UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN W. GRIFFITHS, on behalf of Himself and all others similarly situated,	:	
Plaintiff,	:	Civil Action No. 15-cv-13022-NMG
v.	:	
AVIVA LONDON ASSIGNMENT CORPORATION, AVIVA LIFE INSURANCE COMPANY, AVIVA INTERNATIONAL INSURANCE LTD, f/k/a CGU INTERNATIONAL INSURANCE, plc, ATHENE HOLDING, LTD, ATHENE LONDON ASSIGNMENT CORPORATION and ATHENE ANNUITY AND LIFE COMPANY,	:	
Defendants.	:	

CORRECTED MEMORANDUM IN SUPPORT OF THE CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENTS AND AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD
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INTRODUCTION

Class Representative John Griffiths respectfully submits this Memorandum of law in support of his Motion for Final Approval of the Class Action Settlements and Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Service Award.

After four years of litigation, the parties in this case have reached settlements which provide relief to the Plaintiff class that effectively reverses the challenged action that gave rise to this case. The case was brought because Defendants had cancelled a form of guaranty – a capital maintenance agreement ("CMA") – backing the annuities here at issue. The settlements reinstate that guaranty in the form of a New CMA, now issued by a company that is financially stronger than the one that had stood behind the provision that had been cancelled. The New CMA created as a result of the settlement of this case also imposes additional protections for annuity holders that had not been a part of the CMA that were cancelled. The settlements now before this Court also provide cash relief to the class which, if the Court approves the plan of distribution proposed herein, will fully reimburse each class member for the fee paid by each class member at the time each annuity was purchased, in exchange for coverage by the CMA guaranty. The cash relief will also provide additional monetary relief allocated on the basis of the premiums paid for such annuities, which reflected the magnitude of any increase in the price of the Annuities caused by the initial, but now terminated CMA.

For these reasons, this Court should approve the settlements as eminently fair, reasonable and adequate; it should award the requested attorney's fees; it should allow Plaintiff's counsel to be reimbursed for the expenses they incurred in the prosecution of this case; and it should award the requested Service Award to the Class Representative, who discovered the violation here at issue, located counsel willing and able to prosecute this claim, and worked with counsel

diligently to secure the proposed successful conclusion of the case.

This case has proceeded on behalf of all purchasers of Structured Settlement Annuities ("the Annuities") sold by Aviva Life Insurance Company of North America, or Aviva Life Insurance Company of New York, between 2002 and 2009, when such Annuities were covered by certain Capital Maintenance Agreements issued by CGU International Insurance Company, now known as Aviva International Insurance Company. (*See* Declaration of Jonathan Auerbach in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Approval of Attorneys' Fees and Expenses ("Auerbach Decl.") ¶¶ 3-6) (attached hereto as Exhibit 1).

Marcus & Auerbach was approached regarding this matter in the early fall of 2014 by the Class Representative, John Griffiths (hereinafter "Class Representative" or "Named Plaintiff"). Mr. Griffiths, like all members of the class, had purchased an Annuity, and he did so only because the instrument was covered by the CGU International Insurance plc ("CGU") CMA. But by dint of his own efforts and investigation, Mr. Griffiths had then recently discovered that, around the time Aviva's North American business had been sold to Athene Life Insurance Company in 2013, the CMA had purportedly been terminated. He then researched law firms and determined to call Marcus & Auerbach LLC ("Marcus & Auerbach"), which had served as lead counsel in a previous class action relating to annuities issued by predecessor companies of Aviva. See *In re Am. Investors Life Ins. Co. Mktg & Sales Practices Litig.,* 263 F.R.D. 226 (E.D. Pa. 2009).

After Mr. Griffiths retained Marcus & Auerbach, the firm began to investigate the facts and the law surrounding the issue. The firm conducted extensive research on the specific practices of the defendants, as well as industry-wide; consulted with various economic and industry experts; and conducted independent analyses of regarding guarantees for annuities, their

pricing and valuation, and state regulation of such instruments. They drafted a complaint and determined that the case could be prosecuted most effectively in the District of Massachusetts, where the Aviva entities had been located when the Annuities at issue were sold; and retained as local counsel Paul Klehm of Krasnoo, Klehm & Falkner LLC, a Massachusetts firm with which they had worked on previous litigation in Massachusetts. Auerbach Decl. ¶5.

The terms of the Settlement were presented to the Court on May 1, 2018 (Dkt. 125, and the Court entered preliminary approval on June 29, 2018 (Dkt. 132. As part of the preliminary approval order, the Court appointed Class Counsel and set in motion a series of events designed to give all Class Members a fair opportunity to opt out and/or object to the proposed Settlement. That order was faithfully executed. See Declaration of Josephine Bravata, attached hereto as Exhibit 2. Consistent with the Court's Preliminary Approval Order, the Claims Administrator provided notice to the Settlement Class by direct mail to each of the persons identified, in the records of Defendant Athene, as a beneficiary of one or more of the Annuities at issue. Notice was successfully delivered to 98.6% of the 5073 class members, the beneficiaries of 4551 annuity policies at issue in this case. See Bravata Decl. ¶7.

Since notice was disseminated, the reaction to the proposed Settlements has been extremely positive. As of the date this Motion is submitted, Plaintiff's counsel and/or the Claims Administrator have answered questions from over class members, Auerbach Decl. ¶25, and over 330 persons have viewed the website maintained by the Claims Administrator relating to the settlements. Bravata Decl. ¶7. But there have been no opt outs and no Objections to the settlements. *Id.* ¶¶9, 10. The final date for submission of objections and opt-outs is September 12, 2018.

The Settlement is now before this Court for final approval. As discussed below, the Settlement is eminently fair, reasonable, and adequate and the requirements for final approval are

satisfied. This is an excellent settlement for the Class because it provides virtually complete reversal of the challenged action – cancellation of the Aviva CMA – that sparked the filing of this case as well as providing cash relief on top of the New CMA.

In addition, the Settlement Class satisfies the criteria for class certification under Rule 23, and the notice provided to Class Members comported with due process and Rule 23, both as to its content and as to the method of dissemination.

Plaintiff respectfully requests that the Court:

(a) grant final approval of the proposed Settlement and the method of allocation and distribution of the settlement funds;

(b) certify the Settlement Class pursuant to Rule 23(b)(3);

(c) grant final approval to its appointment of Marcus & Auerbach LLC and Krasnoo, Klehm & Falkner LLP as Class Counsel and its designation and appointment of Jerome M. Marcus and Jonathan Auerbach, and Marcus & Auerbach LLC, as Lead Counsel for the Settlement Class, and its appointment of John W. Griffiths as Settlement Class Representative;

(d) award the requested attorneys' fees and costs and Class Representative Service Award; and

(e) enter final judgment.

Plaintiffs have submitted herewith a proposed Final Approval Order for the Court's consideration as well as a separate Order relating to the award of Attorney's Fees, Reimbursement of Expenses, and payment of a Service Award to the Named Plaintiff.

PROCEDURAL HISTORY AND FACTS

I. Procedural Background

After completion of the factual and legal investigation by Plaintiff's counsel, the initial Complaint in this case was filed on July 27, 2015. It presented a straightforward claim: that Defendants had breached their promise to provide a guaranty in the form of a Capital Maintenance Agreement supporting the financial solvency of the legal entities responsible for paying the

annuities at issue in this case (the "Annuities").

Both sets of Defendants moved to dismiss – the Athene Defendants on the ground that the Complaint failed to state a claim, both because Plaintiff was not a formal party to the CMA and because no payments had been missed on the Annuities, and the Aviva Defendants on those grounds and on the additional theory that, when sued, the Aviva Defendants were all based in England and were therefore not subject to the personal jurisdiction of this Court. Plaintiff addressed each of these attacks on the Complaint by amending his pleading, filing the new, Amended Complaint on December 18, 2015 to plead additional facts that addressed Defendants' arguments. The amendments made clear that Griffiths did in fact have standing and that he had sustained injury at Defendants' hands, and that Aviva had in fact done extensive business, related to the transactions at issue in this case, in this District.

In response to this amendment, the Athene Defendants chose not to move again to dismiss, and instead answered the Amended Complaint. Discovery commenced against Athene at this time.

Aviva renewed its motion to dismiss, but in the face of the amended allegations regarding damages and impact Aviva did so only on the jurisdictional ground. The parties briefed this contention in the Winter of 2016. This Court denied Aviva's motion by opinion dated May 20, 2016. Discovery then commenced from the Aviva Defendants as well.

The Parties then engaged in extensive discovery. Defendants have produced more than one hundred fifty thousand pages of documents (almost 16 gigabytes of data), and responded to multiple sets of interrogatories and requests for production propounded by Plaintiff. The Class Representative, and the broker who handled the purchase of the Class Representative's Annuity, both produced documents, and Plaintiff also responded to Defendants' Interrogatories. Plaintiff's counsel retained the services of US Legal Support to create and maintain a secure searchable document repository to facilitate efficient searching and use of the documents produced in

discovery.

After most of the document production had been completed and Plaintiff's counsel had had the opportunity to review these materials, the parties took depositions throughout the United States and in England. The Class Representative, and the annuity broker who handled the purchase of the Annuity on behalf of the Class Representative, were both deposed in Hawaii, where these two persons reside. Seven more high level current and former executives of the Defendants were also deposed, in Chicago, New York, Charleston, South Carolina, Des Moines, Iowa, Andover, Massachusetts, and London, where the General Counsel of Aviva's parent entity, Aviva plc, was deposed, along with the senior member of the deal team who had shared responsibility for shepherding the sale of Aviva's North American business to Athene. In addition, a representative of the New York law firm of Wilke, Farr & Gallagher, which represented Aviva when the business at issue was sold to Athene, was deposed in New York, after Wilkie, Farr had produced documents in response to Plaintiffs' Rule 45 subpoena.

At the close of discovery Plaintiff moved for class certification. The motion was supported by the reports of two experts.

The first, Stephen Scherff, is a financial expert, who explained that cancellation of the CMA guarantees had a direct, measurable and common economic impact on all class members. He provided the basis for this opinion and explained how that impact could be measured, on a class-wide basis; he also provided his estimation of the range of values for this measure of damages. The second expert was Linda Kaiser Conley, a former Insurance Commissioner of the Commonwealth of Pennsylvania. Ms. Conley explained the context in which the CMAs had operated; why such commitments are entered into and why they provide value to insurance companies and their customers; why the CMA, as originally drafted and described to the public, could not have been terminable.

Plaintiff had also filed a motion for leave to amend the complaint to add a claim for breach of the Massachusetts Consumer Protection Law. That Motion was opposed by both sets of Defendants, and, as of the time the parties reached agreement to settle this litigation, remained pending.

Beginning in early 2017, the Athene Defendants began negotiating with Plaintiff about a potential resolution of the claims against those Defendants. Defendants had each suggested that they wished to negotiate jointly with Plaintiff regarding settlement of this case. Plaintiff's counsel rejected this request, believing that a better result for the class would be attained if the negotiations were carried on separately with the two sets of Defendants. Auerbach Decl. ¶7.

The negotiations with Athene continued throughout the ensuing nine months, culminating in the execution, on September 20, 2017, of a Memorandum of Understanding setting forth the material terms of the Settlement with Athene, which is now before this Court.

Athene had offered to negotiate the payment of an amount of cash specifically designated for attorney's fees. See Auerbach Decl. ¶9. Plaintiff's counsel rejected this offer, however, for two reasons: first, because they refused to discuss attorneys' fees at all until agreement had been reached on all other substantive terms of the settlement; and second, because Plaintiff's counsel sought to negotiate substantive relief that included a cash payment in addition to the primary structural relief, which has come in the form of replacement of the abandoned CMA. Plaintiff's counsel intended that such payment could be used, as approved by the Court, to be disseminated to the class according to a Court-approved plan of allocation as well as to cover attorney's fees and costs. *Id.* at ¶9. Athene acceded to the requested sequencing of the components of relief, and the settlement Plaintiff has reached with the Athene Defendants, like the one reached with Aviva, includes a simple cash payment without any restrictions on its distribution other than those approved by this Court. *Ibid*.

After the Athene negotiations concluded, Plaintiff began negotiations with Aviva. Auerbach Decl., ¶10. Those negotiations continued for three months, included two day-long mediation sessions before Hon. Judith Dein, U.S.M.J., and a number of subsequent follow-on telephone mediation efforts with Magistrate Judge Dein. *Ibid.* As a result of those negotiations and mediation sessions, on December 22, 2017, Plaintiff and Aviva reach a Memorandum of Understanding, which underlies the terms of the Aviva Settlement that is now before the Court. *Ibid*.

THE TERMS OF THE PROPOSED SETTLEMENTS

I. Substantive Terms of the Proposed Settlement Agreements

Two separate Settlement Agreements have been executed in this case – one between the Named Plaintiff, on behalf of the Class, and the Athene Defendants (the "Athene Settlement"), and the other between the Named Plaintiff, on behalf of the Class, and CGU (the "Aviva Settlement"). The Settlements' details are contained in the Settlement Agreements signed, respectively, on behalf of the Named Plaintiff and the Class and the Athene Defendants, and on behalf of the Named Plaintiff and the Class and Aviva. Copies of each Settlement Agreement were attached as Exhibits A and B to Plaintiff's Motion for Preliminary Approval, filed May 1, 2018. (Dkt. 125).

A. The Athene Settlement

The Athene Settlement provides that Athene will cause Athene London Assignment Corporation and Athene Holding Ltd ("AHL"), the ultimate, publicly traded parent of Athene London Assignment Corporation, to enter into a new Capital Maintenance Agreement (the "New CMA") which imposes upon AHL the same obligation as was imposed upon CGU to support the solvency of the entity responsible for making payments under the Annuities. In addition, and also unlike the CMA that had bound CGU, the Settlement Agreement limits the circumstances under which the New CMA can be terminated, including in the event of a sale of the business entity

responsible for payment of the Annuities; makes clear that all class members are intended beneficiaries of the New CMA, by stipulating that breach of the terms of the New CMA constitutes irreparable harm to the Class; and it constitutes an assurance issued by the ultimate, publicly traded parent of the entity responsible for making payments under the Annuities, rather than a wholly owned subsidiary of that entity. Finally, Athene has proffered data demonstrating that the entity that will issue the New CMA is better capitalized than CGU, the entity that had issued the original CMA's at issue in this case. See *infra* at p. 20. Plaintiff's financial expert, Stephen Scherf, has opined that the value of the New CMA to the class, by virtue of the risk protection it affords, is between $27 and $41 million. See Declaration of Stephen Scherf submitted in support of Plaintiff's Motion for Preliminary Approval of the Settlements.[1]

The Athene Settlement further provides that Athene will pay a total of $2.3 million into an escrow fund; and will pay up to an additional $100,000 to fund the costs of notice and settlement administration, and up to an additional $12,500 to be used to pay a Service Award as ordered by this Court.

B. The Aviva Settlement

The Aviva Settlement provides that Aviva will pay: $5,000,000 into an escrow fund; up to an additional $100,000 to fund the costs of notice and settlement administration; and up to an additional $12,500 to be used to pay a Service Award as ordered by this Court. The Aviva Settlement also provides that, should Aviva receive any amounts from Athene in resolution of any claims brought by Aviva against Athene arising out of the facts at issue in this case, Aviva will pay

[1] Mr. Scherf also submitted a Declaration in Support of Plaintiff's Motion for Class Certification, as did Plaintiff's insurance industry expert, former Pennsylvania Insurance Commissioner Kathleen Kaiser Conley. As additional support for the instant motion, Plaintiff relies as well upon, and incorporates by reference, his earlier submissions seeking Class Certification and Preliminary Approval of the Settlements. See Dkt. ## 85 (class certification papers) and 126 (preliminary approval papers).

25% of such amounts, net of Aviva's attorney's fees and costs, to the Class.

II. The Settlement Class

The "Settlement Class" is defined to include:

> All beneficiaries of structured settlement annuities assigned to Athene London Assignment Corporation (formerly known as Aviva London Assignment Corporation and as CGNU London Annuity Service Corp.), which includes all annuities covered by the Capital Maintenance Agreement between CGU International Insurance plc and CGNU London Annuity Service Corp. dated February 1, 2002, where such annuities remained in force as of October 2, 2013.
>
> Excluded from the proposed class are the officers and directors of any Defendant and members of their immediate families and any entity in which any Defendant has a controlling interest, the legal representatives, heirs, successors or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.[2]

III. Value of the Proposed Settlements

The proposed settlements will essentially nullify the impact of the CMA cancellations that were the impetus for this case's filing.

The New CMA issued by Athene is superior to the original, cancelled CMA's, in the following respects, see Auerbach Decl. ¶21:

- It explicitly bars cancellation the New CMA in the event of a sale of the corporate entity responsible for paying the Annuities unless the purchasing entity
  - Takes on the same commitments as those imposed by the New CMA; AND
  - The purchasing entity has an investment grade credit rating.
- Because Defendants took the position in this case that Plaintiffs lacked standing to challenge cancellation of the CMAs because they were not parties to those instruments, the Settlement Agreement includes Athene's acknowledgement that any breach of the New CMA's

[2] Named Plaintiff and Class Counsel seek certification of the Settlement Class for settlement purposes only, and agree that, if approved, certification of the Settlement Class is in no way an admission by Defendants that class certification would be proper in this litigation in the absence of the Settlements.

provisions would cause irreparable harm to all Annuity beneficiaries;

- Whereas the old CMA's were issued by a wholly owned subsidiary of Aviva, whose financial condition, place of operation, and other characteristics could be changed at will by Aviva, the New CMA is issued by the ultimate, publicly traded parent of the Athene entity responsible for making payment on the Annuities.
- Athene has proffered data on the basis of which Plaintiff's financial expert, Stephen Scherf, has opined that the entity issuing the New CMA is financially stronger than the entity that had issued the original CMA's at issue in this case.

As this Court explained when it denied Aviva's Motion to Dismiss, the CMA's at issue in this case "added to the annuit[ies'] value." *Griffiths v. Aviva London Assignment Corp.,* 187 F.Supp. 3d 342, 348 (D. Mass. 2016). The CMA's did so by increasing the security of the annuities – reducing the beneficiaries' exposure to the risk that payments might not ultimately be made as called for by the annuities.

The protections afforded by the New CMA approach a complete replacement of the security provided by the original CMA's, if they do not in fact provide even more protection than the original guaranty.

On the basis of these features, and by reference to the way the market for corporate credit prices exposure to risks of nonpayment, Plaintiff's expert has opined that the New CMA has a value to the class of between $27 million and $41 million. See Declaration of Stephen Scherf attached as Exhibit 4 to Plaintiff's Motion for Preliminary Approval (Dkt 126-4), at ¶11.

In addition to the New CMA, the terms of the settlements create a pool of cash to be distributed to class members, as well as to compensate the class's lawyers. Assuming the Court grants the attorney's fees and expenses as requested, that pool will be $3 million. That sum will be sufficient to:

- Fully reimburse every class member for any amount paid as a fee in connection with purchase of coverage by the original CMA with the total of such payments equaling $500,050; and
- Distribute an additional $2,500,000 to the class members pro rata on the basis of the amount of the annuity premium paid by or on behalf of each class member when the class member's Annuity was purchased.

See Auerbach Decl. ¶22.

In exchange for the above consideration, the settlements provide that members of the Class release Defendants from claims arising out of the subject matter of this case.

IV. Notice

Notice has been provided by direct mail to each of the 5073 class members, through the Settlement Administration firm of Strategic Claims Services. Bravata Decl., ¶¶5-7. Of these, only 71, or 1.4% of the class, have ultimately been returned as undeliverable. In addition, Strategic Claims has created a website which makes available those documents identified for this purpose by the Court's order granting Preliminary Approval to the settlements. As of the date of the submission of this Memorandum, that website has been viewed by 334 individuals. Bravata Decl., ¶6.

ARGUMENT

The Court preliminarily certified the Settlement Class under Rule 23(b)(3), and Plaintiffs now move for final certification and approval.

I. The Court Should Finalize Certification of the Settlement Class

Rule 23(a) requires that a class meet the following four requirements: (*i*) numerosity, meaning "the class is so numerous that joinder of all members would be impracticable,"; (*ii*) commonality, meaning "there are questions of law or fact common to the class"; (*iii*) typicality,

meaning "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (*iv*) adequacy, meaning "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(1)–(4). "Class certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008) (internal citations omitted).

A. The Class Is Sufficiently Numerous

The class consists of 5073 individuals, who are the beneficiaries of 4551 Annuity policies. There can be no serious dispute that numerosity, which is clearly present when a case proceeds on behalf of more than 40 people, is satisfied. *Garcia-Rubiera v. Calderon,* 570 F.3d 443, 460 (1st Cir. 2009).

B. The Class Seeks Resolution of Common Questions

Rule 23(a)(2) requires that "questions of law or fact" be "common to the class." Fed. R. Civ. P. 23(a)(2). It has long been recognized that this prerequisite "is not a difficult one to meet." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 69 (D. Mass. 2005). *See also Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003) ("[T]he commonality requirement ordinarily is easily met"). It "does not require that class members' claims be identical," and "[a] *single* common legal or factual issue can suffice." *Payne*, 216 F.R.D. at 25 (emphasis in original). *See also In re Credit Suisse- AOL Secs. Litig.*, 2008 WL 4368935, at *4 (D. Mass. Sep. 26, 2008) ("A single common legal or factual issue can suffice to satisfy the Rule 23(a)(2) requirement").

When claims arise out of a companywide policy or practice, the commonality prerequisite is usually satisfied. *See, e.g., Overka v. American Airlines, Inc.*, 2010 WL 517407, *2 (D.Mass. Feb. 4, 2010) (the "commonality requirement is usually satisfied" where the "implementation of the common scheme is alleged"); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 309-310

(D. Mass. 2004) (commonality satisfied where plaintiffs "were all employed by the defendant" and their claims arose "out of the same policies and wrongful conduct of the [d]efendant, and [were] based on the same legal theories"); *Wren v. RGIS Inventory Specialists,* 256 F.R.D. 180, 204 (N.D. Cal. 2009) ("[W]here the employer has a uniform policy that is uniformly applied, the appropriateness of class certification is 'easily established.'") (citation omitted); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members").

As emphasized recently by the Supreme Court, commonality requires the identification of an issue that by its nature "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, inc. Dukes*, 564 U.S. 338, 350 (2011). Answers to the following questions, among others, are central to this case and are common to every member of the proposed class:

- Whether the CMAs constituted binding commitments,
- Whether the Annuities' beneficiaries have standing to enforce the terms of the CMAs
- Whether, in the absence of a default in payment, class members have sustained cognizable injury.

The presence in this case of these questions, and their centrality, clearly satisfies the Commonality requirement. Because these questions are present for both the Class representative as they are for all class members, the Typicality requirement is satisfied as well.

For purposes of the claims in this case, the plaintiffs are typical of the putative class. Indeed, in this case, any class member picked at random would be typical, because the challenged practice affected every class member. *See, e.g., McLaughlin*, 224 F.R.D. at 309-310 (typicality satisfied where plaintiffs "were all employed by the defendant" and their claims arose "out of the

same policies and wrongful conduct of the [d]efendant, and [were] based on the same legal theories"); *Key v. Gillette Co.*, 90 F.R.D. 606, 609 (D. Mass. 1981) ("'When the named representative's own claim transcends the individual and implicates a discrete [] practice, the . . . typicality requirements of Fed. R. Civ. P. 23(a) may be satisfied and class treatment may be appropriate.'"), *quoting DeGrace v. Rumsfeld*, 614 F.2d 796, 811 (1st Cir. 1980).

C. The Adequacy Requirement is Satisfied

To satisfy the adequacy requirement, Plaintiffs must show that "the interests of the representative . . . will not conflict with the interests of the class members" and that Class Counsel "is qualified, experienced and able to vigorously conduct the proposed litigation." *In re Sonus Networks, Inc. Sec. Litig.*, 247 F.R.D. 244, 249 (D. Mass. 2007) (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). The Class Representative has no claims that are in conflict with the Class Members. He supports this Settlement and requests that it be finally approved. Auerbach Decl. at ¶11.

With respect to adequacy of representation, Plaintiff's counsel are well-qualified and experienced in class action litigation generally; in class litigation on behalf of the victims of improper conduct by insurance companies. Plaintiff's proposed lead counsel, Marcus & Auerbach LLC, have represented plaintiffs and been appointed as lead counsel for plaintiff classes for over 25 years, and have specific experience in class litigation on behalf of the purchasers of annuities. They served as co-lead counsel in MDL 1712, against the predecessor-in-interest of defendant Aviva plc, which resulted in a settlement which, when approved by the court, was valued at over $500 million. See *In re American Investors Life Ins. Co. Annuity Marketing & Sales Practices Litig.,* 263 F.R.D. 226 (E.D. Pa. 2009), Auerbach Decl. at ¶¶13,14.

D. The Settlement Class Satisfies the Predominance and Superiority Requirements of Rule 23(b)(3)

In addition to satisfying the requirements of Rule 23(a), the Class must also be appropriate

under Rule 23(b)(3) for settlement purposes, which provides that common questions of law or fact must "predominate" over questions affecting only individual members of the class; and a class action is a "superior" method for fairly and efficiently resolving the case as compared to other available methods. Fed. R. Civ. P. 23(b)(3).

Predominance "does not require an entire universe of common issues," only "'a sufficient constellation' of them." *In re Relafen Antitrust Litig.*, 231 F.R.D. at 70, *quoting Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000). Predominance will be found when the class is "sufficiently cohesive to warrant" certification. *Id., quoting Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "A 'single, central issue' as to the defendant's conduct vis-a-vis class members can satisfy the predominance requirement even when other elements of the claim require individualized proof." *Payne*, 216 F.R.D. at 26 (internal citation omitted); *see also Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (when there are "issues identical across all the claimants, [or] issues . . . which [are] unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop").

Defendants took no action at issue in this case that relates to any individual plaintiff: all of defendants' conduct was class wide. The same written commitment was made to the named Plaintiff and to every member of the class, and the legal force of that commitment is, clearly, the central issue in this case. That question is the same for everyone. Any arguments Defendants might make about why the commitment should not apply would also be same for every member of the proposed class.

As the First Circuit recognized in *Smilow v. Southwestern Bell Mobile Sys.,* 323 F.3d 32, 39 (1st Cir. 2003)(internal quotation marks omitted):

> The plaintiffs' claims are based entirely on a standard form contract which the defendant used with every member of the class. The common factual basis is

> found in the terms of the contract, which are identical for all class members. The common question of law is whether those terms precluded defendant [from engaging in the conduct at issue].

Indeed, *Smilow* is noteworthy because in that case the First Circuit took the significant step of reversing, as an abuse of discretion, a district court's decision to reject class certification – a decision the trial court had made because it found that common questions did not predominate even though the case was focused on the meaning of a standard form contract applicable to all class members.

Similarly, the *Smilow* court also recognized that in a dispute based on standard form contracts that are the same for all class members, defenses will also present common questions. *Ibid.* There the Court found that waiver defenses were common because they were based on documents drafted by the defendant and disseminated to all class members. Here as well, to the extent that Defendants have arguments to make about their right to terminate the CMA, they will be based on documents that apply with the same force to all members of the class, and they are therefore arguments that are entirely common across the proposed class.

II. The Parties' Settlement Agreement Is Fair, Reasonable, and Adequate

A class action may only be settled with the approval of the Court. Fed. R. Civ. P. 23(e). The Court must examine the settlement to determine whether it is fair, reasonable, and adequate. *Voss v. Rolland,* 592 F.3d 242, 251 (1st Cir. 2010); *National Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009); *City P'ship Co. v. Atl. Acquisition Ltd.*, 100 F.3d 1041, 1043 (1st Cir. 1996).

The factors the Court should consider in determining whether a class action settlement is "fair, reasonable and adequate," are not set out in a specific laundry list of requirements, but rather, is a decision that "involves balancing the advantage and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations

on the proffered settlement." *Drug Stores,* 582 F.3d at 44. "The district court enjoys *considerable* range in approving or disapproving a class settlement, given the generality of the standard and the need to balance [a settlement's] benefits and costs." *Drug Stores,* 582 F.3d at 45 (emphasis added).

It is important that the Court "not substitute [its] own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong v. Bd. of Sch. Directors of City of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators."). Nor should the Court base its fairness determination on whether the class members will receive as much from the settlement as they could have recovered had they been successful at trial. *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 962 F.Supp. 450, 534 (D.N.J. 1997). Rather, "the essence of settlement is a compromise," and no settlement—no matter how fair or reasonable—can represent a total win for either side. *Armstrong*, 616 F.2d at 316.

The Court, however, must protect the interests of absent class members by "independently and objectively analyz[ing] the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *Newberg on Class Actions* § 11:41 (Alba Conte & Herbert Newberg, eds., 4th ed., 2002). Since such an analysis concerns matters discussed and negotiated in confidence, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties . . . must be limited to the extent necessary to reach a reasoned judgment . . . that the settlement, taken as a whole, is fair, reasonable and adequate to those concerned." *Officers for Justice*, 688 F.2d at 625.

A. The Settlement Is Entitled to a Presumption of Fairness

When the parties negotiate the settlement at arm's length and have conducted significant discovery to allow proper evaluation of the claims, the Court should presume that the settlement is fair. *City P'ship Co.*, 100 F.3d at 1043; *Drug Stores,* 582 F.3d at 44; *Rolland v. Cellucci*, 191 F.R.D. 3, 6 (D. Mass. 2000); *see also In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005). This presumption derives from the "overriding public interest in favor of settlement," particularly in complex class actions, where settlement "minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong,* 616 F.2d at 313. Moreover, when adverse parties are fully informed, i.e., have conducted sufficient discovery, and have aggressively evaluated the merits of the case, arm's-length negotiations lead to a proper evaluation and resolution of the controversy. Discovery is sufficient where it "enable[s] counsel to act intelligently" during the negotiations leading to the proposed agreement. *Rolland*, 191 F.R.D. at 6. In other words, the discovery must provide counsel "an informed view of the strengths and weakness[es] of the plaintiffs' case." *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 244 (S.D.W. Va. 2005).

In light of the lengthy and rigorous discovery conducted in this case, and the vigorous negotiations that led to the Settlement, the presumption of reasonableness applies here. The parties exchanged extensive discovery. There is no reason for the Court to be concerned that the Settlement was the product of collusion or a "reverse auction." On the contrary, the Settlements were achieved only after lengthy negotiation; and the Aviva settlement was reached only with the repeated intervention, participation and encouragement of Magistrate Judge Dein. The proposed Class Agreement was the result of "serious, informed, non-collusive negotiations" that lasted well over a year. *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing *Manual for Complex Litigation, Third*, § 30.41 (West 1995)). The negotiations involved the exchange of multiple proposals and counter- proposals and the evaluation of data, documentation,

and factual and legal arguments. Plaintiff's counsel consulted extensively with experts as part of the negotiations.

In the Athene negotiations the Parties conducted two lengthy in-person meetings, one in Philadelphia and one in Chicago, and more than a score of negotiations by telephone. The negotiations were intensive and adversarial in nature and took close to a year to complete.

The negotiations with Aviva were at least as contentious. Settlement was first broached while depositions were still being conducted, but negotiations did not begin until fact discovery had closed. Early efforts at negotiation broke down, only to resume months later, when class certification briefing was in progress. Auerbach Decl. ¶10.

Ultimately the parties were not able to reach agreement on their own, requiring the intervention of Magistrate Judge Judith Dein. Magistrate Judge Dein held two all-day negotiation sessions, both of which were attended by Plaintiff's counsel, Aviva's counsel, and by Neil Harrison, the Aviva officer responsible for the sale of Aviva's U.S. annuity operations to Athene. Harrison appeared in person for both sessions, flying from London to Boston on each occasion. See Auerbach Decl. ¶10.

In light of the extensive discovery and hard-fought negotiations that led to the Settlement, the Settlement is entitled to a presumption of fairness. *City P'ship*, 100 F.3d at 1043 ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement.").

B. Class Members Will Receive Reasonable, Fair, and Adequate Refunds

The Settlements come very close to providing each Class Member with a full recovery. First and most importantly, the settlements essentially restore the CMA that had been terminated – except that now, the entity providing the guaranty is not a manipulable subsidiary of the corporate parent, but the ultimate, publicly traded parent itself. In addition, the entity committed by the New

CMA has a net worth of over $7 billion – while CGU, the entity that had been behind the CMA's initially in place, now has a net worth of less than half that amount. See Athene Settlement Agreement, Exhibit A to Plaintiff's Motion for Preliminary Approval, at ¶5.7(a). The entity behind the new CMA is therefore stronger than the one that had supported the initial commitment, whose termination led to the filing of this case.

Moreover, the New CMA comes with additional protections not found in the original. The Athene defendants have acknowledged that any failure to comply with the New CMA would cause irreparable harm to each class member – thereby eliminating the risk that in a legal challenge to any breach, the defendants would be able to argue that class members had no right to sue. Further, the New CMA places limits on the identity of any entity to which Athene can sell the corporation responsible for paying the Annuities here at issue. The old CMA's lacked any such restriction.

In addition to replacing the guaranty whose cancellation led to the filing of this case, the settlements create a pool of funds that are to be distributed to class members. That pool, as proposed herein, will be sufficient to fully reimburse each class member for the full amount of any fee paid by the class member in connection with purchase of coverage by the old CMA. This means that class members will have ***both*** coverage under the New CMA ***and*** repayment of any fee they had initially paid to purchase such coverage. Finally, if funds are allocated as proposed herein, the pool of funds to be distributed to class members will be sufficient to allow for an additional payment to each class member, *pro rata*, according to the amount of premium paid for each class member's annuity. This payment will address any increment in the charge for the annuity attributable to Aviva's claim that the annuity was more secure because of the presence of the old CMA.

Creating a settlement "structure for ensuring that reimbursement is tied to the extent of damages incurred" is reasonable and consistent with the federal rules. *In re Ins. Brokerage*

Antitrust Litig., 579 F.3d 241, 272 (3d Cir. 2009).

C. The Settlement Amount Is Based on Expert Estimation of Damages

Stephen Scherf, Plaintiff's damages expert, has opined that the New CMA alone provides relief valued at between $27 and $41 million. He bases these figures on his assessment of how U.S. financial markets would price corporate risk backed by the New CMA, and the original CMAs.[3]

D. The Settlement Also Satisfies the *Grinnell* Factors

Although the First Circuit does not apply a specific list of factors to consider in deciding whether a class settlement is reasonable, fair, and adequate, courts within this district have applied the factors listed in *Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir.1974), *overruled on other grounds by Missouri v. Jenkins,* 491 U.S. 274 (1989). *E.g.*, *In re Relafen*, 231 F.R.D. at 72-74; *In re Lupron*, 228 F.R.D. at 95; *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 281 (D. Mass. 2009) *aff'd sub nom. Drug Stores*, 582 F.3d 30. These factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted). These factors weigh in favor of finding this Settlement reasonable, fair, and adequate.

1. Factor (1): The Complexity, Expense and Likely Duration of the Litigation

[3] Scherf's Declaration in support of Plaintiff's Motion for Class Certification (Exhibit 2 thereto, Dkt. 85-2) compares the New CMA with the credit profile of Aviva when the Annuities were being sold. See *id.* at 9-12. At that time the old CMA increased the credit-rating of the relevant Aviva entities from A to A+. *Ibid*.

This case has the potential to impose enormous costs on the parties. Should this Settlement not be approved, Plaintiffs will shortly proceed to trial. Parties will need to complete litigation of the motion for class certification and the motion for leave to amend to add the Consumer Fraud claim; litigate summary judgment motions; take discovery regarding any expert submissions by Defendants on damages; and address *Daubert* challenges, and motions in *limine*. And only then, would the matter proceed to a substantial and expert-intensive trial. "[W]hile the ultimate result of trial cannot be foreseen, an expensive, complex and time-consuming process is assured." *In re Relafen*, 231 F.R.D. at 72 (citation omitted). No matter which side prevailed, the losing party would surely appeal, once again prolonging the expense and complexity of the case. Thus, the complexity, expense, and likely duration of the litigation weigh in favor of final approval.

2. Factor (2): The Reaction of the Class to the Settlement

Class Members have until September 12, 2018, to opt out of the Settlement and/or issue objections. Preliminary Approval Order at ¶7 (requiring opt-outs and objections to be filed no later than 75 days after issuance of the Preliminary Approval Order, which was dated June 29, 2018 (Dkt. 133).) As of the date this Memorandum is submitted, no Class Members have opted out of the class, and there have been no objections. Thus, "[t]he overall reaction to the settlement has been positive." *In re Relafen*, 231 F.R.D. at 72 (finding the reaction to settlement to be positive where there ten objections were filed). This factor weighs in favor of final approval.

3. Factor (3): Stage of the Proceedings and the Amount of Discovery Completed

As described above, this matter has been pending for four years and has involved numerous two motions to dismiss, class certification briefing, multiple expert declarations on liability and damages and ten depositions. Fact discovery is closed, and class counsel has evaluated more than 150,000 pages of documents produced by Defendants. This factor weighs in favor of final approval.

4. Factors (4, 5, and 6): Risks of Establishing Liability, Damages, and Attaining and Maintaining Class Certification

Although Plaintiffs are confident they would succeed at trial, Defendants have raised serious issues regarding liability, class certification, and damages. With respect to the last of these three, were the settlements not to be approved, Plaintiff would have to establish the presence and measurability of damages even though (a) no payments have been missed on any of the Annuities at issue; and (b) there would be substantial challenges regarding the kind of market data that could be used to prove both class-wide impact and the propriety of class-wide measures of damages. Although Plaintiff does not believe that the arguments Defendants might make on these issues have merit, they would nonetheless require considerable litigation to resolve, and that alone poses a significant risk.

All of the above means that liability might be difficult to establish, there is a substantial risk that a litigation class might not be certified, and there are significant risks to Plaintiff's case on damages. The Settlement eliminates exposure to the class from all of these risks. These factors, thus, weigh in favor of final approval.

5. Factor (7): Ability of the Defendant to Withstand a Greater Judgment

This "defendant-oriented" consideration, *see In re Lupron,* 228 F.R.D. at 97, is at worst neutral. Both the Aviva and Athene Defendants are solvent entities and there does not seem to be a basis for concern on this score, although, as noted above, the Aviva entity that issued the original CMA now has a substantially lower net worth than the Athene entity which has taken on the obligations of the New CMA as part of these settlements.

6. Factors (8 and 9): Comparison of the Settlement Fund to Best Possible Recovery and Risks of Litigation

"A fine-tuned equation by which to determine the reasonableness of the size of a settlement fund does not exist." *Relafen Antitrust Litig.*, 231 F.R.D. at 73. "[I]n any case there is a *range* of

reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972) (emphasis added). This is because a "high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 285 (7th Cir. 2002). Thus, in determining whether the settlement amount is reasonable, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Lupron*, 228 F.R.D. at 97 (quoting *In re GMC Pick-Up Truck Fuel Tank Prods Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995)).

As described above, the various forms of relief provided by the settlements are based on expert opinion, legal considerations, and common sense. And, while it is possible that taking this matter to trial could conceivably result in a better result for the Class Members, "[t]he evaluating court must ... guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Gen. Motors,* 55 F.3d at 806. These factors, like all the others, also weigh in favor of final approval.

E. The Settlement Is Reasonable, Fair, and Adequate

In sum, the Settlement reached between the Plaintiffs and Defendants after four years of vigorous litigation and many months of arm's-length negotiations is reasonable, fair, and adequate. The Settlements come close to providing make-whole relief for the class, while eliminating any risk of loss at trial or on appeal. This settlement may not be perfect—no settlement ever is. But, this Settlement guarantees the Class Members a significant amount of remuneration in the context of an ongoing litigation that has several potential pitfalls.

III. The Court Should Award Attorney's Fees, and Allow Class Counsel to be Reimbursed for the Expenses They Incurred in Prosecuting this Case.

The firm of Marcus & Auerbach LLC is composed of two lawyers – Jonathan Auerbach

and Jerome M. Marcus, who have worked together on complex litigation since 1993. They have successfully represented plaintiffs in class actions in state and federal courts throughout the United States, with a substantial fraction of their practice devoted to cases regarding different forms insurance – including health insurance, life insurance and annuities, and pension matters.

A. Class Counsel Created Value for the Class Of At Least $34.5 Million

As set forth in the Settlement Agreement, the two settlements reached in this case confer value on the class in two ways. First, and most importantly, this case was brought because a guaranty had been cancelled, and the settlement with Athene restores that guaranty. Now issued by a stronger company than the original commitment, and by the ultimate parent of the entity guaranteed rather than merely a co-subsidiary, the New CMA also comes with several commitments to beneficiaries, and restrictions on the freedom of action of the guaranteeing entity, that had not been in terms of original, now-cancelled, CMA. Unlike the terms of the original CMA, the new CMA eliminates the risk that gave rise to the claims presented in this case: in the event that Athene in the future makes the same decision Aviva had made, i.e., to sell the company that benefits from the guaranty, the New CMA provides that *it will remain in place until all of the guaranteed annuities are paid out unless an identical set of obligations is undertaken by a new obligor with an investment grade rating*. And, to eliminate the possibility that any challenge to action by the guaranty would be dismissed for lack of standing, or that injunctive relief might be foreclosed, the New CMA comes with Athene's stipulation that any breach would cause beneficiaries *irreparable harm*.

Plaintiff's expert Stephen Scherf has opined that this relief provides value to the class of between $27 and $41 million. *See* Declaration of Plaintiff's Counsel Jonathan Auerbach in Support of Motion for Preliminary Approval of Class Action Settlement ¶¶6, 7 (and Exhibit 3, attached thereto). Scherf bases that opinion on his assessment of the way credit markets would

value the various commitments at issue in this case. Scherf's valuation is consistent with this Court's recognition, in its opinion denying CGU's Motion to Dismiss, that the guaranty at issue in the case "doubtlessly added to the annuit[ies'] value." 187 F. Supp.3d at 348. Because that is so, the reinstatement of the guaranty also "add[s] * * * value" to the instruments themselves and so conveys value to the annuities' holders and beneficiaries.

In addition, Plaintiff's expert Linda Kaiser Conley, former Insurance Commissioner of the Commonwealth of Pennsylvania, explains that the New CMA confers significant value upon the Class by providing an additional measure of assurance that the entire amount of each Class Member's annuity payments will be made, rather than the often smaller amount guaranteed by state insurance guaranty funds. See Declaration of Linda Kaiser Conley (attached hereto as Exhibit 4) ¶¶15-17.

The settlements before this Court achieve more than restore the protections offered by the original cancelled guaranty. In addition to providing additional protections from termination and ease of monitoring and enforcement as outlined above, they also provide a cash fund of $7.3 million which can be used to pay attorneys' fees and costs; and for distribution to class members.

As noted above, most members of the class paid a fee in exchange for coverage by the original CMA. That fee was $250 per policy from the beginning of the class period up through June 2, 2003, and $100 per policy thereafter. Auerbach Decl. ¶22a. Plaintiff proposes that each class member receive the amount of the fee applicable at the time that class member's annuity was purchased. Applying these fees to all policies purchased during the relevant time periods, yields a total amount paid for coverage of the original CMA of $505,050.[4] If the Court adopts the plan of allocation proposed above for distribution of funds to class members, and grants the

[4] In a handful of instances, the fee was waived. No data are readily available to identify those instances with precision. Plaintiff proposes that the possibility of such waiver therefore be ignored.

amounts sought herein for attorneys' fees and expenses, the entire amount of fees for the original CMA paid by all class members will be refunded. Auerbach Decl. ¶22.

Finally, if the Court adopts the proposals set forth here for distribution to the class and for attorneys' fees and expenses, an additional $2,500,000.00 will be available for distribution to class members, *pro rata*, on the basis of the size of the premium paid per policy. This distribution will allow additional relief to be provided to class members corresponding to the increase in the value of the annuities at the time of sale attributable to the original CMAs.

The settlements also require each of the two sets of Defendants to bear up to $100,000 in the cost of notice and settlement administration, and to pay half of the $25,000 Service Award requested for the Class Representative.

There are no contingencies to any of these values. There is no reversion of the cash to be paid, and no class member need even submit a claim form to receive the cash. Every class member who does not opt out will simply get a check in the mail. The guaranty provided by the New CMA also comes into force automatically, by operation of the settlement with Athene, without the requirement for any action by any class member. If the Court approves that settlement there is no set of facts under which the New CMA would not apply and no set of facts under which it would not convey value to the class within the range defined by Plaintiff's expert. In total, using the lower bound of Scherf's estimate of the value of the New CMA, these provisions convey hard value to the class of at least $34,500,000.

Accordingly, Plaintiff requests the award of $4,155,123.27 in attorneys' fees to Class Counsel.

B. Class Counsels' Requested Fee is Reasonable Whether The Percentage of Recovery Or Lodestar Method Is used

As this Court has held, the percentage of recovery method normally suggests that fees awarded be between 20% and 30% of the actual value of the amounts recovered. *In re Celexa and*

Lexapro Mktg & Sales Practices Litig., 2014 U.S. Dist. LEXIS 125041 (D. Mass. Sept. 8 2014). Because there is no question here of reversion to the Defendants of any of the recovery obtained, use of this method suggests that the amount requested by Plaintiff's counsel – which is just under 12% of the value of the recovery – is eminently reasonable.

The nature of the claim presented here – that a guaranty was breached – has been addressed by the most important element of the recovery attained – reinstatement of the guaranty. This suggests that the percentage of recovery method is appropriately used, even though the settlement is not purely in cash, because the value of the relief can be ascertained with reasonable precision; is not speculative; because there is no reversion to Defendants of any element of the relief; and because no steps need be taken by any class member in order to receive the benefits of the settlements. Even the cash payments will simply be made, without even the need for any class member to submit a claim form.

Thus, for example in *In re Certainteed Fiber Cement Siding Litig.,* 303 F.R.D. 199 (E.D. Pa. 2014), a class action was brought to remedy the defendants' breach of a product warranty. The settlement provided for new and broader warranty provisions, and created a procedure for the submission of claims under these new warranty terms. In evaluating the request for attorney's fees, the court used the percentage of recovery method, referencing its understanding of the value of the relief that would be provided to class members under the settlement.

Similarly, in class actions focused specifically on annuities, and challenging various marketing practices utilized in the sale of such instruments, the courts have looked to the value of structural relief obtained in settlement to provide the metric for award of attorney's fees. Thus, in *In re Am. Investors Life Ins. Co. Annuity Mktg & Sales Practices Litig.,* 263 F.R.D. 226 (E.D. Pa 2009), the court also assessed the request for attorney's fees under the percentage of recovery method, using the opinion of Plaintiffs' expert on the value of the settlement in that case, which

provided both cash and injunctive relief that improved the terms of the annuities at issue in that case.[5] See also *Varacallo v. Mass. Mut. Life Ins. Co.,* 226 F.R.D. 207 (D.N.J. 2005) (awarding fees using the percentage of recovery method in class action providing various forms of conduct and cash relief for claims arising out of challenge to practices in sale of annuities, after determining the value of the settlement including all forms of relief attained).

The attorney's fee sought here is also appropriate under the lodestar method. The cases hold that that approach to award of attorney's fees in class actions is appropriate as a cross-check when the percentage of recover method is used, and as the primary basis for calculation when the percentage of recovery method cannot be applied. Under this method, the court determines the fee award by "ascertain[ing] the number of hours productively expended and multiply[ing] that time by reasonable hourly rates." *Spooner v. EEN, Inc.,* 644 F.3d 62, 68 (1st Cir. 2011). Then, the court applies a multiplier to the lodestar to account for a variety of contingency factors, including the risk, the result achieved, the quality of representation and the complexity and magnitude of the litigation. *See, e.g., In re TJX Companies Retail Sec Breach Litigation*, 584 F. Supp. 2d 395, 408 (D. Mass. 2008) (applying lodestar multiplier of 1.97); *In re Tyco Int'l, Ltd. Multidistrict Litig*., 535 F. Supp. 2d 249, 271 (D.N.H. 2007) (applying lodestar multiplier of 2.697)); *In re Relafen*, 231 F.R.D. at 82 ("A multiplier of 2.02 is appropriate."). As a result, the lodestar "cross-check" also supports Class

[5] More generally, the courts in this Circuit are clear that the percentage of recovery method is appropriately used when the recovery is determinable with precision. *See In re Thirteen Appeals,* 56 F.3d 295, 306-07; *In re Copley Pharm., Inc. Sec. Litig.,* C.A. No. 94–11897–WGY (D. Mass. 1996) (33.33% of fund); *Wechsler v. Comfed Bancorp, Inc.,* C.A. No. 89–2224–MLW (D. Mass. 1996) (27% of fund); *In re Evergreen Ultra Short Opportunities Securities Fund Litigation,* 2012 WL 6184269, at *1 (D. Mass. Dec. 10, 2012) (24% of fund); *New Eng. Carpenters Health Benefits Fund v. 1st Databank, Inc.,* No. 05–CV– 11148–PBS, 2009 WL 2408560, at *1–2 (D. Mass. Aug. 3, 2009) (20% of fund); *In re Am. Dental Partners, Inc. Sec. Litig.,* No. 08–CV–10119–RGS, 2010 WL 1427404, at *1 (D. Mass. Apr. 9, 2010) (22.5% of fund); *In re Fleet/Norstar Sec. Litig.,* 935 F.Supp. 99, 110 (D.R.I. 1996) (20% of fund); *In re Puerto Rican Cabotage Antitrust Litig.,* 815 F Supp. 2d 448 (D.P.R. 2011) (23% of fund).

Counsel's reasonable attorney fee request.

Here, the lodestar incurred totals $2,091,973.50. Auerbach Decl., ¶24; Klehm Decl., ¶5. This amount is calculated using actual hourly rates paid by other clients of Plaintiff's counsel and by opposing parties who have agreed to pay attorney's fees, and which have been awarded to Plaintiff's Lead Counsel by other courts in other class actions. See Auerbach Decl. at ¶24; Klehm Decl., ¶5.

From this lodestar Plaintiff's counsel seek a multiplier of 1.98.

Based on these cases, the 12% fee requested by Class Counsel is entirely reasonable. In this case, Class Counsel took and defended multiple depositions, reviewed many tens of thousands of documents, and has spent over four years aggressively litigating this case to a successful conclusion.

C. Class Counsels' Requested Fee Is Reasonable under the *Johnson* Factors

The First Circuit has adopted the factors as set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), "for use in sculpting fee awards." *Coutin v. Young & Rubicam P.R.,* 124 F.3d 331, 337 n. 3 (1st Cir. 1997) (citing *Johnson,* 488 F.2d at 717-19 and *Segal v. Gilbert Color Sys., Inc.,* 746 F.2d 78, 86 (1st Cir. 1984).) The *Johnson* factors are: time and labor required; novelty and difficulty of questions; skill requisite to perform legal services properly; preclusion of other employment by attorney due to acceptance of case; customary fee; whether it is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation, and ability of attorney; undesirability of case; nature and length of professional relationship with client; and size of awards in similar cases. Not all of the individual *Johnson* factors, however, will apply in every case, and the Court has wide discretion as to which factors to apply and the relative weight to assign to each. *In re Xcel Energy, Inc.,* 364 F.Supp.2d 980, 993 (D.Minn.2005). Class Counsel posits that each of the

relevant *Johnson* factors supports the reasonableness of the fee award request.

1. Time and Labor Required

As illustrated above, Class Counsel and their staffs expended 3,358.2 hours in the prosecution and settlement of this case. Auerbach Decl., ¶24; Klehm Decl., ¶5. Clearly, this was a significant effort which resulted in exceptional results for the Class Members.

2. Novelty and Difficulty of Questions Presented

Prosecution of this case required Class Counsel with experience and understanding of complex litigation, the economics and financial aspects of the annuities at issue, as well as the legal issues presented by conduct which affects the creditworthiness of financial devices but that has not, at least as of now, caused a default on any payments. Despite the novel approach and the complexities of the case, Class Counsel succeeded in negotiating a settlement that greatly benefits that class. As a result, this *Johnson* factor supports Class Counsel's fee request.

3. Skill Requisite to Perform Legal Services Properly and Experience, Reputation, and Ability of Attorney

In evaluating the skill and efficiency of the attorneys involved, courts look to "the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Alexander v. Washington Mutual, Inc*., No. 07-4426, 2012 WL 6021103, at *3 (E.D. Pa. Dec. 4, 2012). The result obtained is in large measure a reflection of the skill and tenacity with which Class Counsel prosecuted this litigation.

Here, Class Counsel achieved significant benefits for Class Members. Class Counsel faced significant factual, legal, and financial obstacles in pursuing this litigation, but were still able to produce a substantial result for the Class Members. The quality of Class Counsel, who have established reputations as class action attorneys, cannot seriously be questioned. The skill and

efficiency with which they have exercised in this case is beyond reproach. Similarly, the Krasnoo, Klehm & Falkner LLP, firm has served efficiently as local counsel, performing all of the duties required by that role including facilitating mediation and counseling Lead Counsel during the mediation process.

Accordingly, this *Johnson* factor strongly favors the award of the requested fee.

4. Preclusion of Other Employment by Attorney Due to Acceptance of Case

Class Counsel and their staffs have expended over 3,300 hours in the prosecution of this case, which has led to the settlement at issue. Obviously, these hours could and would have been spent pursuing and prosecuting other cases but for the acceptance of this case. While not a factor that weighs heavily in favor of Class Counsel's fee request, it is a factor that does support the request.

5. Customary Fee and Whether the Fee Is Fixed or Contingent

As the courts have frequently observed, the contingent fee that plaintiffs in a free market typically agree to pay for legal representation is one third of the gross recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984); *In re A.H. Robins Co., Inc.*, 86 F.3d 364, 377 (4th Cir. 1996); *Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("[w]e know that in personal- injury suits the usual range for contingent fees is between 33 and 50 percent"). In this case, the fee was completely contingent on the outcome and was not fixed. There is no general rule as to what percentage of the common fund should be awarded as attorney fees; however, as noted and cited above, the First Circuit and courts in this circuit have customarily awarded fees which range from 20% to 30% of the settlement fund. Thus, Class Counsel's requested fee is below the acceptable minimum. Thus, this factor supports the request.

6. Amount Involved and Results Obtained

The amount involved is discussed at length above, in the section of this Memorandum

discussing the merits of Final Approval, as well as the results obtained through the settlement. Class Members are significantly and directly benefitted by this settlement in that they will receive the guarantee whose breach was the impetus for the filing of this case as well as cash compensation. These benefits should not be trivialized given the substantial defenses, on the merits and as to damages, that Defendants have raised in this action. Defendants are represented by seasoned and well-respected defense counsel and had this action not been settled, there is every reason to expect that all Defendants would have mounted a very strong effort to prevent Plaintiff and the class from achieving any recovery at all.

The size and nature of the settlement was driven by the nature of the breach challenged and by the magnitude of the fees each class member paid in exchange for coverage under the original CMAs, and by consideration of both the strengths and weaknesses of the Plaintiffs' claims, the difficulties and risk associated with the class certification process and the appeals thereof, and the calculation of damages. Additionally, no Defendant conceded either liability, or the propriety of class treatment, or the existence or amount of the damages claimed by Plaintiff and the class. Thus, after full consideration of the factors, and after substantial discovery and litigation, Class Counsel entered into a fair and substantial non-reversionary settlement that provides relief to each class member that is at least close to make-whole relief, provided to thousands of class members none of whom could rationally have prosecuted this case on his or her own given the cost of doing so when measured against the gain to be achieved by any one class member. This *Johnson* factor is easily satisfied.

7. Undesirability of Case

The difficulties posed by this case demanded exceptional work if Class Counsel hoped to achieve relief for the Class. The complexity of issues and duration of the case were significant. Class Counsel conducted extensive discovery, reviewed thousands of pages of documents,

traveled throughout the United States and to England to conduct multiple depositions, and retained multiple experts to analyze the liability and damages issues. Class Counsel risked all of this time, effort, and expense on an outcome that was uncertain. The fact that no other case was filed by lawyers pursuing the same claims against Defendants is a testament to the undesirability of the litigation and the commitment of Class Counsel. Clearly, this factor favors the requested fee award.

8. Size of Awards in Similar Cases

Plaintiff submits that the most appropriate cases to be compared with this one are those class actions cited above in Section II relating to annuities and challenges to breach of warranty. See *supra* at 29. In the *Certainteed* case, which dealt with breach of a product warranty, a multiplier of 2.6 was found appropriate. 303 F.R.D. at 225. In *In re American Investors Life Ins. Co.,* the Court awarded a multiplier of 2.3, which it found "safely within the [appropriate] range." 263 F.R.D. at 245. *Varacallo*, also cited above, adopted a multiplier of 2.83. 226 F.R.D. at 256.

9. The *Johnson* Factors Weigh in Favor Allowing Fee Request

In sum, with regard to the *Johnson* factors, the time and labor involved to prosecute this case has been substantial and justifies the level of fees requested. Additionally, Class Counsel faced novel issues and difficult legal obstacles both at the motion to dismiss stage and at class certification. Given the substantial risks of non-recovery and the result obtained for the Class, as discussed above, the amount of fees requested here is appropriate, fair, and reasonable. Awards in similar cases confirm as much. The amount involved and the results obtained suggest that Class Counsel exhibited the necessary skill and ability to bring this portion of the pending MDL to a successful resolution.

D. Reimbursement of Expenses

In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled

to reimbursement of out-of-pocket expenses incurred during litigation. *In re Fidelity/Micron Secs. Litig., v. Fidelity Magellan Fund,* 167 F.3d at 737. Reasonableness is the goal, and it is within the Court's discretion to reject or scale back any expenses deemed superfluous or unreasonable. *Id.*

Here, Class Counsel's expenses were reasonably and necessarily incurred in prosecuting the litigation. In addition to expenditures related to travel for attending hearings, depositions, meetings and court fees, a significant component of Class Counsel's expenses is the cost of experts and consultants who contributed to the successful prosecution and resolution of the litigation. A summary listing of the reasonable costs incurred by Class Counsel is set forth in Auerbach Decl., ¶26 and Klehm Decl., ¶6. As of the filing of this Motion, Class Counsel has incurred $144,826.73 (reflecting $144,497.82 in expenses for Marcus & Auerbach and $328.91in expenses for Krasnoo Klehm & Faulkner LLP) and will incur additional expenses through the Final Fairness Hearing. Class Counsel will limit their request for reimbursement of expenses to the amount incurred to date.

This request for reimbursement of reasonable out-of-pocket expenses was set forth in the Notice disseminated to all Class Members, and a cap on the total amount of fees expenses was set forth there. Class Counsel's request does not exceed this amount, and Class Counsel prays that the Court award them reimbursement of these reasonable expenses from the common fund.

F. Service Award

The Settlement Agreements provide that Class Counsel may request a service award of up to $25,000 for the Class Representative, to be paid directly by Defendants, each of whom will bear half of this amount.

In granting service awards to named plaintiffs in class actions, courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement of laws and rewarding representative plaintiffs for being instrumental in obtaining

recoveries for persons other than themselves. *See, e.g., Bussie v. Allamerica Fin. Corp.*, CIV.A. 97-40204-NMG, 1999 WL 342042, *3-4 (D. Mass. May 19, 1999 (*citing Dun & Bradstreet Credit Services Customer Litigation,* 130 F.R.D. 366, 373-74 (S.D. Ohio 1990)). Courts in this district have recognized that a service award of $25,000 is appropriate when the Class Representatives performed an extensive amount of work on behalf of the class. See *Ark. Teachers Retirement Sys. v. State St. Bank & Trust Co.,* 2018 U.S. Dist. LEXIS 111409 (D. Mass. June 28, 2018)(awarding $25,000 to Class Representative who discovered the claim and rendered extensive assistance to class counsel); *In re Lupron (R) Mktg & Sales Practices Litig.,* 228 F.R.D. 75, 49 (D. Mass. 2005) (awarding $25,000 to those named plaintiffs who were deposed).

Here the efforts of the Class Representative were extensive and absolutely essential. As explained in the declaration of his counsel Mr. Auerbach, John Griffiths was the person who discovered the breach that is at issue in this case. While Defendants disclosed to the holders of the Annuities that Aviva had sold its North American business to Athene, they did not disclose that the original CMAs had been terminated. But, as he testified in his deposition, that grant of extra assurance had been very important to Mr. Griffiths, and when he learned of the sale he immediately became concerned about the status of the CMA guaranties that had induced his purchase of the Aviva Annuity. He undertook a substantial series of telephone calls, emails and letters, with various personnel and officers at Aviva and Athene, until he learned what had actually happened. Auerbach Decl., ¶4.

After discovering this, Griffiths researched lawyers, and determined to contact Marcus & Auerbach LLC because of its experience in class litigation relating to annuities and specifically because of the result the firm had achieved in prior litigation against Aviva and its predecessors in interest. See *In re American Investors Life Ins. Co. Annuity Mktg & Sales Practices Litig.,* 263 F.R.D. 226 (E.D. Pa 2009). Griffiths then worked closely with counsel throughout the case,

communicated with counsel on a regular basis, reviewed and provided input with respect to counsel's submissions, provided information, produced documents, provided deposition testimony and monitored settlement discussions. He has fully discharged his obligations as class representative and has provided needed assistance to Class Counsel in the course of the litigation. Furthermore, Class Counsel's request for this class representative service award was outlined in the Settlement Agreement and in the class notices. No Class Member has objected to the request.

For the reasons discussed above, Class Counsel prays that the requested class representative service award be approved.

The Plaintiff
John W. Griffiths
By His Attorneys,

/s/ Jerome Marcus
Jerome M. Marcus, Esquire, *pro hac vice*
Jonathan Auerbach, *pro hac vice*
MARCUS & AUERBACH LLC
1121 N. Bethlehem Pike, Suite 60-242
Spring House, PA 19477
Telephone: (215) 884-2250
Facsimile: (888) 875-0469
jmarcus@marcusauerbach.com
auerbach@marcusauerbach.com

/s/ Paul J. Klehm
Paul J. Klehm (BBO #561605)
KRASNOO, KLEHM & FALKNER LLP
28 Andover Street, Suite 240
Andover, MA 01810
Telephone: (978) 475-9955
Facsimile: (978) 474-9005
pklehm@kkf-attorneys.com

Dated: August 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants via first class mail, postage prepaid, on August 14, 2018.

/s/ Paul J. Klehm
Paul J. Klehm