UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRENDA J. OTTE, ADMINISTRATRIX OF THE ESTATE OF GLADYS REYNOLDS, individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	
vs.	:	**CIV. NO. 09 CV 11537 RGS**
LIFE INSURANCE COMPANY OF NORTH AMERICA, CONNECTICUT GENERAL LIFE INSURANCE COMPANY and DOES 1 through 100, inclusive,	:	
Defendants	:	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT AND RELATED RELIEF

Plaintiff Brenda J. Otte ("Plaintiff" or "Otte") submits this memorandum in support of her unopposed motion for preliminary approval of the parties' proposed settlement of this class action and for related relief.[1] As set forth more fully below, the motion should be granted because the proposed settlement is "fair, reasonable and adequate" within the meaning of Fed. R. Civ. P. 23(e)(2), and because the related relief requested by the parties is appropriate under Fed. R. Civ. P. 20, 23 and 24.

[1] This memorandum reflects the positions of only Plaintiff and her counsel. Defendants have asked that this footnote be included to clarify that, although the motion is unopposed, this memorandum does not in any way reflect the positions or opinions of Defendants.

INTRODUCTION

The parties propose that this class action be settled on the terms set forth in the Stipulation of Settlement that is attached as Exhibit A to Plaintiff's motion for preliminary approval of the proposed settlement. The proposed settlement is a straightforward, all cash settlement. The Stipulation provides that the Defendants shall establish a settlement fund in the amount of $8,134,207.35, and provides that the members of the class who do not exclude themselves from the settlement shall release their claims against the Defendants in exchange for their proportionate share of the settlement fund.

Plaintiff respectfully submits that this proposal should be preliminarily approved as fair, reasonable and adequate because: (1) it was reached only after counsel for the parties had conducted sufficient discovery and motion practice to enable them to assess the relative merits of the case and the potential risks and rewards that would be associated with continued litigation; (2) it is the product of arm's length negotiations between able and experienced counsel; and (3) it will provide immediate, certain and meaningful monetary relief for the members of the class and will eliminate the delay, risks and additional expense that the members of the class otherwise would face but for the settlement.

This Court previously certified this action to proceed as a class action, finding it satisfies the requirements of Fed. R. Civ. P. 23(a) and (b)(3) (Doc. 73). In order to facilitate a global resolution of this controversy, the parties ask that the end of the class period be extended from June 10, 2011, when the class certification order was issued, until November 1, 2012. The parties have identified individuals who satisfy the original class definition, as expanded, and will file a list of such individuals with the Court. In order to provide clarity and certainty as to who is

and is not covered by the settlement, the parties respectfully request that the Court define the class as the individuals identified on the list. The Court has the authority to amend the class in this respect pursuant to Fed. R. Civ. P. 23(c)(1)(C), which provides that "an order that grants … class certification may be altered or amended before final judgment."

Plaintiff also moves to add Helen Keefe, Melanie Lausier and Paula Fitzgibbon to serve as additional class representatives. These individuals previously moved to intervene to represent the interests of certain class members, but their motion was denied without prejudice pending the outcome of Defendants' appeal of the Court's order on class certification. These individuals satisfy Fed. R. Civ. P. 20(a)(1) and 24(b)(1)'s requirements for permissive joinder and intervention because their claims arise out of the same practices that give rise to this action and present common questions of law and fact.

Finally, the proposed notice and the manner in which the parties propose that it be disseminated to the class satisfy the requirements Fed. R. Civ. P. 23(c)(2)(B) and (e)(1) and (4). The notice satisfies the requirements of Rule 23(c)(2)(B) by clearly and concisely stating in plain language all of the information required by the rule. The plan of distribution satisfies the requirements of Rule 23(c)(2)(B) and (e)(1) by providing for individual notice to each class member via United States mail.

BACKGROUND

Although the facts, claims and defenses presented in this case are known to the Court and are well-described in the Court's orders denying Defendants' motion to transfer and granting Plaintiff's motion for class certification (Docs. 14, 73), Plaintiff briefly describes the nature of the case and its procedural history before setting forth the terms of the proposed settlement.

Nature of the Case

This action asserts claims for alleged violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq*. ("ERISA), arising out of Defendants' use of retained asset accounts called "Cignassurance Accounts" to settle claims for life insurance benefits due under ERISA-governed employee benefit plans that are insured by Defendants and their affiliates.

Plaintiff is the administratrix of the estate of a beneficiary that received a Cignassurance Account in connection with a claim for life insurance benefits under an ERISA-governed employee benefit plan that was insured by Defendant Life Insurance Company of North America ("LINA") (Doc. 23 at ¶¶3, 17-20). Plaintiff alleges that after the claim was approved and the Cignassurance Account was established, that LINA transferred the beneficiary's benefits to Defendant Connecticut General Life Insurance Company ("CGLIC"), that CGLIC managed and invested the funds for its own account, and that CGLIC generated more money investing the funds than it credited in interest to the beneficiary's Cignassurance Account (*Id*. at ¶¶11-14, 24-25). Plaintiff alleges that LINA and CGLIC functioned as ERISA plan fiduciaries when they did so (*id*. at ¶15), and that their actions violated ERISA's requirement that plan fiduciaries act solely in the interest of a plan's participants and beneficiaries and violated ERISA's prohibition against fiduciaries dealing with a plan's assets in their own interests (*Id*. at ¶¶27-29, 43-44).

Plaintiff alleges that Defendants treated other beneficiaries similarly and that the action therefore should be certified to proceed as a class action (*Id*. at ¶¶31-41).

Defendants deny the material allegations of the Plaintiff's Complaint and deny any wrongdoing.

Procedural History

Plaintiff filed this action as a class action on September 15, 2009 (Doc. 1).

Defendants subsequently moved to transfer the case to another district (Doc. 7). The motion to transfer was denied on January 6, 2010 (Doc. 14).

Thereafter, the parties and the Court agreed upon a schedule for discovery and briefing concerning whether this action should be allowed to proceed as a class action (Doc. 16), and the parties proceeded in accordance with that schedule.

Plaintiff moved for class certification on July 2, 2010, Defendants filed a response in opposition to the motion on September 3, 2010, Plaintiff filed a reply in further support of the motion on September 24, 2010, and the Court held a hearing on the motion on November 16, 2010 (Docs. 34, 39, 41 and 48).

On November 1, 2010, Plaintiff moved for partial summary judgment on the issue of Defendants' liability (Doc. 42). On November 17, 2010, Defendants sought and obtained an extension of time to respond to the motion (Doc. 49).

On December 21, 2010, the parties requested and were granted a stay of proceedings in order to allow them to engage in mediation (Doc. 52).

Thereafter, the parties engaged in extensive mediation in an effort to resolve the matter. The parties selected Hunter R. Hughes, an attorney who practices with the firm of Rogers & Hardin LLP in Atlanta, Georgia and who specializes in the mediation of class actions and other complex litigation, to serve as the mediator. The parties participated in two day-long mediation sessions and numerous teleconferences with Mr. Hughes and conducted additional discovery

relating to the amount in controversy, but reached an impasse on February 16, 2011 (Doc. 53). Plaintiff notified the Court of the impasse and asked that the stay be lifted. *Id.*

The Court lifted the stay and directed Defendants to respond to Plaintiff's motion for partial summary judgment within thirty days. Defendants subsequently obtained another extension to respond to the motion and eventually moved pursuant to Fed. R. Civ. P. 56(d) for an order dismissing the motion without prejudice in order to allow them to conduct additional discovery before responding to the motion (Docs. 55, 60).

On June 10, 2011, the Court provisionally certified two subclasses to proceed as class actions pursuant to Fed. R. Civ. P. 23(a) and (b)(3) (Doc. 73). Both subclasses consist of beneficiaries of ERISA-governed employee welfare benefit plans that were insured by group life policies issued by LINA or any other underwriting subsidiary of Cigna Corporation for whom a Cignassurance Account was created. *Id.* at 5, 21. The first subclass consists of all beneficiaries "whose claims accrued during the three years prior to the filing of the Complaint" (*i.e.*, whose claims accounts accrued since September 15, 2006). *Id.* at 21. The second subclass consists of all beneficiaries "whose claims accrued during the three years prior to the inception of the primary class" (*i.e.*, whose claims accrued between September 15, 2003 and September 15, 2006). *Id.*

The Court created the second subclass in response to Defendants' argument that beneficiaries whose Cignassurance Accounts were created more than three years before suit was filed might be subject to a statute of limitations defense and that this potential defense might make a class-wide trial of their claims unmanageable (Doc. 73 at 19 fn. 13 and 20). The Court directed the parties to submit a proposed schedule for conducting discovery to determine whether

the second subclass is maintainable as a class action and whether suitable class representatives for that subclass could be identified. *Id*.

The Court subsequently dismissed without prejudice Plaintiff's motion for partial summary judgment as premature, and on June 23, 2011, entered a scheduling order to govern the remaining proceedings in the case (Doc. 76).

On June 24, 2011, Defendants petitioned the United States Court of Appeals for the First Circuit pursuant to Fed. R. Civ. P. 23(f) for permission to appeal this Court's order certifying the action to proceed as a class action.

On August 16, 2011, Plaintiff identified three additional beneficiaries, Helen Keefe, Melanie Lausier and Paula Fitzgibbon, to serve as representatives for the second subclass (Doc. 80), and on August 23, 2011, those individuals subsequently moved to intervene in the case (Doc. 83).

Subsequently, proceedings in the case were stayed and the motion to intervene was denied without prejudice pending the outcome of the appeal (Doc. 89 and Electronic Order entered November 18, 2011).

The parties completed briefing in the appeal on February 13, 2012, and the First Circuit heard oral argument on the appeal on March 6, 2012.

The parties subsequently resumed settlement discussions. On July 31, 2012, the parties filed a joint motion advising the First Circuit that they had reached agreement on a framework for settlement but needed additional time to negotiate and memorialize a definitive settlement agreement. The First Circuit agreed to stay its decision of the case until September 15, 2012, in response to the parties' request.

On September 17, 2012, the parties requested that the stay be extended until November 16, 2012, to allow them to finalize their negotiations and memorialize their agreement.

On November 16, 2012, the parties notified the First Circuit and this Court that they had reached a proposed settlement and requested a further extension of the stay until November 27, 2012, in order to finalize and execute the required settlement documents. The settlement documents subsequently were signed on November 19, 2012, and the parties will shortly request a final extension of the stay with the First Circuit, pending resolution of the parties' proposed settlement.

Terms of the Proposed Settlement

The terms of the proposed settlement are set forth in the Stipulation of Settlement attached hereto as Exhibit A ("Stipulation").[2] The material terms of the proposed settlement are as follows.

The Settlement Fund and Plan of Allocation

The Stipulation provides for the creation of a $8,134,207.35 Settlement Fund (Stipulation ¶¶1.14, 2.2), and provides that each Settlement Class Member will receive an Individual Share of the Settlement Fund proportional to the amount of interest that was credited to his or her Cignassurance Account compared to the total amount of interest that was credited to all Settlement Class Members' Cignassurance Accounts (Stipulation ¶1.4 and the Plan of Allocation attached thereto as Exhibit A).[3]

[2] This memorandum incorporates by reference the definitions set forth in the Stipulation.

[3] Specifically, a Settlement Class Member's Individual Share will be approximately equal to the result of a computation in which (i) the Settlement Fund less the deductions set forth in paragraph 2.4 of the Stipulation is multiplied by a fraction in which (ii) the numerator is the

Notice and Administration of the Settlement

The Stipulation provides for the appointment of a professional Settlement Administrator (Stipulation ¶¶ 1.9 and 2.1). The Settlement Administrator will mail all Settlement Class Members a notice describing the proposed settlement and their rights with respect thereto, including their right to opt out of or object to the proposed settlement,[4] and will administer the Settlement Fund pursuant to the terms of the Stipulation and the Preliminary Approval Order (*Id.* at ¶¶ 2.1-2.12).

Opportunity to Opt Out of and Object to the Settlement

Settlement Class Members will have the right to exclude themselves from the proposed settlement and/or to object to the terms of the proposed settlement. Preliminary Approval Order, ¶¶8, 10, 13.

No Reverter

The Stipulation provides that no part of the Settlement Fund will revert to the Defendants. Any check issued to a Settlement Class Member that is not negotiated within 180 days of issuance shall be deemed to be an "uncashed check," and the value of that check shall be added to the unclaimed funds (Stipulation ¶2.12). All unclaimed funds shall be paid first to

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amount of interest credited on the Settlement Class Member's Cignassurance Account and (iii) the denominator is the amount of interest credited on all Settlement Class Members' Cignassurance accounts, subject to a $1 minimum. *Id.* Paragraph 2.4 of the Stipulation provides for the following deductions before this calculation is performed: expenses associated with notice to the class and administration of the settlement, attorney's fees and reimbursement of expenses awarded to Class Counsel by the Court, and any amounts awarded by the Court to the class representatives for their service on behalf of the class.

[4] The notice proposed by the parties is attached to the Stipulation as Exhibit C.

persons who become Settling Plaintiffs pursuant to paragraph 2.6 of the Stipulation, which provides a mechanism for persons who were not included on the list of Settlement Class Members, but who desire to participate in the settlement and can demonstrate that they fall within the class definition, to participate in the settlement. Any remaining unclaimed funds shall be paid either to Settlement Class Members who cashed their checks or to charities approved by the Court, depending upon the amount of the unclaimed funds. *Id*. If the remaining unclaimed funds equal or exceed $200,000, then the funds will be distributed to class members who cashed their checks. If the remaining unclaimed funds are less than $200,000, then, subject to the Court's approval, the funds will be paid in equal shares to Merrimack Valley North Shore Legal Services and to the SeniorLaw Center pursuant to the *cy pres* doctrine.

Release and Dismissal

The Stipulation provides that all Settlement Class Members who do not opt out of the Settlement Agreement and all persons who become Settling Plaintiffs pursuant to paragraph 2.6 of the Stipulation shall release all Settled Claims against Defendants and their Affiliated Entities (Stipulation ¶¶1.10, 4.3), and provides that the action shall be dismissed with prejudice (*Id*. at ¶4.2).

Attorneys' Fees and Costs and Incentive Awards to the Class Representatives

The Stipulation provides that Class Counsel will apply for an award of attorney's fees not to exceed one-third of the Settlement Fund and for reimbursement of the expenses they reasonably incurred in prosecuting this action (Stipulation ¶2.4(b), (c)). Class Counsel also will apply to the Court for an award of up to $5,000 for class representatives who were deposed, and for an award of up to $1,000 for class representatives who were not deposed, to compensate them

for their service on behalf of the interests of the class (Stipulation ¶2.4(d)).

ARGUMENT AND CITATION OF AUTHORITY

Rule 23(e) provides:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> > (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
> >
> > (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
> >
> > (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
> >
> > (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
> >
> > (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).

The parties have submitted the Stipulation that sets forth the terms on which they propose this class action be settled, thus satisfying the requirement of Rule 23(e)(3).

Because the proposed settlement would bind class members, it must be approved by the Court as fair, reasonable, and adequate, and the members of the class must be notified of the proposed settlement and given an opportunity to opt out of or object to the settlement. Fed. R. Civ. P. 23(e)(1)-(2) and (4)-(5).

I. The Proposed Settlement Is Fair, Reasonable and Adequate and Should Be Submitted to Class Members for Their Consideration.

When presented with a proposal that a class action be settled:

> [T]he judge is required to scrutinize the proposed settlement to ensure that it is fair to the persons whose interests the court is to protect. Those affected may be entitled to notice and an opportunity to be heard. This usually involves a two-stage procedure. First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.

Hochstadt v. Boston Scientific Corp., 708 F.Supp.2d 95, 106 (D. Mass. 2010), quoting Manual for Complex Litigation (Fourth) § 13.14 (2004).

The Manual for Complex Litigation further describes the procedures that govern the evaluation of class action settlements:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentation by parties…. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual for Complex Litigation (Fourth) § 21.632 (2004).

A proposed settlement is presumed to be fair and reasonable when the parties negotiated at arm's length and conducted sufficient discovery. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) ("If the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable.");

City P'ship Co. v. Atl. Acquisition Ltd. P'ship, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arm's length, there is a presumption in favor of the settlement."); accord Newberg at §11.41 ("There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for Court approval.").

The presumption that a proposed settlement is fair and reasonable may be established by showing, *inter alia*: (1) "[t]hat the settlement has been arrived at by arm's-length bargaining; (2) [t]hat sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently; [and] (3) [t]hat the proponents of the settlement are counsel experienced in similar litigation[.]" H. Newberg, A. Conte, Newberg on Class Actions (4th ed. 2002) ("Newberg"), §11.41; *accord In re Lupron Marketing & Sales Practices Litig*., 345 F. Supp.2d 135, 137 (D. Mass. 2004) (considering these factors in preliminarily approving a proposed settlement and quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 785 (3d Cir. 1995), *cert. den. sub nom., General Motors Corp. v. French*, 516 U.S. 824 (1995)).

The settlement proposed by the parties satisfies each of these requirements.

A. <u>Plaintiff's Counsel Are Experienced in Similar Complex Litigation</u>.

Plaintiff's counsel submitted their resumes as exhibit B to Plaintiff's Motion for Class Certification (Docs. 32-34). As detailed in their resumes, Plaintiff's counsel have substantial experience prosecuting complex litigation, including class actions involving practices and claims similar to those presented in the case *sub judice*. In fact, Plaintiff's counsel brought the first case alleging that an insurance company's use of a retained asset account to retain and invest for its

own account benefits owed under an ERISA-governed employee benefit plan violated ERISA. That case resulted in the First Circuit's decision in *Mogel v. Unum Life Ins. Co. of Am.*, 547 F.3d 23 (1st Cir. 2008), and ultimately was settled on terms favorable to the plaintiffs and a class of similarly-situated beneficiaries.

Plaintiff's counsel also have prosecuted, or are in the process of prosecuting, six more similar class actions in the First, Second and Third Circuits. Those cases have resulted in several published and unpublished opinions, including: *Merrimon v. Unum Life Ins. Co. of Am.*, 845 F.Supp.2d 310 (D. Me. 2012); *Edmonson v. Lincoln Nat'l Life Ins. Co.*, --- F.Supp.2d ---, 2012 WL 368367 (E.D. Pa. Feb. 3, 2012), *appeal docketed* (3d Cir. Mar. 5, 2012); *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 777 F.Supp.2d 869 (E.D. Pa. 2011); *Vander Luitgaren v. Sun Life Ins. Co.*, No. 1:09-cv-11410, 2010 WL 4722269 (D. Mass. Nov. 18, 2010); and *Faber v. Metro. Life Ins. Co.*, No. 08-Civ-10588, 2009 WL 3415369 (S.D.N.Y. Oct. 23, 2009), *aff'd*, 648 F.3d 98 (2d Cir. 2011).

Plaintiff's counsel's experience in complex litigation and in the prosecution of actions similar to the case *sub judice* qualified and allowed them to prosecute this action and to negotiate a reasonable compromise of the claims asserted in the case.

B. Plaintiff's Counsel Conducted Sufficient Discovery and Motion Practice.

Plaintiff's counsel conducted sufficient discovery and motion practice to enable them to assess the relative merits of the case and the potential risks and rewards that would be associated both with settling the case and continuing to prosecute the case. This action has been pending for over three years. During that time, Plaintiff's counsel conducted extensive written discovery and deposed the key employees of Defendants who possess knowledge concerning the practices

at issue in the case and the profits that Defendants derived from those practices. From such discovery and knowledge gained from other similar cases, Plaintiff's counsel were able to move for class certification and for partial summary judgment on the issue of liability promptly. From the briefing surrounding these motions, the parties were able to understand each other's positions and evaluate the strengths and weaknesses of their respective cases.

It was clear to the parties from the proceedings in this case and from proceedings in other similar cases that both sides faced significant risks with respect to the issues of class certification and liability. Specifically, although the Court certified this action to proceed as a class action, the First Circuit agreed to review that decision on an interlocutory basis, and it is uncertain how the First Circuit would have ruled on that appeal. Similarly, although Plaintiff's counsel have received favorable decisions in some similar cases, *e.g.*, *Mogel* (reversing dismissal of action) and *Merrimon* (certifying action to proceed as a class action and entering partial summary judgment in favor of the plaintiffs), they have not fared as well in others. *E.g.*, *Faber* (dismissing action) and *Edmonson* (entering summary judgment in favor of the defendant).

The risks faced by both sides are also reflected in the mixed results that have been obtained in other "retained asset account" cases involving non-ERISA, common law claims. *Compare Lucey v. Prudential Ins. Co. of Am.*, 783 F.Supp.2d 207 (D. Mass. 2011) (denying motion to dismiss), and *Keife v. Metro. Life Ins. Co.*, 797 F.Supp.2d 1072 (D. Nev. 2011) (same), *with Garcia v. Prudential Ins. Co. of Am.*, No. 08-cv-5756, 2009 WL 5206016 (D. N.J. Dec. 29, 2009) (dismissal); *Phillips v. Prudential Ins. Co. of Am.*, No. 11-cv-0058, 2011 WL 5915148 (S.D. Ill. Nov. 28, 2011) (dismissal); *Clark v. Metro. Life Ins. Co.*, 461 Fed. Appx. 538, 2011 WL 6085515 (9th Cir. Dec. 7, 2011) (affirming summary judgment in favor of defendant); *Rabin*

v. MONY Life Ins. Co., 387 Fed.Appx. 36, 2010 WL 2838402 (2d Cir. July 21, 2010) (affirming dismissal and summary judgment in favor of defendant).

It is also apparent that continued litigation would likely be lengthy and expensive. The parties already have devoted significant time and resources to the case over the three years that it has been pending. To date, although much work has been done by the parties and the Court on the issue of class certification, that issue has not been resolved completely at this time. Further, although Plaintiff moved for partial summary judgment, that motion was denied without prejudice as premature. Accordingly, at a minimum, additional discovery and briefing relating to that motion will be necessary. Further, depending on the Court's ruling on the parties' anticipated cross-motions for summary judgment, there likely will be a trial and/or an appeal. Realistically, it could take several more years before this controversy is resolved finally, during which time the parties and the Court would expend substantial time and resources on the case.

According to information received from the Defendants, Plaintiff's Counsel estimate that Defendants derived a profit of approximately $55 million from the practices in question during the class period. Pursuant to the proposed settlement, Defendants will pay $8,134,207.35, or approximately fifteen percent (15%) of that profit to resolve this matter. Such a recovery is comparable to recoveries that have been approved as fair, reasonable and adequate by this Court and others. *See, e.g., Nichols v. SmithKline Beecham Corp*., No. 00-cv-6222, 2005 WL 950616 (D. Mass. Apr. 22, 2005) (approving as fair, reasonable, and adequate a settlement that totaled between 9.3% and 13.9% of the potential recovery); *In re Cendant Corp. Sec. Litig*., 109 F.Supp.2d 235, 264 (D. N.J. 2000) (citing settlements that were approved in several securities class actions in amounts "between 1.6% and 10% of damages").

In assessing the reasonableness of the proposed settlement, it is also important to consider the interests of the class in a prompt resolution of this matter. The class consists of beneficiaries of life insurance policies, many of whom are surviving spouses of deceased insureds and may be approaching the twilight of their lives as well. Such individuals have a strong interest in seeing this litigation concluded sooner rather than later. This factor supports the reasonableness of the proposed settlement. *In re Lupron Marketing & Sales Practices Litig*., 345 F.Supp.2d 135, 138 (D. Mass. 2004) (finding a proposed settlement fell within the range of reasonableness based, in part, upon "the fact that many of the members of the class are ill and/or elderly and therefore have an interest in seeing the litigation concluded sooner rather than later.").

In sum, the proposed settlement represents a fair and reasonable compromise of this controversy considering the potential risks and rewards that would accompany continued litigation, the costs and delay that would be associated with such a course, and class members' interests in a prompt resolution of this matter.

The Parties Negotiated at Arm's Length.

The parties did not begin to discuss the possibility of settlement until December 2010, at which time they had completed discovery relating to class certification and related merits issues, Plaintiff had moved for class certification and partial summary judgment, and the motion for class certification had been fully briefed and was ripe for decision. After agreeing to engage in settlement discussions, the parties engaged an experienced mediator who specializes in the resolution of complex litigation to facilitate those discussions. The parties participated in two day-long mediation sessions with the mediator. In connection with those sessions, Defendants provided Plaintiff with information relating to the profits that they had generated through the

practices at issue in the case. Because until that point in the case discovery had focused primarily on class certification and related merits issues and not on the issue of remedy, counsel for Plaintiff requested that they be allowed to conduct additional discovery, including deposing the employees of Defendants with relevant knowledge, to explore and confirm the information provided by Defendants. After completing that discovery, the parties resumed settlement discussions, but ultimately reached an impasse in February, 2011.

At that juncture, the parties requested that the stay be lifted and proceedings in the case resumed. Thereafter, Plaintiff's motion for class certification was allowed in part, Defendants were allowed to file an immediate appeal of that decision, the parties briefed the appeal, and the First Circuit heard oral argument on the appeal. With a decision on the appeal looming, the parties agreed to resume settlement discussions and asked the First Circuit to stay decision of the case in order to allow them to do so. The parties resumed negotiations under the supervision of the mediator and were able to agree to a potential framework for a settlement, but were unable to reach final agreement on all of the details of a settlement or memorialize an agreement before the stay was scheduled to expire on September 15, 2012. The parties requested that the stay be extended further until November 27, 2012, to allow them to finalize their negotiations and memorialize their agreement. The parties finally executed a stipulation memorializing the terms on which they propose the case be settled on November 19, 2012.

Thus, the proposed settlement is the product of nearly six months of negotiations between the parties that occurred in two discrete periods over the span of nearly two years. The negotiations were conducted under the supervision of an experienced mediator and were conducted at arm's length in every respect.

II. The Request to Amend the Class Definition, Add Plaintiffs and Certify the Class, As Amended, Should Be Granted.

This Court previously certified this action to proceed as a class action, finding it satisfies the requirements of Fed. R. Civ. P. 23(a) and (b)(3) (Doc. 73). In order to facilitate a global resolution of this controversy, the parties ask that the end of the class period be extended from June 10, 2011, when the class certification order was issued, until November 1, 2012. The parties have identified individuals who satisfy the original class definition, as expanded, and will file a list of such individuals with the Court. In order to provide clarity and certainty as to who is and is not covered by the settlement, the parties respectfully request that the Court define the class as the individuals identified on the list. The Court has the authority to amend the class in this respect pursuant to Fed. R. Civ. P. 23(c)(1)(C), which provides that "an order that grants … class certification may be altered or amended before final judgment." *See In re Pharmaceutical Industry Average Wholesale Price Litig*., 588 F.3d 24, 38 (1st Cir. 2009) (affirming the district court's enlargement of the class definition in connection with its approval of a class action settlement in light of the defendant's desire for "total peace").

The proposed amendment will not affect the Court's prior findings that the action satisfies the requirements for class certification under Rule 23(a) and (b)(3), because the amendment merely adds beneficiaries who were treated similarly to the existing class members and because everyone will be treated similarly under the terms of the proposed settlement. Further, the proposed settlement will eliminate any concern that the claims of class members

whose claims accrued more than three years before suit was filed could present manageability problems if the case were tried because there will be no trial if the settlement is approved. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial.").

Plaintiff's request to add Helen Keefe, Melanie Lausier and Paula Fitzgibbon as additional class representatives also should be granted. As set forth more fully in these individuals' prior motion to intervene (Doc. 83), these individuals are members of the second subclass that was conditionally certified by the Court on June 10, 2011, which consists of all class members whose claims accrued prior to September 15, 2006. These individuals' claims arise out of the same practices that give rise to this action and present common questions of law and fact (Doc. 83). Accordingly, these individuals satisfy Fed. R. Civ. P. 20(a)(1) and 24(b)(1)'s requirements for permissive joinder and intervention.

III. The Proposed Notice and Notice Plan Should Be Approved.

Rule 23(c)(2)(B) provides that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all class members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). It further provides that the notice "must clearly and concisely state in plain, easily understood language" the following:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Rule 23(e) provides that when a court is presented with a proposal to settle a class action, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1).

The notice that the parties propose to use to notify members of the pendency of this class action and of the proposed settlement is attached as exhibit C to the Stipulation. This notice satisfies the requirements of Rule 23(c)(2)(B) by clearly and concisely stating in plain language all of the information required by the rule. The notice also satisfies the requirements of Rule 23(e)(1) by describing the material terms of the proposed settlement and the class member's right to object to, or opt out of, the class and the proposed settlement.

The parties propose that the notice be disseminated to each class member via U.S. Mail. Specifically, the Stipulation provides that the Settlement Administrator will research and obtain current addresses for each class member before mailing the notice, Stipulation ¶2.9, and further provides that if a class member's notice is returned for any reason, the Settlement Administrator will use its best efforts to obtain a correct current address for the class member and will re-mail his or her notice to the updated address. *Id.* at ¶2.10. Such direct, individual notice constitutes the best notice practicable. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974)

("Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.").

For these reasons, Plaintiff respectfully requests that the Court approve the parties' proposed notice and the manner in which the parties propose that it be disseminated to the class.

IV. A Final "Fairness" Hearing Should Be Scheduled.

Because the proposed settlement would bind class members, "the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Accordingly, Plaintiff respectfully requests that the Court schedule a final hearing to consider whether the proposed settlement is fair, reasonable and adequate.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for preliminary approval of the proposed settlement and related relief should be granted.

Respectfully submitted on November 20, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2012, I electronically filed the foregoing **Memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Proposed Settlement and Related Relief** with the Clerk of Court using the Court's CM/ECF system which will cause a copy of same to be delivered to the following individuals:

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