial expert Timothy Pfeifer and produced his report on November 10, 2022. *Id.*

In rebuttal, on December 16, 2022, Plaintiffs produced three reports: one from Rouse, one from Baker, and one from Mills. *Id.* Pfeifer was deposed. *Id.*

III. Class Counsel Overcame RLIC's Hard-Fought Efforts at Both the Class-Certification and Summary-Judgment Stages and RLIC's Rule 23(f) Petition

Success in this case required Plaintiffs to prevail on extensive motion practice, in addition to the hotly-contested motion for leave to amend. On May 28, 2021, Plaintiffs moved for class certification, supported by an over-thirty-page memorandum of law, Dkt. 148, and 37 exhibits, Dkts. 150, 151. RLIC filed a 34-page opposition brief. Dkt. 161. Less than a month later, RLIC moved for summary judgment. Dkt. 164. RLIC's supporting memorandum of law was 34 pages. Dkt. 161. On September 24, 2021, Plaintiffs filed a 14-page reply brief in support of their motion for class certification. Dkt. 180. On December 8, 2021, Plaintiffs responded to RLIC's motion for summary judgment with a 42-page memorandum of law, supported by 24 exhibits. Dkts. 193, 195, 196.

The Court conducted a three-hour hearing on both motions on January 28, 2022. Dkt. 206. A few months later, the Court granted Plaintiffs' motion for class certification and denied RLIC's motion for summary judgment in a 32-page order. Dkt. 211. In the order, the Court certified the COI Class and Rider Class, appointed SG as Class Counsel, and appointed the Class Representatives.[3] *Id.* On April 12, 2022, RLIC filed a 23-page Rule 23(f) petition to the Eighth Circuit for review of the Courts class-certification decision. *See* *ReliaStar Life Ins. Co. v. Advance Tr. & Life Escrow Servs.*, et al., No. 22-

[3] The Court initially appointed ATLES as a class representative, and then later substituted in PHT for ATLES, following a stipulation by the parties. *See* Dkts. 251, 254.

08006 (8th Cir. 2022). On April 29, 2022, Plaintiffs filed a 22-page response opposing the petition. *Id.* The Eighth Circuit denied the petition the next month. *Id.*

IV. Class Counsel Vigorously Litigated the Case to an Impending Trial

Class Counsel made clear to RLIC that Class Counsel was ready to try this case. Shortly after the Court granted class certification, the parties submitted a joint status report to the Court in which they requested that the Court set a status conference to discuss the parties' proposal for a trial date. Dkt. 212 at 3. The Court later set a trial ready date of May 2, 2023. Dkt. 224 at 2. In the same order, the Court set a July 1, 2022 deadline for RLIC to supplement its production, including policy-level data, and a deadline for motions relating to that supplementation. *Id.* at 1–2. Because RLIC was unable to supplement its production by the July 1, 2022 deadline, Dkt. 227 at 2, the Court extended those deadlines, Dkt. 230. Those deadlines were further extended on August 5, 2022, after Class Counsel identified gaps in RLIC's supplemental production. Dkts. 231, 234.

On September 19, 2022, the Court held a status conference, Dkt. 238, and later set the case for a jury trial on June 12, 2023, Dkt. 239 at 7. Due to a conflict, on January 18, 2023, the parties' requested a continuance of the trial, which resulted in the case being "set for a date certain jury trial on December 4, 2023." Dkt. 250 ¶ 2. The Court stated that it would issue a subsequent trial management order setting the pretrial conference along with the relevant trial document requirements and due dates. *Id.*

V. Class Counsel Negotiated a Comprehensive Settlement

The parties held two separate mediation sessions, which were in addition to informal settlement discussions that took place over the course of more than three years. Sklaver

Decl. ¶ 6. The parties' first settlement discussion took place in March 2020, pursuant to a Court order requiring the parties to "exchange at least one round of a demand from the plaintiff and a specific offer from the defendant" in advance of a settlement conference. Dkt. 72 at 2; *see also* Sklaver Decl. ¶ 7. Those discussions were unsuccessful. Sklaver Decl. ¶ 7. Two years later, settlement discussions resumed, again pursuant to a Court order, but the parties were unable to reach an agreement. *See* Dkt. 214; Sklaver Decl. ¶ 7.

The first mediation took place on September 8, 2022, with mediator H. Jeffrey Peterson in Minneapolis, Minnesota. Sklaver Decl. ¶ 8. The second mediation took place on May 31, 2023 with Judge Sidney I. Schenkier (Ret.) of JAMS. *Id.* ¶ 9. Before the mediations, the parties submitted lengthy mediation statements and updated damages estimates. *Id.* ¶¶ 8–9. For the first mediation, the parties also provided supplemental statements detailing the opinions of their experts. *Id.* And for the second mediation, Plaintiffs provided a supplemental mediation statement. *Id.* The parties were unable to reach an agreement at the first mediation but reached an agreement at the second. *Id.*

A long-form settlement agreement was negotiated and agreed to thereafter. *See id.* ¶ 9 & Ex. 2. For the Class, the Settlement awards three main benefits:

1. **CASH**: A cash settlement fund of $39,000,000, which is equal to approximately 57% of all alleged overcharges collected by RLIC from the Class Policies through May 31, 2023, or 106% of alleged overcharges under Plaintiffs' HMI model.

2. **COI RATE SCHEDULE INCREASE FREEZE**: A freeze on any new COI rate scale increase for a period of seven years following the earlier of either the date of final approval or January 1, 2024. Thus, even if RLIC experiences a future change in expectations that would otherwise permit a COI rate increase, RLIC will not increase COI rate schedules for seven years. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for close to a decade.

3. **POLICY VALIDITY STIPULATION AND STOLI WAIVER**: An agreement that RLIC 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, STOLI, or misrepresentations in the application for such policies.

See id. ¶ 24 & Ex. 2.

An eminently qualified expert, with experience in the insurance industry and with longevity-based products specifically, using RLIC's own data, has opined that this non-monetary relief is worth $8,757,089 to the Class, with the vast majority of that amount resulting from the COI freeze ($7,178,941). *See* McNally Decl. ¶ 11 & Ex. I. The COI freeze is particularly valuable because insurance companies have claimed that a huge spike in mortality due to the COVID-19 pandemic could justify new COI increases.[4]

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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Tussey*, 2019 WL 3859763, at *2 ("Under the 'common fund' doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds.").

[4] *See, e.g.*, "Life Insurance During the Pandemic," available at https://www.wealthmanagement.com/insurance/life-insurance-during-pandemic ("[COVID-19] will result in many insurers using this pandemic as a valid reason to increase their [COI], which will result in some insurers charging a higher premium than another, for a similar condition.").

B. The Requested Fee Is Reasonable under the Preferred Percentage-of-the-Benefit Approach

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

Courts typically use the percentage-of-the-benefit method to award attorney's fees from a common fund. *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). Indeed, "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established.'" *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)). Courts have noted that the percentage method is even "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) (quoting *West v. PSS World Med., Inc.*, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014)). As the Eighth Circuit has recognized, that 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." (citing *Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 255 (3d Cir. 1985)) (listing reasons)).[5]

[5] "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) (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)).

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

In calculating the overall settlement value, courts include the value of both the monetary and non-monetary benefits of the settlement. *See* Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges 35 (3d ed. 2010) ("Courts use two methods to calculate fees for cases in which the settlement is susceptible to an objective evaluation. The primary method is based on a percentage of the actual value to the class of any settlement fund *plus the actual value of any nonmonetary relief.*" (emphasis added)).[6] Here, the total settlement benefits are $47,757,089 million, which includes $39 million of cash and $8.75 million in non-monetary relief. *See* Ard Decl. ¶ 3; McNally Decl. ¶ 11 & Ex. I. Other courts have included virtually identical non-monetary relief—i.e.,

[6] *See also* *Poertner v. Gillette Co.*, 618 F. App'x 624, 628–29 (11th Cir. 2015) (holding that the district court properly determined the settlement was fair based in part on valuation of "nonmonetary relief and cy pres award as part of the settlement pie"); *Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (holding that the district court properly determined the settlement was fair based in part on valuation of "nonmonetary" benefits, principally a "price freeze"); *Tussey*, 2019 WL 3859763, at *2 ("[T]he benefit should be based on both the monetary and the non-monetary value of the settlement."); *Karg*, 2021 WL 9440635, at *1–2 (awarding attorneys' fee of 33⅓ percent of the total monetary and non-monetary benefit to the class, or 36.1% of the monetary benefit); *Barfield*, 2015 WL 3460346, at *4 ("Thus, it is appropriate to base the percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the KAMO Defendants' separate payment of attorneys' fees and expenses, and the expenses of administration."); *Carlson v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2671105, at *6–8 (D. Minn. Sept. 18, 2006) (awarding fees that amounted to 35.5% of the settlement fund where, "[i]n addition to monetary relief, the settlement provides for substantial programmatic relief"); *In re Checking Acct. Overdraft Litig.*, 2013 WL 11319391, at *13 (S.D. Fla. Aug. 5, 2013) ("When the non-cash relief can be reliably valued, courts often include the value of this relief in the common fund and award class counsel a percentage of the total fund."); *Sheppard v. Consol. Edison Co. of N.Y.*, 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) (approving fee award measured as a percentage of "total settlement," including $6.745 million in cash and "an estimated $5 million in non-monetary, injunctive relief").

a COI freeze and a validity confirmation—in calculating the overall settlement value. *See, e.g.*, *Phoenix COI*, 2015 WL 10847814, at *10 & nn.7–8.

Class Counsel respectfully requests a fee award of $15,919,029, which is 33⅓ percent of the $47,757,089 in settlement benefits. As discussed above, courts in the Eighth Circuit and beyond regularly approve fee awards between 33⅓ percent and 36 percent. *See, e.g.*, *Huyer*, 849 F.3d at 399; *Tussey*, 2019 WL 3859763, at *4.[7]

The fee awards in other COI-related cases in this Circuit confirm the reasonableness of the fee 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).

[7] *See also In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285–86 (D. Minn. 1997) (awarding 33⅓ percent of $86 million fund); *City of Farmington Hills*, No. 0:10-cv-04372-DWF-HB, Dkt. 686, ¶¶ 45–15, 17 (approving fee award of 33⅓ percent of $62.5 million cash fund); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming award of 36% of $3.5 million settlement fund); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061–62 (D. Minn. 2010) (awarding 33⅓ percent of $16.5 million fund plus costs); *Carlson*, 2006 WL 2671105, at *8 (awarding 35.5% of the settlement fund); *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33⅓ percent of $20 million settlement); *KK Motors v. Brunswick Corp.*, No. 98-cv-02307-JRT-RLE, Dkt. 67 (D. Minn. March 6, 2000) (awarding 33⅓ percent of $30 million settlement fund); *In re SciMed Life Sec. Litig.*, No. 3:91-cv-00575-PAM-SPMS, Dkt. 254 (D. Minn. July 17, 1995) (awarding 33⅓ fund); *In re Control Data Sec. Litig.*, No. 3:85-cv-01341-JMR-FLN, Dkt. 315 (D. Minn. Sept. 23, 1994) (awarding 36.96% of fund); *In re Employee Benefit Plans Sec. Litig.*, 1993 WL 330595, at *6–7 (D. Minn. June 2, 1993) (awarding 33⅓ percent of cash payment and 33.3% of debentures to be issued); *Saunders v. Ace Mortg. Funding, Inc.*, No. 05-cv-01437-DWF-SRN, Dkt. 457 (D. Minn. May 20, 2008) (Frank, J.) (approving award of 33% of fund); *Rodney*, No. 4:95-cv-00800-DWF-RLE, Dkt. 198 (approving fee award of 33⅓ percent of cash fund); *Lo v. Inv. Advisers, Inc.*, No. 0:98-cv-02597-DWF-RLE, Dkt. 109 (D. Minn. Dec. 22, 2000) (Frank, J.) (approving fee award of 33⅓ percent of cash fund); *Rasschaert v. Frontier Comm's Corp.*, No. 0:11-cv-02963-DWF-JSM, Dkt. 116 (D. Minn. Apr. 12, 2013) (Frank, J.) (approving fee award of 33% of escrow fund).

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" to determine whether the proposed fee is reasonable. *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))); *see also* *In re Pork Antitrust Litig.*, 2022 WL 4238416, at *9 (D. Minn. Sept. 14, 2022) (noting that a lodestar cross-check is not required).[8] "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 (quoting *In re Xcel Energy*, 364 F. Supp. 2d at 999). Such circumstances include "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) (quoting *Childress v. Fox Assocs.*, LLC, 932 F.3d 1165, 1172 (8th Cir. 2019)). The Court then considers the multiplier that it would need to apply for the resulting amount to equal

[8] Courts in the Eighth Circuit, for example, 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 and without reference to a lodestar or lodestar cross-check); *Massey v. Shelter Life Ins. Co.*, 2006 WL 8457745, at *2 (W.D. Mo. Oct. 17, 2006) (same).

the fee award that the Court determines is appropriate 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 v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1065 (D. Minn. 2010) (quoting *In re Xcel*, 364 F. Supp. 2d at 999). The Eighth Circuit has noted, for example, that a 5.3 lodestar multiplier is within "the bounds of reasonableness." *Rawa*, 934 F.3d at 870 (citing *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)).

Here, the requested fee award is equal to a 3.04 multiplier. Ard Decl. ¶ 13. In this entirely contingent action, Class Counsel spent 6,885.10 hours representing a lodestar of $5,078,575, and advanced $1,266,698.39 in expenses. *See id.* ¶¶ 8–9, 14. Local Counsel spent 253.28 hours, representing a lodestar of $155,362.60, and advanced $1,366.80 in expenses.[9] *See* Leach Decl. ¶¶ 10, 12. Together, Counsel spent 7,138.38 hours, representing a lodestar value of $5,233,937.60, and advanced $1,268,065.19 in expenses. *See* Ard Decl. ¶¶ 9, 14.[10]

[9] Like Class Counsel, Local Counsel is working on a contingent fee basis and will be paid from the fee awarded to Class Counsel.

[10] 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." (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987))); *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" when calculating a fee award in an ERISA case).

The resulting 3.04 multiplier here 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 crosscheck 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).[11]

Counsel's hourly rates are reasonable. Counsel's rates, and the rates of the members of their staff, are lower than peer law 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), *aff'd*, 59 F.4th 905 (8th Cir. 2023) (citing *Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1992)).

[11] The same is true in non-COI cases in this District, and nationwide. *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 999 (approving multiplier of 4.7); *In re St. Paul Travelers Sec. Litig.*, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (approving multiplier of 3.9); *Khoday v. Symantec Corp.*, 2016 WL 1637039, at *11 (D. Minn. Apr. 5, 2016), *report and recommendation adopted*, 2016 WL 1626836 (D. Minn. Apr. 22, 2016), *aff'd sub nom. Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017) ("Multipliers can range from two to five."); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court.").

In a survey of AmLaw 50 law firms performed by PwC Product Sales, LLC, and issued in June 2022, the median standard billing rate for equity partners was $1,374 and for associates was $895. *See* Ard Decl. ¶ 11. Here, all of the SG partners bill at rates below the 2022 median standard billing rate for equity partners. *Id*. ¶¶ 11–12. Four of the SG partners working on this matter have billing rates of $800—below the 2022 median standard billing rate for *associates*.[12] *See id.* The same is true for all three M&G partners working on this matter: all three M&G partners have billing rates below the 2022 median standard billing rate for *associates*. *See* Leach Decl. ¶¶ 8–9.

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"). The same is true for M&G. *See, e.g.*, *3M Co. v. Mohan*, 2011 WL 197219, at *6 (D. Minn. Jan. 19, 2011) (accepting M&G's rates as reasonable).

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

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

> (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

[12] Two of those partners—Glenn Bridgman and Rohit Nath—were associates when this case began and have continued working on the matter since their respective promotions to partner. Their current rates are still under the median standard billing rate for associates.

> 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) (quoting *Winter v. Cerro Gordo Cty. Conservation Bd.*, 925 F.2d 1069, 1074 n.8 (8th Cir. 1991)).

"Many of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Moreover, because not all of the *Johnson* factors are applicable in every case, courts in the Eighth Circuit focus on the most relevant factors in evaluating fee requests. *See, e.g.*, *In re Xcel Energy*, 364 F. Supp. 2d at 993; *Tussey*, 2019 WL 3859763, at *2; *cf. Hardman v. Bd. of Educ. of Dollarway, Ark. Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983) ("Although the district court did not specifically recite all twelve of the *Johnson* factors, it did discuss in sufficient detail those factors which it considered relevant to this litigation.").

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

The first *Johnson* factor addresses the time and labor expended by counsel and supports approval of the requested fee. Counsel spent over 7,000 hours prosecuting this case over almost five years, and that figure will increase as Counsel prepares for final approval proceedings and administers the Settlement. *See* Ard Decl. ¶¶ 8–9.

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

The second *Johnson* factor, which addresses the novelty and difficulty of the questions presented, also strongly supports approval of the requested fee. Like in *Vogt*,

which was a single-state class action whereas this case was a nationwide class action, the claims here "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.[13] Indeed, RLIC aggressively challenged liability and class certification, and the Court issued a detailed opinion in response to those challenges. *See* Dkt. 211.

The novelty and complexity of the claims here introduced significant risk. Policyowners have lost other COI cases on the pleadings, *see, e.g.*, *Slam Dunk*, 853 F. App'x 451; at class certification, *see, e.g.*, *Taylor*, 2019 WL 7500238; on summary judgment, *see e.g.*, *Norem*, 737 F. 3d 1145; and recently lost 95% of damages post-trial, *Meek*, No. 19-CV-472. 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), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited.").

Both pre-suit and at the time of settlement, Class Counsel faced additional hurdles, including an argument by RLIC that the Class's damages were substantially lower than Class Counsel calculated due to a release of claims in prior class action litigation and an argument that RLIC's COI rates for the Class Policies were in fact based on its EFME, in which case there would be no breach. *See* Dkt. 165 at 7–10, 18–23. And trial would not have been the end of the road. If Plaintiffs succeeded at trial, this case would still likely be

[13] *See also* *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 524 (4th Cir. 2022) (referring to a COI case as "chock-full of the most esoteric principles of life insurance accounting imaginable"); *Phoenix COI*, 2015 WL 10847814, at *6 (referring to the litigation as "indisputably complex").

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)). The questions presented in this class action were novel and challenging.

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

Class Counsel has significant experience with insurance litigation and class actions, including COI class actions and settlements thereof. *See* Sklaver Decl. ¶¶ 3–4 & Ex. 1. The Class here benefitted—recovering 57% of all COI and rider overcharges through May 31, 2023, or 106% of the overcharges under the HMI model, as well as non-monetary benefits with substantial additional value—from Class Counsel's skill and expertise. The skill required to reach such a successful result for the Class merits a substantial fee award. *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *8 (D. Minn. Mar. 7, 2008), *amended in part*, 2008 WL 3896006 (D. Minn. Aug. 21, 2008) (noting that Plaintiffs' counsel had "significant amounts of experience in mass tort litigation," "[h]ad it not been for the skill of counsel, there may have been no settlement and no recovery for the Plaintiffs here at all," and "the fact that counsel brought this case to a fair and reasonable conclusion [was] a good indicator of counsel's skills"); *see also Rajender v. Univ. of Minn.*, 546 F. Supp. 158, 170 (D. Minn. 1982) ("The quality factor has been interpreted to include a degree of skill either above or below that expected for

lawyers of the caliber reflected in the hourly rates, and an increase or decrease may be considered only as a reflection of that exceptional performance.").

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

Counsel's over 7,000 hours of work on this case were significant and, for busy law firms, precluded other work. This factor supports approval of the requested award. *See* *Ewald v. Royal Norwegian Embassy*, 2015 WL 1746375, at *17 (D. Minn. Apr. 13, 2015) (approving requested award where counsel "was required to reduce her workload in order to work on this case").

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

In assessing the fifth "customary fee" factor, as with the twelfth factor addressing "awards in similar cases," 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*, 364 F. Supp. 2d at 998. In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer*, 849 F.3d at 399.[14] They have also awarded 33⅓ percent of the total settlement value—including the monetary

[14] *See, e.g.*, *Caligiuri*, 855 F.3d at 865–66 (affirming award of 33.33% of $60,000,000 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 $84,000,000 common fund); *In re Airline Ticket Commission Antitrust Litig.*, 953 F. Supp. at 285–86 (awarding 33.3% of $86,892,000 common fund); *In re Monosodium Glutamate Antitrust Litig.*, 2003 WL 297276, at *3 (D. Minn. Feb. 6, 2003) (awarding 30% of $81,400,000 common fund); *In re Xcel*, 364 F. Supp. 2d at 999 (awarding 25% of $80,000,000 common fund and noting "courts in this circuit and this district have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions"); *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.").

and non-monetary benefits to the class. *See, e.g.*, *Karg*, 2021 WL 9440635, at *1–2. Here, as in *Karg*, Class Counsel seeks a fee of 33⅓ percent of the total settlement benefits. This factor strongly 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. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been v. O.K. Indus., Inc.*, 2011 WL 4478766, at *9 (E.D. Okla. Aug. 16, 2011), *report and recommendation adopted*, 2011 WL 4475291 (E.D. Okla. Sept. 26, 2011).

Counsel in this case worked on a fully contingent basis, investing over $1.2 million in expenses and over 7,000 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, antitrust, etc.). Ard Decl. ¶ 4. When it does so and where the firm is advancing expenses, as is the case here, the firm typically negotiates contingent fee arrangements starting at 40% of the gross sum recovered, and with further increases based on 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. The only certainty from the outset of this litigation was that, if the case were lost, there would be no fee or

expense award and an enormous write-off. Like the fifth and twelfth *Johnson* factors addressed above, the sixth *Johnson* factor strongly supports approval of the requested fee.

7. Time Limitations Imposed by the Client or the Circumstances (*Johnson* Factor 7)

The seventh *Johnson* factor "suggests consideration of time limitations imposed by the circumstances." *Wiley v. Portfolio Recovery Assocs., LLC*, 594 F. Supp. 3d 1127,1149–50 (D. Minn. 2022), *appeal dismissed sub nom. Yang v. Portfolio Recovery Assocs., LLC*, 2022 WL 197309597 (8th Cir. May 5, 2022). Courts in this District, for example, have considered that "attorneys involved were willing to adhere to . . . strict deadlines for all pre-trial events, and did so efficiently while submitting high quality work addressing all issues." *In re Guidant Corp.*, 2008 WL 682174, at *9.

Here, Class Counsel worked expeditiously to prepare this case for trial, all while submitting high quality work addressing the issues. *See, e.g.*, Dkts. 146–155 (motion for class certification and supporting materials); Dkts. 193–199 (opposition to RLIC's summary judgment motion and supporting materials). The case was extended in part due to an additional breach Class Counsel discovered through their diligent prosecution of the case. *See* Dkt. 131 (order granting leave to amend to add the new claim). In granting Plaintiffs leave to amend, this Court agreed that "Plaintiffs were diligent in seeking leave to amend to add the proposed rider charge claim." *Id.* at 13–14, 26. Class Counsel continued to demonstrate such diligence throughout this case. This factor favors approving the requested fee.

8. 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. The settlement reflects 57% of all COI and rider overcharges collected by RLIC through May 31, 2023, or 106% of the overcharges under Plaintiffs' alternative HMI model, Mills Decl. ¶ 12, *and* includes another $8.75 million in non-monetary relief, McNally Decl. ¶ 11 & Ex. I. This recovery is at least 15% higher than the 42% recovery in a COI overcharge case that the court called "quite extraordinary," *Hancock COI*, Dkt. 164 at 20:10, and 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.

The requested fee represents one-third of the value of this remarkable settlement. As a result, the requested fee is directly proportional to the degree of success obtained, which success supports awarding the requested fee.

9. Experience, Reputation, and Ability of the Attorneys (*Johnson* Factor 9)

As noted, Class Counsel has significant experience with insurance litigation and class actions, particularly COI class actions and settlements thereof. Sklaver Decl. ¶¶ 3–4 & Ex. 1. SG has been appointed sole 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.), North American Company for Life and Health Insurance, and PHL Variable Insurance Company. *Id.* ¶ 3.[15]

SG's results in such COI cases have been lauded by federal judges as "superb," *Phoenix COI*, Dkt. 319 at 3:9–11, "the best settlement pound for pound for the class I've ever seen," *id.*, and "quite extraordinary," *Hancock COI*, Dkt. 164 at 20:10. SG's experience, reputation, and ability weigh strongly in favor of awarding the requested fee.

SG also worked with Local Counsel on this class action, M&G, which has an office in Minneapolis and others across the country, including in Atlanta, Denver, Knoxville, Los Angeles, New York, and Alexandria. Leach Decl. ¶ 3. M&G has built a reputation nationwide for combining technical experience with trial advocacy skills and served as a critical resource during every aspect of this case, particularly with respect to practicing before this Court. *See id.* ¶¶ 3, 4, 5, 11.

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 (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)). Here,

[15] The following is a non-exhaustive list of COI cases in which SG has been found to be "adequate" class counsel: *Phoenix COI*, 2013 WL 12224042, at *12; *Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y.*, 2022 WL 986071, at *5 (S.D.N.Y. Mar. 31, 2022); *In re AXA Equitable Life Ins. Co. COI Litig.*, 2020 WL 4694172, at *16 (S.D.N.Y. Aug. 13, 2020); *Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374, 387 (S.D.N.Y. 2019); *SLD COI*, 2021 WL 62339, at *9; *Advance Tr. & Life Escrow Servs., LTA v. N. Am. Co. for Life & Health Ins.*, 592 F. Supp. 3d 790, 809–10 (S.D. Iowa 2022); and *Hancock COI*, Dkt. 139 ¶¶ 7–8.

opposing counsel are experienced lawyers who practice in high-stakes, complex matters across the country—including as opposing counsel to SG in another COI overcharge matter, *SLD COI*—further supporting the appropriateness of the requested fee.

10. 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. *See* *Ewald*, 2015 WL 1746375, at *17 (citing that "employees would find it very difficult to vindicate their rights due to several factors, including the discrepancy in resources between employees and employers, the time-intensive nature of employment law cases, and the employer's control over much of the information related to the employment relationship" as support for the undesirability of the case).

Often cases involving large potential damages produce competing counsel offering to represent the class. That was not the case here. The policies at issue here first went on sale in the 1980s, and the COI Class includes 36,480 policies that were sold in 44 states. Ard Decl. ¶ 3. Contingent lawyers have had decades to offer to represent this Class, or a portion thereof, and allege that RLIC should have decreased its COI rates to be based on RLIC's EFME. In that time, however, Class Counsel were the first and only lawyers to pursue litigation against RLIC for these claims, demonstrating the challenges with the claims that made them undesirable and supporting the requested fee.

11. Nature and Length of the Professional Relationship (*Johnson* Factor 11)

Class Counsel has a long professional relationship with both PHT and Alice Curtis. Class Counsel has represented PHT in several matters, some starting even before this litigation began. *See* *SLD COI*, No. 1:18-cv-01897-DDD-SKC (D. Colo.); *PHT Holding I, LLC v. N. Am. Co. for Life & Health Ins.*, No. 4:18-cv-00368-SMR-HCA (S.D. Iowa); *PHT Holding I, LLC v. PHL Variable Life Ins. Co.*, No. 1:18-cv-3444 (MKV) (S.D.N.Y.). Class Counsel has worked with Ms. Curtis for over three years, since shortly before she was added as a named plaintiff in this case. *See* Dkts. 82, 84 (stipulation regarding amending the complaint to add Ms. Curtis and first amended complaint). This factor also supports the requested award. *See* *Ewald*, 2015 WL 1746375, at *17 (noting in favor of approval of the requested fee "that Plaintiff's counsel represented her for more than four years, developing a long professional relationship with [the plaintiff]").

E. The Reaction of the Class Supports the Requested Fee

"The Court may consider both the number and quality of objections when determining how a class has reacted to an attorney fee request." *In re Guidant Corp.*, 2008 WL 682174, at *11. The Settlement Notice informed Class Members that Class Counsel would move the Court for an award of attorneys' fees up to 33⅓ percent of the gross benefits provided to the Class, specified that the amount of fees requested would not exceed $15,919,029.67, and stated that Class Members could object to this request. *See* Dkt. 260-3 at 8. As of September 21, 2023, no Class Member has objected. Ard Decl. ¶ 18. The lack of objections, at least to date, weighs in favor of the requested award. *See* *DeBoer v. Mellon*

Mortg. Co., 64 F.3d 1171, 1178 (8th Cir. 1995) ("The fact that only a handful of class members objected to the settlement similarly weighs in [class counsel's] favor.").

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

Class Counsel also requests reimbursement of $1,268,065.19 for out-of-pocket expenses reasonably and necessarily incurred in prosecuting this action, and $177,179.45 in expenses incurred by the Settlement Administrator to date. *See* Ard Decl. ¶¶ 14–15; Keough Decl. ¶ 4. "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 (quoting *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)).

The expenses are described in the papers filed in support of this application. *See* Ard Decl. ¶¶ 10, 14. These expenses were reasonable and necessary, and have been spent for the direct benefit of the Class. *See id*. The largest components of these costs are for experts, online legal research, and class notice and administration. *See Tussey*, 2019 WL 3859763, at *5 ("Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." (citing Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.))). The fact that Class Counsel was willing to spend its own money (using *no* outside litigation funding), where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary.

Class Counsel also requests that the Court approve the continued payment of settlement administration expenses, as the Court ordered at preliminary approval. Dkt. 266 ¶ 5. The Settlement Administrator has incurred $177,179.45 through August 31, 2023, and will incur additional costs as settlement payments are distributed. *See* Keough Decl. ¶ 4.

III. Awarding Service Awards for the Class Representatives Is Appropriate

Class Counsel seeks a service award of $50,000 for each Class Representative. The factors for deciding whether the service awards are warranted 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 v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017).

Here, both Class Representatives have devoted significant time working with Class Counsel to protect the Class's interests, and the Class has benefitted tremendously as a result of those efforts. After being added as a named plaintiff, Class Representative Alice Curtis gathered, scanned, and produced hard copies of years-old documents, prepared over multiple days for her deposition, sat for a deposition during the pandemic, and remained actively involved throughout this case. *See* Ard Decl. ¶ 16. These efforts were particularly burdensome given Ms. Curtis's age—she will be turning 82 this November. *See Spann v. AOL Time Warner Inc.*, 2005 WL 1330937, at *4 (S.D.N.Y. June 7, 2005) (considering that named plaintiffs were elderly in awarding the requested service award).

Moreover, while Class Representative PHT's predecessor in interest, ATLES, was the one to collect and produce documents and make a corporate representative available for a deposition in this case, PHT took over for ATLES pre-settlement and was willing to

do whatever was necessary to facilitate a favorable resolution of this matter for the Class, which it did. *See* Ard Decl. ¶ 17; *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 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 in determining to support the settlement, and provided a benefit to the class in the form of "his informed support" of the settlement).

The requested awards are also in line with those awarded in other class actions, including a service award issued in this District this month and one issued by this Court. *See* *Kruger v. Lely N. Am., Inc.*, 2023 WL 5665215 (D. Minn. Sept. 1, 2023) (awarding $50,000 to a 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); *City of Farmington Hills*, No. 0:10-cv-04372-DWF-HB, Dkt. 686 ¶ 16 (awarding $50,000 to class representatives).[16]

CONCLUSION

For the above reasons, Class Counsel respectfully requests that this Court award (1) its requested fees in the amount of $15,919,029 plus a *pro rata* share of the interest earned on the settlement fund; (2) reimbursement of $1,268,065.19 in costs and expenses;

[16] *See also* *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657 (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).

(3) ongoing expenses by the Settlement Administrator, including $177,179.45 to date; and

(4) a $50,000 service award each for Class Representatives PHT and Alice Curtis.

Dated: September 21, 2023

/s/ Steven G. Sklaver

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