IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NEWARK)

Stephen Giercyk, Ajay Das and James and Emma Imes on behalf of themselves and all other similarly situated, Plaintiffs, v. National Union fire Insurance Company of Pittsburgh, PA, d/b/a National Union Fire Insurance Company, a division of American International Group, Inc. (AIG), Healthextras, Inc., Healthextras Benefits Administrators, Inc., Catamaran Health Solutions, LLC f/k/a Catalyst Health Solutions, Inc., Healthextras Insurance Agency, Inc., American International Group, Inc., d/b/a Group Insurance Trust, for the account of Healthextras, Alliant Insurance Services, Inc., f/k/a Driver Alliant Insurance Services, Inc., Alliant Services Houston, Inc., f/k/a JLT Services Corporation, and Alliant Insurance, Services Houston, LLC, f/k/a Capital Risk, LLC and f/k/a Jardine Lloyd Thompson, LLC, and Virginia Surety Company, Inc. Defendants.	:	Civil Action No: 2:13-cv-6272-FSH-MAH CLASS ACTION

UNOPPOSED MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs[1] respectfully request that the Court issue an order granting final approval to the Settlement Agreement,[2] certifying a class, and entering final judgment dismissing the case with prejudice. The Claims period is now complete and the Parties have all the information necessary to make this submission and request. Consistent with the terms of the Settlement Agreement, the Defendants do not oppose this requested relief. The Settlement Agreement was preliminarily approved by Judge Arleo on October 13, 2016, after having been mediated before the Honorable Judge John Martin (ret.), an experienced neutral mediator and former Judge of the Southern District of New York. As discussed below, the terms of the Settlement Agreement create substantial benefits for a class of hundreds of thousands of consumers; are fair, reasonable and adequate; and meet all of the requisite criteria under Fed. R. Civ. P. 23(e) for final approval. As discussed below, the single lone objector's claim and position in this matter is without merit and does not provide any basis for non-approval. Accordingly, Plaintiffs respectfully request that the Court enter the proposed Order submitted as an attachment to the Preliminary Approval filings at D.E. # 262-4 and again herewith, granting final approval to the Settlement.

II. LITIGATION HISTORY

The HealthExtras litigation began with the filing of *Petruzzo v. National Union, et al*., 5:12-cv-00113-FL (E.D.N.C.) on March 6, 2012. Since then, sixteen (16) additional cases (the Actions) were filed in various federal district courts, including in New Jersey, California,

[1] Mario Petruzzo, Jeffery & Kimberly Bush, James & Emma Imes, Arie Waiserman, Christine Hine, Ralph Williams, Sharen Smith, Robert & Maria Watson, Manette Dubuisson, Alice Lacks, Jayantilal Patel, Virginia Riker, Paul & Deborah Johnson, Kenneth Graham, Rita Campbell, Larry & Linda Lake, Stephen Giercyk, Ajay Das, Danny & Tracy Walker, Dagmar Durcik, and Thomas & Kim Broome (collectively, "Plaintiffs").

[2] The Settlement Agreement was submitted with Plaintiffs' Unopposed Motion for Preliminary Approval, and is filed at Docket Entry # 262-2.

Georgia, Tennessee, South Carolina, Arkansas, Louisiana, Washington D.C., New York, Ohio, Texas and Florida, on behalf of twenty-eight (28) class representatives and naming varying defendants, but with the marketing entity, Catamaran Health Solutions, LLC, f/k/a HealthExtras, Inc., common to all cases. *See* Joint Declaration in support of Preliminary Approval (PA Decl.) at ¶¶ 8-10 [D.E. # 262-2].

While the specific causes of action and some of the factual and legal allegations differ from state to state in the Actions, the Plaintiffs' core allegation has been that the defendants were involved in a decade-long scheme to sell group insurance framed as legitimate disability insurance that almost never bore benefits and never was, and never could have been, approved by various states' Departments of Insurance, because the defendants were selling the product to an illegally formed group that they themselves created. Over the course of nearly five (5) years, the case has been litigated aggressively by all Parties. During the litigation, in September and October 2014, the HealthExtras Program[3] was cancelled nationwide and cancelation notices were sent to all members effective December 31, 2014. *See* PA Decl. at ¶ 12 [D.E. # 262-2].

Over the course of litigation in the Actions, Plaintiffs' counsel responded to numerous motions to dismiss. *Id.* at ¶ 10. Four of the cases were voluntarily dismissed before a ruling was made, four motions were denied in whole or in part, eight were granted, and three were still pending as of the date of the Settlement. *Id.* Appeals of district court decisions on motions to dismiss were filed and briefed in the Second, Fourth, Eighth, Ninth and Eleventh Circuits. An additional appeal (also to the Eleventh Circuit) was filed following a summary judgment order in

[3] Defined terms in this memorandum have the same meaning ascribed to them in the Settlement Agreement unless otherwise noted.

Georgia. *Id.* All of these appeals were pending as of the date of Settlement. *Id.* As of announcement of the Settlement, most – but not all – of the appeals have been stayed.[4]

III. SETTLEMENT OF THE CLASS ACTIONS

In 2014, the Parties first began to discuss case resolution but did not stay the cases pending these discussions. The Parties agreed upon and jointly engaged the Honorable Judge John Martin (ret.) to mediate the case and undertook in-person mediation in New York City in October of 2014. Mediation was conducted over a two-day period and was unsuccessful in resolving the Actions. Settlement discussions between the Parties and with Judge Martin continued over the next year. An additional in-person mediation date was set for September of 2015, but was subsequently cancelled. Settlement discussions continued from December of 2015 through early May of 2016. A defendants-only meeting took place on April 29, 2015 which led to the Parties' agreement on the terms of a settlement in principle, which was then codified in a Memorandum of Understanding. The Parties then undertook further negotiations to establish the terms of the Settlement. The subsequent negotiations over the terms of the Settlement were hard-fought, often contentious, and lasted almost three months. The efforts resulted in a final Settlement Agreement executed by the Parties on September 7, 2016, and preliminarily approved by this court on October 13, 2016. [D.E.# 268).

A. The Settlement Class

The Settlement Class consists of two separate and distinct nationwide classes:

> "HealthExtras Settlement Class"
>
> Any individuals who paid for or received any benefits or memberships from or relating to any Benefits Program for which

[4] Appeals involving non-settling party Stonebridge Life Insurance Company ("Stonebridge") in the 2nd, 8th and 11th Circuits are pending and have not been stayed because Stonebridge is not a party to the Settlement Agreement.

> any insurance coverage was underwritten by National Union Fire Insurance Company of Pittsburgh, Pa. Federal Insurance Company, Reliance National Insurance Company, Zurich American Insurance Company, or AMEX Assurance Company.
>
> "Stonebridge Settlement Class"
>
> Any individuals who paid for or received any benefits or memberships from or relating to any Benefits Program for which any insurance coverage was underwritten by J.C. Penny Life Insurance Company, or Stonebridge Life Insurance Company.

Settlement Agreement, at ¶¶ 1.24, 1.38. [D.E. # 262-2]

B. Compensation to the Class

The Defendant Released Parties[5] have agreed to create a fund in the amount of $15,000,000 (the Settlement Amount), which will provide substantial compensation to consumers who previously purchased the Benefits Programs, regardless of whether the plan was underwritten by National Union (a Settling Defendant), Stonebridge (a Non-Settling Defendant), or another insurer. *See* Settlement Agreement, at ¶ 1.34. The money remaining from the Settlement Amount, including any accrued interest thereon, after the subtraction of any approved Case Contribution Fees, approved Attorneys' Fees and Expenses, Administrative Costs, Taxes, and Tax-Related Costs, shall be available for distribution to the Class Members (the Distributable Settlement Amount). *Id*. at 3.2(a).

If approved, the Distributable Settlement Amount will be divided among the Class Members who submitted Claim Forms based on how much money they paid for the Benefits Programs, when those payments were made, how many years claimants were in the Programs, and whether the Programs that they paid for were underwritten by Stonebridge or someone else, including NUFIC.

[5] The Defendant Released Parties are Catamaran Health Solutions, LLC (Catamaran), Alliant Services Houston, Inc. (Alliant), National Union Fire Insurance Company of Pittsburgh, PA (NUFIC), and Virginia Surety Company (Virginia Surety).

Seventy-five percent (75%) of the Distributable Settlement Amount is allocated to members of the HealthExtras Settlement Class that file claims, and the remaining twenty-five percent (25%) to claim-filing Stonebridge Settlement Class Members. *Id.* at ¶ 3.2(b). The parties negotiated this allocation because NUFIC and Alliant were not involved in the plans that Stonebridge Settlement Class Members were enrolled in and Stonebridge did not participate in the Settlement.[6] The parties based the specific allocation in part on the ratio of maximum potential recovery on behalf of the HealthExtras Settlement Class to the maximum potential recovery on behalf of the Stonebridge Settlement Class, adjusted to account for participation in the settlement by NUFIC and Alliant, but not Stonebridge. Under the Settlement, 100% of the Distributable Settlement Amount is to be paid directly to class members of the Settlement Class.

As to the HealthExtras Settlement Class, each member who has submitted a valid claim will be paid a *pro rata* share of the Distributable Settlement Amount allocated to the HealthExtras Settlement Class based on how much money the member paid in membership fees for his or her Benefit Program. How much each class member paid will be calculated based on: (i) the total amount of membership fees paid for the Benefit Program between January 1, 2005 and December 31, 2014 as recorded in the AS/400 database, which served as the system of record for the HealthExtras Benefits Programs; (ii) plus fifty percent (50%) of all membership fees that Class Members paid for the Benefit Program prior to January 1, 2005 (the Adjusted Membership Fee). *Id.* at ¶ 1.1. Recovery of damages suffered in earlier time periods are discounted to account for statute of limitations defenses that were raised by the defendants.

With respect to the Stonebridge Settlement Class, each member who has submitted a valid claim will be paid a *pro rata* share of the Distributable Settlement Amount allocated to the

[6] Class Counsel continues to pursue claims against Stonebridge that, if successful, will result in an additional payment to the Stonebridge Settlement Class Members.

Stonebridge Settlement Class based on the number of years the member was enrolled in the Benefits Program. Payments to Stonebridge Settlement Class Members are based on years enrolled rather than the amount of money paid for membership fees because of the way data was is recorded in the AS/400 database.

C. The Release

In exchange for the consideration described above, Plaintiffs and Settlement Class Members agree to release Defendants and all of their affiliates, as well as the now bankrupt HealthExtras LLC, from any and all rights and duties relating to claims made in the Actions or involving the Benefits Programs in general. The full text of the proposed releases is set forth in the Settlement Agreement and the proposed Final Approval Order. *See id.* at ¶¶ 1.15, 1.31, V. Plaintiffs and Settlement Class Members specifically do not release any and all claims they may have against Stonebridge, and are free to continue to litigate against Stonebridge, which has not contributed to this Settlement.[7] *Id.*

D. Attorneys' Fees, Expenses and Class Representative Case Contribution Fees

The Parties and their counsel did not discuss the provisions regarding attorneys' fees or class representative Case Contribution Fees until after the Parties had already agreed upon the terms of the Settlement in principle, had executed the Memorandum of Understanding, and the material terms of the Settlement Agreement had been negotiated. Under the terms of the Settlement Agreement, Class Counsel submitted a Fee and Expense Application to the Court on March 10, 2017 [D.E. # 276], and any amount awarded by the Court shall be paid by the Settlement Administrator from the Settlement Amount. *Id.* at ¶ 6.2.

[7] Plaintiffs and Settlement Class Members agree only to reduce potential judgments, settlements or other recoveries from Non-Settling parties such as Stonebridge to discharge or extinguish contribution claims a Non-Settling Party may assert against the Defendant Released Parties. *Id.* at ¶ 7.1.

The Parties agree that the Court's failure to approve, in whole or in part, any award for attorneys' fees or Case Contribution Fees shall not prevent the Settlement Agreement from becoming Effective, nor shall it be grounds for termination. *Id.* at ¶ 6.4.

IV. NOTIFICATION TO THE CLASS AND RESPONSE OF CLASS MEMBERS

On October 13, 2016, the Court entered an order (the "Preliminary Approval Order") finding that the proposed Settlement is within the range of possible approval, provisionally certifying the Settlement Class, appointing Plaintiffs as representatives of the Settlement Class, and appointing Co-Lead Counsel as Class Counsel for the Settlement Class. *See* D.E. # 268. In that same order, this Court also set a Fairness Hearing for April 20, 2016, at 2:00 p.m., authorized the appointment of Heffler Claims Administration ("Heffler") as the Claims Administrator, and authorized notice to Settlement Class Members. *Id*.

In accordance with the Court's Preliminary Approval Order, mailed notice was sent to over 1.3 million individuals, summary notice was published in the national edition of USA Today, and a Settlement Website, www.healthextrassettlement.com, was created to give Settlement Class members access to case-related documents such as the Settlement Agreement, the Preliminary Approval Order, the Notice and the Claim Form. *See* Exhibit 1, Decl. of Settlement Administrator, Michael E. Hamer ("Hamer Decl."), at ¶¶ 5-12. The court-approved Notice program provided a summary of the litigation, a summary of the proposed Settlement, and detailed information to Settlement Class Members regarding their rights and options in relation to the proposed Settlement. Class Counsel and/or Heffler have received and responded to dozens of phone calls and email inquiries from Settlement Class Members. To date, out of the entire mailing of over 1.3 million notices, only five (5) individuals have requested to be excluded, and only one (1) objection has been formally filed with the Court. *See* McGrann Objection at D.E. # 280.

V. THE SETTLEMENT SATISFIES REQUIREMENTS FOR FINAL APPROVAL

Before granting final approval, the Court should determine whether to certify the class, and then assess whether the terms of the settlement are fair, reasonable and adequate within the meaning of Fed. R. Civ. P. 23(e). *See Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013) ("…in addition to determining whether a proposed settlement is 'fair, reasonable, and adequate, district courts must ensure that each of Rule 23(a)'s requirements, including commonality, is satisfied before certifying a class and approving a class settlement agreement.") (*quoting* Fed. R. Civ. P. 23(e)). The Court should also make final its determination in the Preliminary Approval Order that notice "constituted due, adequate, and sufficient notice to all persons entitled to receive notice" and that the class members received adequate notice of the settlement. Fed. R. Civ. P. 23 (c)(2)(B). As set forth below, these requirements are satisfied here.

A. The Settlement Meets the Requirements of Rule 23

Plaintiffs seek certification of the Settlement Class pursuant to Rule 23. "For the Court to certify a class, the plaintiffs must satisfy all of the requirements of Rule 23(a), and one of the requirements of Rule 23(b)." *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 564 (D.N.J. 2010), *rev'd on other grounds*, *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012). The four requirements of Rule 23(a) are numerosity, commonality, typicality, and adequacy. In addition, Plaintiffs seek certification of the Settlement Class pursuant to Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." Fed. R. Civ. P. 23(b)(3). As discussed below, these requirements are met.

1. Numerosity Under Rule 23(a)(1)

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Generally, if the named plaintiff demonstrates the potential number of plaintiffs exceeds 40, the numerosity requirement of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001); *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990) ("It is proper for the court to accept common sense assumptions in order to support a finding of numerosity.") Here, Class Counsel identified more than one million Class Members through discovery, and notices were mailed to over 1.3 million Class members. *See* Ex. 1, Hamer Decl. at ¶¶ 5-12. Numerosity is therefore easily satisfied.

2. Commonality Under Rule 23(a)(2)

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "A finding of commonality does not require that all class members share identical claims, and factual differences among the claims of the putative class members do not defeat certification." *In re Prudential Ins. Co. Sales Litig.*, 148 F.3d 283, 310 (3d Cir. 1998). The Supreme Court has stated that Rule 23(a)(2)'s commonality requirement is satisfied where the plaintiffs assert claims that "depend upon a common contention," that is "of such a nature that it is capable of class wide 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. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Both the majority and dissenting opinions in that case agreed that "for purposes of Rule 23(a)(2) even a single common question will do." *Id*. at 2556. Here, there are many common issues of fact and law, including:

- Whether Defendants sold disability insurance policies and collected premiums for those insurance policies that were illegal;

- Whether Defendants illegally sold disability insurance policies and collected premiums for those policies to a group that was not and could not be a legal "blanket group";

- Whether Defendants wrongfully collected and increased premiums for those illegal policies;

- Whether any Defendant or several of the Defendants knew or should have known that selling and collecting premiums for the subject insurance policies was illegal pursuant to applicable law and in derogation of states' interests in regulating the sale of insurance within their borders;

- Whether the Defendants have been unjustly enriched at the expense of Plaintiffs and the Class Members;

- Whether Plaintiffs and the Class Members suffered any injury that was proximately caused by the unlawful acts alleged herein;

- Whether the Defendants conspired with each other to perform the illegal acts described herein; and

- Whether Plaintiffs and the Class Members are entitled to recover damages proximately caused by the alleged unlawful conduct, including actual damages consisting of restitution of premiums collected for the illegal policies, treble damages, punitive damages, interest, attorneys' fees, filing fees, and reasonable costs of suit.

These issues are more than sufficient to satisfy Rule 23(a)(2)'s commonality requirement.

3. Typicality Under Rule 23(a)(3)

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23(a)(3). The typicality requirement is satisfied as long as the named plaintiffs and the class "point to the same broad course of alleged fraudulent conduct to support a claim for relief." *Zinberg*, 138 F.R.D. at 401. "If the named plaintiffs and class members involve the same conduct by the defendant, typicality is established." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001). Factual differences between class representatives and other members of the class do not preclude a finding of typicality, so long as the plaintiffs' claims arise from the same event or course of

conduct and are based on the same legal theories. *Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 150 (3rd Cir. 2008).

Plaintiffs' claims are typical of claims of all of the members of the Settlement Class, all of whom owned or purchased the disability insurance coverage or paid premiums for the disability insurance coverage through the Benefits Programs during the Class Period. In fact, the two Classes are specifically tailored to the different underwriters of the Benefits Programs. Plaintiffs are confident, given the sworn testimony several Plaintiffs provided during their lengthy and detailed depositions, that their claims arise from the same course of events that each Class Member was subjected to, and that this same conduct caused the same injury to all of the Settlement Class Members. This requirement is, therefore, met.

4. Adequacy of Representation Under Rule 23(a)(4)

Rule 23(a)(4) is also met because the named plaintiffs will fairly and adequately protect the interests of the class. Adequacy "is satisfied by showing that (1) Class Counsel is competent and qualified to conduct the litigation; and (2) class representatives have no conflicts of interest." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007). Here, the adequacy requirement is plainly met.

No conflict exists between the named and unnamed class members because their interests are plainly aligned. Plaintiffs and the Class Members have all been injured by the same conduct. Plaintiffs do not have any interests antagonistic to those of the other class members and all class members share a strong interest in proving defendants' liability. In addressing the adequacy of the proposed class representative, district courts examine whether he or she "has the ability and incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf

of the class." *Ritti v. U-Haul Int'l., Inc*., 05-4182, 2006 U.S. Dist. LEXIS 23393, at *15 (E.D. Pa. Apr. 26, 2006).

Here, Plaintiffs have been actively protecting the interests of the Class. They have engaged in the prosecution of this matter since its inception, having consistently conferred with Class Counsel, reviewed the various versions of the complaints in the Actions, reviewed and signed their interrogatory responses, provided documents and consulted with counsel regarding the propriety of the Settlement, and prepared for and sat for day-long depositions.

Plaintiffs are also represented by experienced counsel who has litigated this case vigorously on behalf of the class. *See* Declaration in Support of Counsel's Fee Request (Fee Decl.) at ¶¶ 35-37 [D.E. # 227]. The firms representing Plaintiffs have extensive experience prosecuting cases against these Defendants and in consumer class actions as well. *Id*. (attaching the resumes of Class Counsel). Class Counsel has spent over four years litigating these actions as well. As a result, the adequacy requirement is satisfied.

5. The Requirements of Rule 23(b)(3) Are Met

In addition to the four requirements of Rule 23(a), the proposed class must also satisfy at least one provision of Rule 23(b). Rule 23(b)(3) is satisfied when: (1) the questions of law or fact common to the class predominate over any questions affecting only individual class members ("predominance"); and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority"). Fed. R. Civ. P. 23(b)(3); *Anchem Products, Inc., v. Windsor*, 521 U.S. 591, 615 (1997). Both of these requirements are met here.

(a). Predominance Exists Here

The predominance standard requires the Court to "determine whether the common legal and factual issues are more significant than the non-common issues such that the class is

'sufficiently cohesive to warrant adjudication by representation.'" *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 186 (D.N.J. 2003) (quoting *Amchem*, 521 U.S. at 623). "'[I]n general, predominance is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' [sic] individual position.'" *In re Bulk (Extruded) Graphite Products Antitrust Litig.*, No. Civ. 02-6030 (WHW), 2006 WL 891362, at *9 (D.N.J. April 4, 2006) (quoting *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002)). Predominance does not require that every relevant issue before the Court be postured identically for each and every proposed class member. *Anchem*, 521 U.S. at 623; *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484 (W.D. Pa. 1999).

To determine whether common issues will predominate, the underlying elements of the substantive claim must be identified. Here, defendants' liability turns on, among other things: whether the representations made in marketing and selling the Benefits Programs were truthful, whether the coverage promised was illusory, and whether the members of the Benefits Programs were a bona fide group. The answer to these questions can be proven by the same set of facts for all Class Members. Moreover, determining whether (and to what extent) Settlement Class Members were injured turns on common proof. Regardless, when common questions of law or fact predominate regarding liability, "the existence of individual questions as to damages is generally unimportant." *Guzman v. VLM, Inc.*, No. 07- 1126, 2008 WL 597186, at *8 (E.D.N.Y. Mar. 2, 2008). Each element presents issues that are sufficiently cohesive and common to warrant adjudication by representation. Moreover, because this case has settled, the Court need not "consider the available evidence and the method or methods by which plaintiffs would use the evidence to prove the disputed element at trial" because there will be no trial. *Sullivan v. DB*

Investments, Inc., 667 F.3d 273, 306 (2011) (internal quotation marks and citation omitted). Here, the underlying elements of the claim can be proven through common legal and factual issues that are more significant than any existing non-common issues such that the predominance element is satisfied.

(b). Superiority Exists Here

The superiority prong asks whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule expressly sets forth a list of relevant factors: class members' interest in bringing individual actions; the extent of existing litigation by class members; the desirability of concentrating the litigation in one forum; and potential issues with managing a class action. Fed. R. Civ. P. 23(b)(3)(A-D).

Here, the superiority requirement is satisfied. First, since at least 2012 when the first lawsuit resolved by this Settlement was filed, no Class Members have expressed interest in bringing individual actions regarding the allegations in the Actions, and in fact, no such cases have been filed by anyone. Second, it is well settled that a class action is the superior method of adjudication where, as here, "the proposed class members are sufficiently numerous and seem to possess relatively small claims unworthy of individual adjudication due to the amount at issue . . . [and] there is reason to believe that class members may lack familiarity with the legal system, discouraging them from pursuing individual claims." *Jankowski v. Castaldi*, No. 01-0164, 2006 WL 118973, at *4 (E.D.N.Y. Jan. 13, 2006). In light of the fact that each Class Member has a relatively small damage claim, combined with the fact that consumer class actions like this one are particularly expensive, complicated and lengthy, a class action is particularly well-suited to resolve individual claims. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual

suits, as only a lunatic or a fanatic sues for $30."). Third, individual litigation has the potential to result in inconsistent or contradictory judgments. Fourth, a class action presents fewer management problems and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. Because the case is settled, no manageability issues will arise. *Sullivan*, 667 F.3d at 306. Without the class action vehicle, the Class would have no reasonable remedy.

Accordingly, a class action is the best available method for the efficient adjudication of this litigation.

B. The Settlement is Fair Reasonable and Adequate

The Third Circuit has recently reiterated that "[t]he approval of a class action settlement is governed by Rule 23(e)(2), which specifically requires that a district court approve a settlement agreement only 'after a hearing and on finding that it is fair, reasonable, and adequate.'" *In re NFL Players Concussion Injury Litig.*, 775 F.3d 570, 581 (3d Cir. 2014) (*quoting* Fed. R. Civ. P. 23(e)(2)). This Court has stated that "'the Court is required to 'independently and objectively analyze 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.'" *In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *22 (*quoting In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001)). The Court must also "direct notice in a reasonable manner to all class members who would be bound by the proposal." See Fed. R. Civ. P. 23(e)(1).

The Third Circuit has directed the district courts to consider the following non-exhaustive list of factors in deciding whether to approve a proposed class action settlement:

> (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 . . . .

In re Prudential, 148 F.3d 283 at 317, quoting *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). These factors squarely support the Settlement.

1. The Complexity, Expense and Likely Duration of the Litigation Favors Approval

The first factor assesses "the probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001). Courts have consistently held that "[t]he expense and possible duration of the litigation [should] be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Bullock v. Administrator of Kircher's Estate*, 84 F.R.D. 1, 10-11 (D.N.J. 1979) ("[T]he Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation.").

This case has been vigorously litigated since March of 2012, and has involved a total of seventeen (17) cases filed in various federal district courts. Without the Settlement of these Actions, the Parties and the Courts would still be mired in this complex litigation for the foreseeable future.

The relief requested in each of the Actions include monetary damages and injunctive relief.[8] The Settlement Agreement secures substantial monetary benefits for the Class with none

[8] The request for injective relief is now moot because in September and October 2014, after the filing of certain of the Actions and at least in part as a result of the continued litigation, the

of the delay, risk and uncertainty of continued litigation. Thus, this first *Girsh* factor, standing alone, strongly favors approval of the Settlement.

2. The Reaction of the Class to the Settlement Favors Approval

The second factor "attempts to gauge whether members of the class support the settlement," *Prudential*, 148 F.3d at 318, and the Class's support "creates a strong presumption . . . in favor of the Settlement." *Cendant*, 264 F.3d at 235. As discussed below, this factor strongly supports approval of the Settlement.

(a). Response from the Class

The deadline by which Class Members could object to or exclude themselves from the Settlement was March 10, 2016. To date, only one (1) person claiming to be a class member filed an objection and only seven (7) individuals, or 0.0005%, have elected to opt out. *See* Joint FA Decl. at ¶¶ 5-6; Hammer Decl. at ¶ 14.

One objector in 1.3 million, and the seven (7) exclusions represent a miniscule percentage of the Class. This Court has noted that such a response is indicative of the fairness of the settlement, and provides further proof that it should be approved.

> These numbers amount to miniscule fractions of the Settlement Class (approximately .0005% [opt-outs] and .0001% [objections], respectively). The paucity of negative feedback in the face of an extensive notice plan leads the Court to conclude that the Settlement Class generally and overwhelmingly approves of the Settlement.

In re Ins. Brokerage Antitrust Litig., No. 04-5184 (CCC), 2012 U.S. Dist. LEXIS 46496, at *69 (D.N.J. Mar. 30, 2012) (noting that a "small number of objections by Class Members to the Settlement weighs in favor of approval."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d

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Benefits Programs were cancelled and cancelation notices were sent to all members effective December 31, 2014. *See* Joint PA Decl. at ¶ 12 [D.E. # 262-2].

Cir. 2005), as amended (Feb. 25, 2005) (finding a similarly low level of objection to be a "rare phenomenon" weighing in favor of approval).

In addition, pursuant to 28 U.S.C. § 1715, the parties provided notice to the Attorneys General and Departments of Insurance of each state. None of these officials have expressed any objection to any aspect of the Settlement Agreement. Courts routinely cite this fact as supporting final approval. *See Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-1365, 2010 U.S. Dist. LEXIS 49477, at *37 (N.D. Cal. Apr. 22, 2010) ("Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures."); *Nieto v. Unitron, LP*, No. 06-cv-11966, 2009 U.S. Dist. LEXIS 13230, at *4 (E.D. Mich. Feb. 20, 2009).

(b). Objection by William McGrann

On March 9, 2017, William McGrann filed a letter with this Court objecting "to the terms of the settlement" because *inter alia*, he has "suffered extreme loss" and believes people who have "made a claim [against the Healthextras Disability Policy] should be paid before any premiums are returned to the insureds." *See* McGrann Objection, at Exhibit 3, [D.E. # 280]. Mr. McGrann filed this letter after several phone calls with Plaintiffs' counsel Kenneth Grunfeld and Aaron Hemmings. *See* Joint FA Decl. at ¶ 6.

Mr. McGrann allegedly suffered an injury resulting in his disability prior to enrolling in a HealthExtras Benefit Program in 1999. *Id.* In 2001, he filed a claim for benefits from the plan, which was denied. *Id.* Mr. McGrann then filed a *pro se* lawsuit against Federal Insurance Company ("Federal")[9] in Orange County California on March 2, 2007. *See* Complaint, attached

[9] Federal Insurance Company underwrote the disability coverage for the HealthExtras Benefits Programs from 1999-2005 and is defined as a Non-Settling Party to the Settlement. Federal

Exhibit 3.1. The matter was then removed to the Federal District Court for the Central District of California. *See* Docket sheet, attached as Exhibit 3.2. Mr. McGrann's case was dismissed on the merits on December 10, 2008. *See* Summary Judgment Motion and Order of Dismissal, attached as Exhibits 3.3, and 3.4 respectively. Mr. McGrann appealed the decision to the 9th Circuit, which affirmed the Judgment and dismissed the appeal. *See* 9th Circuit Order, attached as Exhibit 3.5. His objection is basically a request that the Court disregard the principles of *res judicata* and overturn the Central District of California and Ninth Circuit's rulings.

Mr. McGrann's objection is without merit. There is no basis to pay persons who "made a claim [against the Healthextras Disability Policy] … before any premiums are returned to the insureds." Aside for asserting that he should receive special "priority," Mr. McGrann does not object to any of the terms of the Settlement Agreement, and in fact would benefit from the Settlement. Mr. McGrann's claim for disability benefits has been fully adjudicated on the merits by the Federal Courts and it would be wholly unfair to force the Class to pay him benefits based on his previously denied, already litigated, and untimely disability claims. Accordingly, his objection thus should be overruled.

(c). Letters to the Court from Class Members and Inquiring Individuals

On February 7, 2017, **Kayson Pearson** filed a letter with this Court requesting a claim form. *See* Exhibit 4, at D.E. # 273. On February 9, 2017, Class Counsel, Kenneth Grunfeld, mailed him a Claim Form along with a Long Form Notice. *See* Exhibit 4.1, and Exhibit. 2, Joint FA Decl. at ¶ 7.a. Mr. Pearson has not submitted a viable claim.

Insurance Company is a Defendant in one of the 17 actions - *Gonzales v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 15-cv-02259 (S.D.N.Y.), on appeal No. 16-3526 (2nd Cir.).

On February 24, 2017, Class Member **Wynde Juliet Winston**, an attorney, filed a letter with this Court indicating that she had mailed a Claim Form to the address established by Heffler Claims, only to have the mailing returned "Not Deliverable." *See* Exhibit 5 at D.E. # 274, Joint FA Decl. at ¶ 7.b. After speaking with Class Counsel Aaron Hemmings, she successfully sent a second mailing to the claims address, and has now submitted a viable Claim. *Id.* She has subsequently informed the Court that she is "satisfied that this matter has been resolved." *See* Exhibit 5.1.

On March 9, 2017, **Bruno Palumbo** filed a letter with this Court requesting a claim form. *See* Exhibit 6 at D.E. # 281. On March 21, 2017, Class Counsel Aaron Hemmings was unable to reach Mr. Palumbo by phone, and mailed to him, via *Priority Mail*, a Claim Form, along with a pre-addressed envelope. *See* Exhibit 6.1. and Exhibit. 2, Joint FA Decl. at ¶ 7.c. Mr. Palumbo is has not filed a Claim that has been processed to date.

On March 10, 2017, **Norlito B. Soriano, Sr.** filed a letter with this Court requesting a Claim Form. *See* Exhibit 7 at D.E. # 279. On March 16, 2017, Class Counsel Aaron Hemmings reached Mr. Soriano by phone and mailed, via *Priority Mail*, a Claim Form along with a pre-addressed envelope to Mr. Soriano. *See* Exhibit 7.1 and Exhibit 2, Joint FA Decl. at ¶ 7.d. Mr. Soriano is a Class Member and he has submitted a viable Claim.

On March 28, 2017, **Mr. and Mrs. Dewhite Gano** filed a letter with this Court requesting a Claim Form. *See* Exhibit 8 at D.E. # 273. On March 30, 2017 Class Counsel Aaron Hemmings spoke to Ms. Gano by phone. *See* Joint FA Decl. at ¶ 7.e. Ms. Gano indicated that she was satisfied, but has not filed a Claim that has been processed to date. *Id.*

3. The Stage of the Proceedings and the Discovery Completed Favor Approval

The third *Girsh* factor "captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Cendant*, 264 F.3d at 235. Unsurprisingly, "post-discovery settlements are more likely to reflect the true value of the claim and be fair." *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993).

Formal discovery was reached and conducted in nine different cases. *See* PA Decl., D.E. # 262-2 at ¶ 11. The Parties have worked together to informally coordinate discovery across all these cases, with varying degrees of success. The Parties exchanged over 2 million pages of records, responded to over 500 interrogatories, and conducted 17 depositions all across the country including the depositions of current and former defendants' employees and Plaintiffs in the case. *Id.* As discussed above, the Settlement Agreement was reached as a result of extensive, arm's-length negotiations between experienced counsel, and which culminated in several days of mediation sessions over six months before Honorable Judge John Martin (ret.). *Id.* at ¶¶ 14-18.

When the "negotiation process follows meaningful discovery, the maturity and correctness of the settlement becomes all the more apparent." *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 400 (D.N.J. 2006). Here, the Settlement Agreement was reached through arm's length negotiation between highly experienced counsel only after very significant discovery was undertaken. Accordingly, the third *Girsh* factor strongly favors approval of the Settlement.

4. The Risk of Failing to Establish Liability and Damages Favors Approval

In negotiating and reaching the Settlement Agreement, Class Counsel accounted for the difficulties and potential risks associated with proving liability and damages. *See, i.e. In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *32-33. Throughout the litigations, the defendants have argued that, *inter alia*, some or all of the claims are barred by the statute of limitations and that the plaintiffs never suffered an actionable harm.[10] While Plaintiffs disagree with each of the defendants' arguments and have vigorously litigated against them, including in this Court, the arguments pose a real risk to recovery. In short, continued litigation presents additional risks, delays, and expenses that include, but are not limited to, further Rule 12 dismissals, summary judgment and pretrial motions, trial, final appellate review, and the countless other uncertainties inherent in litigation, particularly in the context of a large, complex, non-coordinated group of Actions in multiple district courts across the country.

To that end, in assessing the Settlement Agreement, the Court should balance the benefits potentially afforded to the Class as a result of the Settlement, against the risks of continued litigation. *See Prudential*, 148 F.3d at 317 (noting how "settlement provide[s] class members the opportunity to file claims immediately after court approval of the settlement, rather than waiting through what no doubt would be protracted litigation."); *Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 707 (D. Colo. 2007) (recognizing that "any class action presents complex and

[10] *See, i.e. Gonzales v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 15-cv-02259 (S.D.N.Y.), on appeal No. 16-3526 (2nd Cir.): *Graham v. Catamaran Health Solutions*, No. 4:14-cv-589 (E.D. Ark.), on appeal No. 16-1161 (8th Cir.); *Johnson v. Catamaran Health Solutions, LLC*, No. 15-cv-61752-RNS (S.D. Fla.), on appeal No. 16-11735 (11th Cir.); *Patel v. Catamaran Health Solutions, LLC*, No. 15-cv-61891-BB (S.D. Fla.); on appeal No. 16-10613 (11th Cir.); *Smith v. Catamaran Health Solutions LLC*, No. 3:15-cv-02846 (D.S.C.); *Waiserman v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2:14-cv-667 (C.D. Cal.), on appeal No. 14-56813 (9th Cir.)

difficult legal and logistical issues which require substantial expertise and resources."). In light of the risks, these *Girsh* factors support approval of the Settlement Agreement.

5. The Risks of Maintaining the Class Action Through Trial, and the Ability of Defendants to Withstand A Greater Judgment Favor Approval.

The sixth and seventh *Girsh* factors also favor approval of the Settlement. Although Plaintiffs believe that their claims asserted are well-suited for treatment on a class-wide basis, the defendants would have argued that certification was inappropriate because individual issues predominate over common issues, which was one of the arguments made in their successful effort opposing transferring these matters to an MDL. *See In Re: Healthextras Ins. Mktg. & Sales Prac. Litig.*, MDL No. 2544 (Order Denying Transfer) [D.E.#39].

There is currently no evidence indicating that any of the defendants here would or would not be able to withstand a more significant judgment. However, this factor is not dispositive. *See In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *35 ("Plaintiffs acknowledge that there is currently no indication that Defendant here would be unable to withstand a more significant judgment. Nevertheless, the Court is satisfied that the Settlement is fair, reasonable, and adequate, despite the possibility that Philips could pay a greater sum.") (internal citations omitted). Here, the Settlement is well within the range of reasonableness and provides substantial benefits to the Class. Accordingly, both the sixth and seventh *Girsh* factors favor approval of the Settlement.

6. The Range of Reasonableness of the Settlement to a Possible Recovery in Light of All the Attendant Risks of Litigation Favors Approval

The eighth and ninth *Girsh* factors also support approval of the Settlement. The determination of a "reasonable" settlement is not susceptible to a simple mathematical equation yielding a particularized sum. Rather, "in any case there is a range of reasonableness with

respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). The $15 million Settlement Fund is a significant amount of money given the challenges facing the Actions. In addition, a good portion of the money enrollees paid for these Benefits Programs occurred prior to 2005. The defendants have challenged the timing of these Actions, and if they were to be successful in enforcing a shortened statute of limitations period, the total damage potentially recoverable would be significantly diminished further. Accordingly, given the size of the Settlement Class, the potential benefits available, and the aforementioned risks in proving liability and damages and in obtaining class certification, the Settlement fairly and adequately rewards the Class.

C. The Notice Provided to the Class Satisfies Due Process

In accordance with the Court's Order preliminarily approving the Settlement, Heffler, the Settlement Administrator, sent the Court-approved settlement information by U.S. Mail to 1,332,508 unique households on the Class List. *See* Hammer Decl. at ¶ 8. Heffler also established and monitored the toll-free telephone number (1-844-245-3767) and the Settlement Website (www.HealthExtrasSettlement.com). *Id.* at ¶¶ 5-9. Through March 31, 2017, the Settlement Website statistics show 104,995 visits, 245,406 page views, 14,136 downloads of the Claim Form, and 7,143 downloads of the full Class Notice or the Postcard Notice. *Id*. at ¶ 6. In addition, a Press Release was issued over PR Newswire's US1 National wire on December 12, 2016 and was picked up by over 150 news outlets. *Id*. at ¶ 10. Further, the Published Notice was placed in the weekend edition of *USA Today* on Friday, December 16, 2016 to a circulation of over 1.5 million. *Id*. at ¶ 11. Also, banner ads were displayed on AOL Network sites from December 12, 2016 through January 11, 2017, resulting in almost 8 million impressions on sites including Huffington Post, MapQuest, Moviefone, among others, and on AOL email and Outlook. *Id*. at ¶ 12. Finally, Heffler and the Parties developed and mailed a Reminder to Class

Members that had not filed Claims, which included a Claim Form. *Id.* at ¶ 16. The Reminder has been successful in driving up the number Class Members that have filed Claims. *Id.* Accordingly, potential Settlement Class Members have been (i) provided with direct notice of the Settlement Agreement; (ii) fully informed of their rights and obligations under the Settlement Agreement; and (iii) provided with the resources to ask questions and, to the extent necessary, receive assistance in submitting Claim Forms.

This Notice program meets the due process requirements of Fed. R. Civ. P. 23, which calls for "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (emphasis omitted); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000) ("In order to satisfy due process, notice to class members must be '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.'") (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The attached Declarations set forth the significant efforts (at considerable expense) taken to provide information to the Class and ample opportunities to file Claims, object or opt-out. *See* Declarations. Class Counsel look forward to the Final Approval Hearing on April 20, 2017 to answer any specific questions the Court has regarding the excellent and successful Notice plan accomplished in this case, as well as any questions at all about the Settlement.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue final approval of the Settlement, certifying the class and finding the Settlement to be fair, reasonable and adequate, and to dismiss this action with prejudice.

Date: April 5, 2017

Respectfully submitted,

/s/ *Kenneth J. Grunfeld*

Richard M. Golomb, Esquire
Kenneth J. Grunfeld, Esquire
GOLOMB & HONIK, P.C.
1515 Market Street, Suite 1100
Philadelphia, PA 19102
Phone: (215) 985-9177
Fax: (215) 985-4169
rgolomb@golombhonik.com
kgrunfeld@golombhonik.com

Aaron C. Hemmings, Esquire
(*pro hac vice*)
HEMMINGS & STEVENS, P.L.L.C.
5540 Mcneely Drive, Suite 202
PO Box 90698
Raleigh, NC 27675
Phone: (919) 277-0161
Fax: (919) 277-0162
ahemmings@hemmingsandstevens.com

Joseph "Jay" H. Aughtman, Esquire
(*pro hac vice*)
AUGHTMAN LAW FIRM, LLC
1772 Platt Place
Montgomery, AL 36117
Phone: (334) 215-9873
Fax: (334) 213-5663
jay@aughtmanlaw.com

Attorneys for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I, **KENNETH GRUNFELD, ESQUIRE**, certify that on this date, the foregoing: Unopposed Motion and Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement was filed and served via the Court's CM/ECF Filing System.

Date: April 5, 2017

/s/ *Kenneth Grunfeld*
KENNETH GRUNFELD, ESQUIRE