UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

----------x **ROY MOGEL, TODD D. LINDSAY, and JOSEPH R. THORLEY, individually and on behalf of all others similarly situated,** **Plaintiffs,** **vs.** **UNUM LIFE INSURANCE COMPANY OF AMERICA, a subsidiary of UNUMPROVIDENT CORPORATION,** **Defendant.** **----------x**	**:** **:** **:** **:** **:** **:** **:** **:** **:** **:** **:**	**Civ. No. 07-CA-10955 NMG** **HON. NATHANIEL M. GORTON**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PAYMENT OF ATTORNEYS' FEES, COSTS AND SERVICE AWARDS TO CLASS REPRESENTATIVES

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I. INTRODUCTION

This class action was commenced in May, 2007 and was litigated aggressively on both sides for three years. Settlement terms were finally achieved under the auspices of a highly respected mediator, Suffolk University Law School Prof. Dwight Golann.[1] By the time of settlement, the parties had a thorough knowledge of the strengths and weaknesses of their respective cases and of the risks attendant to the pending summary judgment motions, or if those motions were both denied, then trial. Further, regardless of the ultimate outcome in this court, an appeal by the losing party was certain.

Plaintiffs respectfully submit this memorandum and the accompanying declarations of Class Counsel in support of their request for this Court to approve the terms of the parties' settlement agreement ("Settlement"). The Settlement includes a $5 million Settlement Fund that provides for resolution of the class claims for the beneficiaries of certain of the group life insurance policies at issue in this case – those with a type of policy that by its terms mandates payment of benefits to the beneficiary in a lump sum (so called "AA" policies). The parties have also agreed upon a dismissal without prejudice of the claims of the remaining class members -- those who are beneficiaries of a different type of group of life insurance policy, one that does not

[1] Professor Golann is an expert in both dispute resolution and consumer financial services. He was a civil litigator before joining the Suffolk Law School faculty, practicing with a Boston law firm and as Chief of Consumer Protection for the Massachusetts Attorney General. He later served as Chief of the Government Bureau and Trial Division for the Attorney General, directing the litigation and settlement of all cases against officials and agencies of the Commonwealth. Professor Golann has taught and lectured on dispute resolution widely across North America, Europe, and in China. He serves as a Distinguished Neutral at the CPR Institute of Dispute Resolution in New York, the ADR Center of Rome, the US-China Business Center in Beijing, and other organizations. He has been a Visiting Scholar at the Program on Negotiation at Harvard Law School, taught in the Program of Instruction for Lawyers at Harvard, and served as a visiting professor at several American law schools.

contain a provision requiring payment of benefits to the beneficiary in a lump sum (so called "CXC" policies).

"A district court can approve a class action settlement only if it is fair, adequate and reasonable." *City P'ship. Co. v. Atl. Acquisition*, 100 F.3d 1041, 1043 (1st Cir. 1996), quoting *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). To make a preliminary determination on the fairness and adequacy of a proposed settlement agreement, a court must have sufficient information to evaluate it, but "[t]here is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact." Newberg on Class Actions §11.45 (4th ed. 2002); see also, Manual for Complex Litig. (Fourth) § 22.921 (2004).

"If the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig*., 588 F.3d 24, 32-33 (1st Cir.2009); *Hochstadt v. Boston Scientific Corp.*, 2010 WL 1704003 at *9 (D. Mass. Apr. 27, 2010) (articulating these factors on final approval, *citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig*., 55 F.3d 768, 785 (3d Cir. 1995), *cert. den. sub nom*., *General Motors Corp. v. French*, 516 U.S. 824 (1995)); *In re Relafen Antitrust Litig.,* 231 F.R.D. 52 (D. Mass. 2005); *United States v. Cannons Eng'g Corp.*, 720 F.Supp. 1027, 1036 (D. Mass.1989) (*quoting City of New York v. Exxon*, 697 F.Supp. 677, 692 (S.D.N.Y. 1988)), *aff'd*, 899 F.2d 79 (1st Cir. 1990); Newberg on Class Actions §11.41 (4th ed. 2002). "[T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation". *Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc*., 455 F.2d 101, 110 (7th Cir. 1972).

The essence of a settlement is compromise, and there is an "overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved." *Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985). "By their very nature, because of the uncertainties of outcome, difficulties of proof, and length of litigation, class action suits lend themselves readily to compromise." Newberg, §11.41, *citing HEW Corp. v. Tandy Corp*., 1979 WL 1580 (D. Mass. Jan. 16, 1979) (settlement appropriate when it was uncertain that plaintiffs would prevail on the merits, the parties recognized that they would be faced with a lengthy and expensive trial, and the question of damages was uncertain).

While the Class Plaintiffs believe that eventually they would have been able to convince this Court to certify a class, this would first have required a successful appeal and remand. As this Court is well aware, Plaintiffs' motion for 23(b)(2) class certification had been denied, and so too was leave to file a motion for 23(b)(3) certification. In addition, the merits of plaintiffs' claims were disputed and success on the merits was not assured. In light of these obstacles, the Settlement's substantial and meaningful benefit to a class of individuals, clearly meets the standard of fairness, adequacy and reasonableness.

Given the terms of the settlement set forth in Section III, *infra*, and for the reasons more fully explained in Section IV, *infra*, the Court should grant final approval here.

II. STATEMENT OF THE CASE

Plaintiffs who will receive payments under the Settlement were beneficiaries of so-called "AA series" group life insurance policies issued by Unum. The group life insurance policies insured employee benefit plans that constituted "employee welfare

benefit plans." These policies all provided that "unless otherwise elected, payment for loss of life will be made in one lump sum."

Plaintiffs submitted valid claims for death benefits to Unum in accordance with the policies. Unum mailed Plaintiffs packets containing a letter and a "checkbook." The letters stated that (1) Plaintiffs' death benefits, plus applicable interest, had been deposited into a "Unum Security Account," which were described as checking accounts established in Plaintiffs' names; (2) Plaintiffs could write checks in amounts ranging from $250 up to the balance of the accounts; and (3) interest would be paid on the funds held in the accounts at a variable rate.

Plaintiffs filed this action as a putative class action on May 18, 2007. The gist of Plaintiffs claim is that Unum's practice of retaining benefits due under ERISA plans that it insures until a check is written on the retained account, and investing those benefits for its own account, violates ERISA's fiduciary standards and prohibited transaction rules. Unum moved to dismiss the action on July 23, 2007, asserting, *inter alia*, that its conduct was exempt from ERISA's fiduciary standards and prohibited transaction rules pursuant to 29 U.S.C. § 1101(b)(2) (the "guaranteed benefit policy" exemption). Unum's motion to dismiss was allowed on February 4, 2008. *Mogel v. Unum Life Ins. Co. of Am.*, 540 F. Supp. 2d 258 (D. Mass. 2008) ("Mogel I"). The First Circuit vacated the dismissal on November 6, 2008. *Mogel v. Unum Life Ins. Co. of Am.*, 547 F.3d 23, 26 (1st Cir. 2008) ("Mogel II"). Rehearing and rehearing en banc were then denied. Following remand of the case, Plaintiffs moved for class certification pursuant to Fed. R. Civ. P. 23(b)(2). The motion was denied on August 19, 2009. *Mogel v. Unum Life Ins. Co. of Am.*, 646 F. Supp. 2d 177 (D. Mass. 2009) ("Mogel III"). On September 17, 2009, Plaintiffs moved

for leave to amend the complaint and to file a renewed motion for class certification under Fed. R. Civ. P. 23(b)(3). The Court denied the motion on December 16, 2009. *Mogel v. Unum Life Ins. Co. of Am.*, 677 F. Supp. 2d 362 (D. Mass. 2009) ("Mogel IV").

The parties filed cross-motions for summary judgment in December 2009. During the pendency of the cross motions for summary judgment, on March 18, 2010, the parties advised the Court that they had reached an agreement to settle the case, and on March 22, 2010, the Court entered an Order staying the proceedings pending the submission of a Stipulation of Settlement. Plaintiffs thereafter filed an unopposed motion for preliminary approval and conditional class certification of a 23(b)(3) class. Following a hearing on this motion, the motion was granted on June 18, 2010 (Docket 87).

III. THE TERMS OF THE PROPOSED SETTLEMENT

A. The Settlement Fund

The Stipulation of Settlement ("Stipulation" or "Settlement") provides for a $5 million Settlement Fund (“Settlement Fund”). The settlement will be distributed on a formula basis explained immediately below. The settlement is an all cash settlement, and - each class member will receive his/her/its "Individual Share" by means of a check mailed to him or her without the necessity of a claim being submitted.[2]

Administration costs, notice costs, attorneys’ fees awarded to Class Counsel, reimbursement of expenses to Class Counsel and service awards to the named plaintiffs will be deducted from Settlement Fund before payments to class members. Stipulation, ¶ 2.4.

B. Distribution Plan and Settlement Payments

[2] Unum no longer issues new AA policies, obviating the need for injunctive relief related to future practices as part of the settlement.

The Plan of Allocation (Exhibit A to the Stipulation) provides that each Settlement Class Member will receive an Individual Share of the Settlement Fund proportional to the amount of interest Unum paid or credited to his Unum Security Accounts compared to the total interest paid to Settlement Class Members. In other words, a Settlement Class Member's Individual Share is equal to the result of a computation in which (i) the Settlement Fund (after the deductions provided for in Stipulation ¶ 2.4, discussed below) is multiplied by a fraction in which (ii) the numerator is the amount of interest paid or credited on the Settlement Class Member's Unum Security Account and (iii) the denominator is the amount of interest paid or credited on all Settlement Class Members' Unum Security Accounts. The anticipated average payment is approximately $150, assuming the court grants service awards and attorney fees in the approximate amounts requested.

Unum's records indicate the exact amount of interest paid or credited to the majority of Settlement Class Members' accounts. Individual payments will be proportionate to the size of the life insurance benefit payable to the class member, the duration of the account, the amounts left in the account during that time, and the passage of time since the funds were available to UNUM. This formula accounts for the time value of money.

Fewer records are available for Unum Security Accounts opened before January 1, 2002. Where Unum's records are inadequate to calculate the actual interest paid on an individual account, a surrogate interest figure will be determined, based on the average balance in the account, the number of days the account was open and the average interest rate paid on Unum Security Accounts during the time the account was open. For the

small number of accounts for which Unum does not have opening and closing dates, the average interest paid on other accounts will be imputed to those accounts for purposes of calculating Individual Shares.

In brief, the parties have cooperatively devised formulas which provide the maximum feasible accuracy in determining the amounts of the payments each individual should, in fairness, receive in light of the extent of the use Unum was allegedly able to make of their funds.

C. Notice and Administration

The Settlement provided that Settlement Class Members would receive notice of the settlement through mailing of a Notice attached to the Stipulation as Exhibit C. Stipulation, ¶¶ 3.3 and 3.4. Within 14 days of entry of the Preliminary Approval Order, the Settlement Administrator was to mail or cause to be mailed the class notice, and was then to administer the Settlement Fund pursuant to the Stipulation or the Preliminary Approval Order. Stipulation, ¶ 2.1. These provisions of the Settlement, as approved by this Court in its Preliminary Approval Order, have in fact been carried out. See Section IV B, *infra*.

D. Cy Pres

No unclaimed, undelivered or uncashed funds will revert to Unum under any circumstances. The full $5 Million settlement fund will be paid out. This provision has helped to ensure that UNUM does not have a disincentive to providing accurate information to the Administrator regarding class members' addresses and appropriate shares of the Settlement Fund.

In the event that a balance larger than $50,000 remains in the Settlement Fund after distribution to class members, the Settlement Administrator will distribute those funds to the Class Members who have already received settlement funds, in amounts proportional to the Class Members' individual shares. In the event that a balance of less than $50,000 remains, the Settlement Administrator will make a cy pres distribution to one or more appropriate charities or legal services groups. Stipulation ¶ 2.11. The parties have filed a joint motion requesting the Court to approve Eastern Tennessee Legal Services, Chattanooga, TN; Legal Assistance Corp. of Central Massachusetts, Worcester, MA; and Pinetree Legal Services, Portland, ME as appropriate recipients of such cy pres funds if and when they accrue under the Stipulation.

E. Opt Out Opportunity and Right to Object

Proposed Settlement Class Members were allowed to exclude themselves provided their exclusion requests were received by the Settlement Administrator no later than August 2, 2010. Stipulation, ¶ 3.6. The Notice contained opt out instructions for Settlement Class Members who wish to be excluded from the Settlement Class. Proposed Class Notice (attached to the Stipulation as Exhibit C), Questions 13-15 and answers thereto. A written request for exclusion signed by the Settlement Class Member means a letter sent by mail saying that the proposed class member wants to be excluded from the proposed settlement in Roy Mogel, Todd D. Lindsay, and Joseph R. Thorley v. Unum Life Insurance Company of America, and must have included the proposed class member's name, address, telephone number, and signature. Nothing else was required to opt out.

The Settlement Agreement also provided an opportunity for Settlement Class

Members to object to the Settlement Agreement, by serving a written statement of his or her objection upon Class Counsel, counsel for Unum and the Court by August 2, 2010. Stipulation ¶ 3.8, Proposed Preliminary Approval Order, ¶ 8, and Proposed Class Notice, Questions 18-19 and answers thereto. The Class Notice instructed any objectors to include the specific reasons for the objection, including any legal support the Settlement Class Member wished to bring to the Court's attention and a description of any evidence the Settlement Class Member wished to include in support of the objection. *Id*.

F. Release

Any Settlement Class Member who does not opt out of the Settlement Agreement releases any claims arising out of (i) Unum's use of Unum Security Accounts for the distribution of life insurance benefits with respect to group life insurance policies (so-called "AA policies") issued by Unum containing in substance a provision that benefits for loss of life will be paid in a lump sum; and (ii) any of the events, statements, or allegations contained in the Plaintiffs' complaint with respect to the matters raised in subparagraph (i) above, except that the term does not include "Non-Settled Claims." Stipulation ¶ 1.9. Settlement Class Members do not release any Non-Settled Claims as defined in Stipulation ¶ 1.6:

> "Non-Settled Claims" means any and all past, present and future claims, actions, causes of action, rights or liabilities, known or unknown, based on, arising out of, or in any way relating or pertaining to Unum's use of Unum Security Accounts for the distribution of life insurance benefits in respect to group life insurance policies (so-called "CXC policies") issued by Unum containing payment language:
>
> > (a) "If you or your dependent's life claim is at least $10,000, Unum will make available to the beneficiary a retained asset account (the Unum Security Account). ¶ RETAINED ASSET ACCOUNT is an interest bearing account established at an intermediary bank in the name of

> your beneficiary, as owner. ¶ Payment for the life claim may be accessed by writing a draft in a single sum or drafts in smaller sums. The funds for the draft or drafts are fully guaranteed by Unum;" or
>
> (b) any other substantially similar operative payment language providing for the distribution of death benefits via a retained asset account, irrespective of the nomenclature used to refer to such account including, but not limited to, "Money Market Account," "Retained Asset Account" and/or "Unum Security Account."

G. Fees and Costs and Service Awards to the Named Plaintiffs

The Settlement Agreement provides that Class Counsel will submit a fee petition for attorneys' fees, costs and expenses in an amount not to exceed thirty three and one-third percent (33 1/3%) of the Settlement Fund plus actual costs. Stipulation ¶ 2.4. Class Counsel also will apply to the Court for service awards of $5,000 each to the three named plaintiffs, Roy Mogel, Todd D. Lindsay, and Joseph R. Thorley. Stipulation, ¶¶ 2.4 and 2.5. These submissions are being filed simultaneously herewith.

IV. The Settlement Agreement Should Be Approved in All Respects

Settlement promotes the interests of the litigants by saving them the expense of a trial and appeals of disputed issues, and also reduces the strain on already overburdened courts. The certainty of recovery through settlement in contrast to the expense, length and uncertainty of litigation, is a strong argument in favor of settlement. *See Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000). Where the litigants are able to achieve compromise, settlement avoids unnecessary public expense and overburdening the courts. *Id.* (noting that without settlement of the class action for which settlement approval was sought, the following resource expenditures would be required: a two week trial, the time required for the court to issue an opinion, and one or more years of appellate practice)

Accord, *In re Relafen*, 231 F.R.D. at 72 (noting that alternative of lengthy trial and likelihood of appeal favors final approval of settlement); *Giusti-Bravo v. U.S. Veterans Admin*., 853 F. Supp. 34, 40 (D.P.R. 1993).

A. The Settlement Agreement is Fair, Reasonable and Adequate

The Settlement Agreement represents a fair, adequate and reasonable resolution of this dispute. It will provide a significant economic benefit to class members and will relieve Unum of the burden of litigation.

Factors which this Court has considered in evaluating whether a proposed class settlement is fair, reasonable and adequate include: (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) whether the settlement appears to have been negotiated in good faith; (5) the risks of establishing liability and obtaining and maintaining a class action through the trial; (6) the range of reasonableness of the settlement fund in light of the best possible recovery and (7) whether experienced counsel support the settlement. *In re Lupron Mktg. & Sales Practices Litig*., 228 F.R.D. 75, 93 (D. Mass. 2005), cited with approval in *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 72 (D. Mass. 2005). Each of these factors will be discussed in turn below; without exception, each weighs in favor of approval of the settlement here.

1. The Complexity, Time and Expense of Protracted Litigation Makes the Instant Action Appropriate for Settlement

As this Court is well aware from the extensive briefing presented to it, the issues in this case are complex. This is the first case which challenged as ERISA violations the use of retained asset accounts to "pay" life insurance proceeds under group life policies. Among the complicated issues presented were the effect and limits of the guaranteed

benefit policy exemption under 29 U.S.C.§ 1101(b)(1), the meaning of the term "payment" of benefits, and whether the conduct challenged was subject to ERISA's fiduciary standards.

Recognizing both the complexity and the uncertainty involved here, the parties entered into mediation before a dispute resolution expert, Suffolk Law Prof. Dwight Golann. Had the parties not reached an agreement with his assistance, they would have faced prolonged motion practice, oral arguments, possibly a trial on the merits and, regardless of the outcome of the pending summary judgment motions and/or trial, an appeal of the denial of class certification, with additional proceedings possibly to follow. This continued litigation would have caused class members who have already spent 3 years without recourse to wait years longer for a resolution of their claims. Not only was the ultimate outcome uncertain, but importantly, delay would have caused difficulty in finding beneficiaries in the event of a successful outcome.

2. The Reaction of the Class to the Proposed Settlement Has Been Positive

Reaction to a settlement is considered positive when the number of objectors is minimal compared with the number of claimants, and if notice effectively reached absent class members. *In re Lupron*, 228 F.R.D. at 96. A small percentage of objections and exclusions is an important factor contributing to a conclusion that a settlement is fair and reasonable. *Bussie v. Allmerica Fin. Corp*., 50 F. Supp. 2d 59, 77 (D. Mass. 1999). Only four individuals out of a class of nearly 25,000 members have timely excluded themselves from the settlement and opted out.[3] Affidavit of Kimberly K. Ness ¶11. Even more importantly, no notices of objection to the settlement were filed with the Clerk of

[3] One untimely opt out was also submitted. Affidavit of Kimberly K. Ness ¶11.

Court by August 2, 2010, as required by Paragraph 9 of the Settlement Agreement; indeed, none have been filed to date. The number of exclusions and objections to the settlement is thus *de minimis* relative to the size of the class.

3. The Advanced Stage of the Litigation and the Significant Amount of Relevant Discovery Exchanged Allowed the Parties to Meaningfully Evaluate the Merits of the Case and Construct an Appropriate Settlement

For a settlement to be fair and adequate, the parties must have gathered sufficient evidence through discovery and the litigation must have progressed to a stage where the parties are able to fully and knowledgeably evaluate the merits of the case. *Duhaime v. John Hancock Mut. Life Ins. Co*., 177 F.R.D. 54, 67 (D. Mass. 1997); *Rolland*, 191 F.R.D. at 10 (observing that parties had sufficient evidence to settle when discovery was completed before mediation); *Greenspun*, *infra*, 492 F.2d at 378 (same, although only two depositions had been taken); *Compact Disc Minimum Litig*., *infra*, 216 F.R.D. at 211 (noting that, as here, settlement appropriate when reached after consolidated cases were in the final stages of motions for summary judgment and class certification); *In re Relafen*, 231 F.R.D. at 73 (also finding motion practice that included motions to dismiss, for summary judgment and for class certification constituted sufficient litigation to allow parties to assess the merits of the case and propose an appropriate compromise).

With respect to discovery, plaintiffs submitted requests for production of documents, interrogatories and requests for admissions to Unum. Joint Decl., ¶11. Class Counsel reviewed Unum's responses and 23,900 pages of documents. Joint Decl., ¶11. Class Counsel also conducted the depositions of two key UNUM personnel regarding the retained asset accounts at issue in this case, Marlene Ingraham and Linda Bessman. One of these was in Chattanooga, Tennessee, and the other was in Portland, Maine. Plaintiffs

also conducted substantial informal discovery to investigate the extent to which Unum benefited from its use of the retained asset accounts. For example, Class Counsel obtained Unum's financial statements and related information back to 1994 from the Maine Bureau of Insurance before Unum produced much of the same information in discovery. Unum, in turn, submitted requests for production of documents and interrogatories to plaintiffs, and took the depositions of the three named plaintiffs, Roy Mogel, Todd Lindsay and Joseph Thorley. Joint Decl. ¶ 13.

The parties also engaged in substantial motion practice. Defendant filed a Motion to Dismiss, which the Court granted following oral argument. Plaintiffs thereupon appealed this decision to the First Circuit, which reversed the dismissal and remanded the case for further proceedings. Unum, however, filed for a rehearing and rehearing en banc, necessitating another round of appellate briefing. When the requests for rehearing were denied, the case was remanded to this Court. Soon thereafter, plaintiffs filed a motion for leave to file a First Amended Complaint to correct a scrivener's error regarding the class period, which was granted. Plaintiffs next filed a motion for class certification under Rule 23(b)(2). The Court held a hearing on the motion, and subsequently denied it on the ground that the monetary relief sought by plaintiffs was not merely incidental to the injunctive relief they requested. Plaintiffs then filed a motion for leave to file a motion for class certification under Rule 23(b)(3), attaching its proposed class certification motion as well as its briefing in support of 23(b)(3) certification. When the Court denied plaintiffs the leave they had requested, the parties filed cross-motions for summary judgment on liability as to the individual plaintiffs, raising all the arguments on the merits

that pertained equally to the class. These motions had been fully briefed, but not decided, at the time the parties reached a mediated settlement.

The extensive discovery and motion practice here thus provided the parties with substantial insight into their claims and defenses and allowed them to construct an appropriate and informed settlement.

4. The Settlement was Negotiated in Good Faith by All Parties Involved. The Arm's Length Nature of the Negotiations and Lack of Collusion Ultimately are Reflected in its Terms

"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." 2 H. Newberg, A. Conte, Newberg on Class Actions, § 11.41 (4th ed. 2002). Here, the parties first discussed the possibility of settlement in January 2010, after more than two and one half years of contentious litigation. Following lengthy discussions, the parties agreed to employ the services of a mediator, Prof. Dwight Golann. Prof. Golann teaches mediation and negotiation at Suffolk University Law School and serves as a Distinguished Neutral at the CPR Institute of Dispute Resolution in New York, the ADR Center of Rome, the US-China Business Center in Beijing and other organizations. The parties conducted a vigorously contested, full day mediation on March 17, 2010. The mediation was successful, and on March 18, the parties so advised the Court. Joint Decl., ¶ 15.

The duration of the litigation, the excellent result for the class in spite of the significant procedural and substantive hurdles that Messrs. Mogel, Lindsay and Thorley faced, and the neutrally mediated course of negotiations are all testaments to the non-collusive nature of the settlement. The Settlement Agreement was the result of arms-

length negotiations by experienced class action lawyers. See Declaration of Stuart T. Joint, of the National Consumer Law Center, in Support of Preliminary Approval, ¶¶ 3, 6-8.

5. Even With a Strong Factual and Legal Case, Class Members Faced Significant Risks in Establishing Liability and Obtaining Class Certification.

In reviewing a settlement, a district court's role is not to make decisions on the merits of the case. *Duhaime*, 177 F.R.D. at 68, *citing*, *Greenspun*, 492 F.2d at 381. Rather, the district court must weigh the "plaintiff's likelihood of success on the merits against the amount and form of relief offered in the settlement." *Santana v. Collazo*, 714 F.2d 1172, 1175 (1st Cir. 1983), *citing*, *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). Plaintiffs and Class Counsel believe that their claims would ultimately have been found meritorious if litigated to judgment. However, they are aware that the outcome in their case was uncertain at two levels: first, on the merits, for the reasons argued by the Defendant in its Motion for Summary Judgment, and second as to class certification, for the reasons argued by the Defendant in its Memoranda in Opposition to Class Certification. The odds of succeeding on both levels and obtaining benefits for the absent class members are, of course, the product of the two probabilities.

In addition, given the procedural posture of the case at the time a settlement was agreed to, a favorable outcome for the class would have been achieved, if at all, only after many years of arduous litigation with drawn-out appeals since class certification had been foreclosed at the trial level. At a minimum, substantial delay would have resulted.

6. The Settlement Terms and Conditions Offer Meaningful Benefits to all Settlement Class Members and are Reasonable in Light of the Best Possible Recovery and all the Attendant Risks of Litigation

A settlement is fair and reasonable if it is "tailored to remediate the alleged wrongdoing as set forth in the [c]omplaint." *Bussie*, *supra,* 50 F. Supp. 2d. at 75. The settlement here requires Unum to disgorge a substantial portion of the profits it made from the "alleged wrongdoing," namely, the use of funds belonging to beneficiaries of life insurance policies governed by ERISA, in breach of its fiduciary duties. Fortunately, Unum did not lose these funds. However, it did profit from them, and the settlement reduces the amount of that profit.

The $5 million economic benefit provided for under the Settlement will permit an average distribution of $150 per class member. This is a meaningful benefit to these individuals, virtually all of whom undoubtedly had no idea their rights may have been violated.

During class briefing in 2009, plaintiffs estimated that the entire universe of possible disgorgement, including both AA and CXC policies, was in the range of $200 million. The settlement now before the Court covers only beneficiaries of AA policies, who plaintiffs' counsel believed were covered by between 9% and 18% of the universe of policies; beneficiaries of CXC policies are specifically excluded from the settlement and the release.[4] Hence, the portion of plaintiffs' estimate of the total of $200 million for all policies attributable to the AA policies was calculated to be between $18 and $36 million.

The settlement has thus obtained certain recovery of between 14% and 28% of what plaintiffs might have obtained had they achieved ultimate success ($5 million of between $18 and $36 million). Given the substantial hurdles and long delay facing plaintiffs before such success could be achieved, this recovery is easily within the range

[4] All three named Plaintiffs have AA policies. Beneficiaries subject to CXC policies are not included in the proposed settlement class. Such beneficiaries remain free to pursue their claims in separately filed litigation, should they desire to do so.

of reasonableness for approval. Plaintiffs faced an uncertain outcome, having failed to get a class certified (Mogel III) and facing a summary judgment motion put forth by Unum. Had they chosen to litigate further, Plaintiffs faced at least two years of further delay, with no assurance that they would prevail on every substantive motion and issue on appeal (which they would have had to do in order to obtain ultimate success).

The relative strength of the case for plaintiffs and the time-value of money should be balanced against the extent of the settlement offer. *See, e.g.*, *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982). Settlements are commonly approved at percentages substantially less than the 14% to 28% range plaintiffs have achieved here because a settlement may be reasonable even though it is for just a small percentage of actual damages. *See, e.g.*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir.1974) (approving a three to five percent recovery); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y.1992) (approving settlement totaling approximately three percent of potential recovery in securities class action); *Bennett v. Behring Corp.*, 737 F.2d 982, 987 (11th Cir. 1984) (finding adequate settlement providing for $675,000 of maximum possible $12 million recovery, or 5.6%); *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1324 (2d Cir. 1990) (approving recovery of approximately 10%).

Moreover, the settlement here is all cash; unlike settlements involving securities, injunctive relief, discount certificates and the like, here there is no question of valuation. The value to the plaintiffs – in cash and in payment of attorneys' fees for work done on plaintiffs' behalf – is the full value of the settlement fund (less negligible notice costs, service awards and a small potential cy pres award).

In addition to the litigation risk that this and every case involves, there is a substantial value to the beneficiaries of the AA policies in obtaining relief now, not years from now. Further litigation would result in lengthy disputes over the merits, with at least one more appeal and substantial additional attorneys' fees. In addition to implicating the time value of money, delay would likely have resulted in additional class members not receiving their proportionate shares due to relocation or death.

7. Plaintiffs' Counsel Believes That The Settlement Is Fair, Reasonable And In The Best Interest Of Settlement Class Members

In addition to the factors enumerated above, the opinion of class action counsel, who have substantial experience in litigation of similar size and scope, is an important consideration. "When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland*, 191 F.R.D. at 10; *see also In re Compact Disc Litig*., 216 F.R.D. at 212 (noting that in determining the fairness of a settlement proposed by counsel, the court considers the experience and level of competence of class counsel who believe the settlement to be fair and reasonable); *Bussie*, 50 F. Supp. 2d at 77 (same).

Here, the settlement was negotiated by a team of counsel, including six attorneys who are highly experienced in class action litigation, and specifically experienced in litigating consumer rights cases, along with two attorneys with great expertise in ERISA matters. See the resumes of attached to Plaintiffs' Memorandum in Support of Plaintiffs' Request for an Award of Attorney Fees being filed simultaneously herewith. All of these attorneys unanimously believe that the agreed-upon settlement is in the best interests of the class for the very reasons discussed above in this Section of this Memorandum.

B. All Class Members Were Given Proper and Reasonable Notice

Notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974), *quoting*, *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950); *see also In re Compact Disc Litig*., 216 F.R.D. 197, 203-04 (D. Me. 2003) (finding that notice satisfied Rule 23 because it provided sufficient information for class members to decide whether to file claims, opt out, seek exclusion or object); *Greenspun v. Bogan*, 492 F.2d 375, 382 (D. Mass. 1974) (observing that essential purpose of notice is to apprise class members of settlement terms and class members' options). When a 23(b)(3) class is certified for purposes of settlement, it is accepted practice to combine the mandatory 23(c)(2)(B) and 23(e)(1) notices into a single notice, as was done here. *See* Manual for Complex Litigation, Fourth, § 21.633 (2009); Newberg §8.21.

Where a class is certified pursuant to Rule 23(b)(3), Rule 23(c)(2) provides that "individual notice" must be directed "to all members who can be identified through reasonable effort." This generally has been interpreted to mean individually mailed notices to every class member for whom an address can be found. *Eisen*, 417 U.S. at 176. Because all members of the class and their addresses could be determined from Unum's records, individual notice could be directed to all class members. Therefore, there was no need to supplement the individually mailed notice with publication in order to reach other potential class members. As the Supreme Court has noted, where individual class members can be identified, "the reasons disappear for resort to means less likely than the mails to apprise them of an action's pendency." *Eisen*, 417 U.S. at

174-175, *quoting Mullane*, 339 U.S. at 318.

Unum supplied last known addresses for all 24,777 class members to Rust Consulting, Inc., a highly respected Settlement Administrator (Affidavit of Kimberly K. Ness). Before Notice was mailed to Settlement Class Members, Rust Consulting updated each address on the Class List by consulting the National Change of Address database to ensure the Notice was sent to class members' current addresses. (Affidavit of Kimberly K. Ness, ¶¶ 5-6). The court-approved notice of the settlement was then sent to class members by first class mail on July 2, 2010. Affidavit of Kimberly K. Ness, ¶¶ 5-6. For notices returned because the addressee was no longer found at the address as updated by Rust, Rust then used its best efforts to obtain correct current addresses by using the Accurint service, and thereafter re-mailed the class notices by first class U.S. mail to any available corrected addresses. (Affidavit of Kimberly K. Ness 10¶). It appears that with these efforts, notice was delivered to approximately 93% of the class. *Id*.

The Notice was clear, straightforward and sufficiently detailed to allow class members to determine the potential costs and benefits involved in participating in the settlement. It alerted recipients that they are members of class action settlement with Unum, Notice, p. 1, described the lawsuit, Id., disclosed the compensation class members would receive, Notice, pp. 2-3, explained the right to opt-out and the process for doing so, Notice, p. 4, provided a detailed description of the scope and implications of the release, Notice, p. 3, explained the process for filing objections, Notice, p. 4, and clearly stated the deadlines for filing claims, opting out, and objecting, Notice, pp. 3, 5. The Notice provided the names and addresses of the attorneys available to answer questions from class members. Notice, p. 4.

In addition to individual mail notice, the parties established an English and a Spanish claims information website, (www.mogelclassactionsettlement.com and www.spanish.mogelclassactionsettlement.com), and provided a toll-free telephone number to receive questions from class members. As of August 21, 2010, a total of 727 hits had been recorded at the websites, and a total of 490 calls had been made to the toll free number. Affidavit of Kimberly K. Ness ¶¶ 7, 8-9.

C. The Settlement Class Meets Rule 23's Criteria and Should be Certified for Settlement Purposes

For the sake of brevity, and because nothing has changed, plaintiffs will not repeat the arguments recently advanced in their Memorandum in Support of Preliminary Approval (Docket No. 85) regarding why certification under Rule 23(b)(3) is appropriate for a Settlement Class which includes beneficiaries whose claims were governed by so-called "AA policies," all of which contain in substance a provision that benefits for loss of life will be paid in a lump sum.[5] Specifically, a "Settlement Class Member" means:

> any person who has not made a valid and timely request for exclusion and for whom, during the applicable Settlement Class Period, Unum maintained a Life Retained Asset Account in connection with the payment and/or distribution of life insurance benefits under an employee welfare benefit plan where the applicable policy, generally known as the "AA series policy," called for the payment of benefits in a lump sum.

"Settlement Class Period" means:

> a. January 1, 1995, to March 17, 2010, for persons who were also members of the plaintiff class in Crutchfield v. Unum Life Ins. Co. of America, Civil Action File No. E-67803, Superior Court of Fulton County, State of Georgia ("Crutchfield"); and
> b. January 1, 2002, to March 17, 2010, for all other persons.

[5] The Settlement Class does not include beneficiaries whose claims were governed by so-called "CXC policies," all of which contain in substance a provision that Unum will make death benefits "available to the beneficiary [via] a retained asset account."

As counsel for Unum conceded at the hearing on preliminary approval in this matter, while there would have been a dispute regarding whether a class could be certified under Rule 23(b)(3) due to alleged manageability concerns, these do not present an obstacle to certification in the settlement context. Accordingly, this Court should certify the settlement class of beneficiaries of Unum "AA" policies requested herein.

V. CONCLUSION

Voluntary settlement of this class action serves the interests of the parties, the public and the Court. Both sides have compromised their positions in a reasonable manner to achieve a substantial benefit for the class, on the one hand, and a cap on exposure on the other. Justice will be served by granting final approval of the settlement.

DATED: August 24, 2010

Respectfully submitted,
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By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Memorandum in Support of Motion for Final Approval of Settlement Agreement was served upon the attorney of record for each other party via the Court's CM/ECF electronic filing system on August 24, 2010.

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