UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN FLEISHER, AS TRUSTEE OF THE MICHAEL MOSS IRREVOCABLE LIFE INSURANCE TRUST II and JONATHAN BERCK, AS TRUSTEE OF THE JOHN L. LOEB, JR. INSURANCE TRUST, on behalf of themselves and all others similarly situated, Plaintiff, vs. PHOENIX LIFE INSURANCE COMPANY, Defendant.	Civil Action No. 11-cv-8405(CM)

SPRR LLC, on behalf of itself and all others similarly situated, Plaintiff, vs. PHL VARIABLE INSURANCE CO., Defendant.	Civil Action No. 14-cv-8714 (CM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR (1) ENTRY OF JUDGMENT, (2) APPROVAL OF PAYMENTS AND DISTRIBUTION FROM SETTLEMENT FUND, AND (3) DETERMINATION OF VALIDITY OF CLAIM OF BINDAY TO SHARE IN CLASS ACTION SETTLEMENT FUNDS

On September 9, 2015, this Court entered a Decision and Order approving the class action settlement and the motion for attorneys' fees and costs. 11-cv-8405 Dkt. # 318. The order approved the Settlement between Class Representative Plaintiffs Martin Fleisher, as Trustee of the Michael Moss Irrevocable Life Insurance Trust II and Jonathan Berck, as Trustee of the John L. Loeb, Jr. Insurance Trust, in Civil Action No. 11-cv-8405(CM), and Class Representative Plaintiff SPRR LLC in Civil Action No. 14-cv-8714 (together, "Class Plaintiffs" or "Plaintiffs"), for themselves and on behalf of the proposed Settlement Class, with Defendants Phoenix Life Insurance Company and PHL Variable Insurance Company (together, "Defendants" or "Phoenix"[1]).

Plaintiffs now respectfully move the Court for (1) entry of judgment under Federal Rule of Civil Procedure 58; (2) an order approving reimbursement of Settlement Administrator Costs and Class Counsel's expenses that were incurred after the filing of the initial motion for costs from the Settlement Fund; (3) an authorization to distribute money to class members in accordance with the distribution plan previously approved by the Court and a release for the Settlement Administrator, Class Plaintiffs, Class Counsel, Defendants, and Defense counsel from any claims arising out of their handling of that distribution; and (4) resolution of a dispute asserted by Michael Binday regarding Class membership. A Proposed Order and Judgment reflecting these requests is attached.

I. Entry of Judgment

In the Second Circuit, a judgment must be explicitly labeled a "judgment" in order to qualify as a judgment under Rule 58. *Redhead v. Conference of Seventh-Day Adventists*, 360 F. App'x 232, 233 (2d Cir. 2010) (citing *Cooper v. Town of E. Hampton*, 83 F.3d 31, 34 (2d Cir.

[1] Unless otherwise defined, all Capitalized Terms in this memorandum have the same meaning as set forth in the Settlement Agreement.

1996)). No judgment has yet been entered in a separate document. The Proposed Order and Judgment, attached to this motion, satisfies this separate judgment rule and largely tracks the language of the Proposed Order and Judgment submitted with the motion for final approval, with the additions noted below. It also dismisses the action with prejudice, as required by paragraph 101 of the Settlement (Dkt. #299-2).

II. Reimbursement for Administrative Costs and Supplemental Counsel Costs

The Settlement Administrator has incurred fees and expenses of $22,799. The Settlement, and the preliminary approval order, provides that Notice and Administrative Costs shall be paid from the Settlement Fund as they become due. Settlement ¶¶ IV.E, VIII; Prel. Appr. Order, 11-cv-8405, Dkt. 303 ¶10. Plaintiffs request that the final judgment include a provision authorizing payment from the Settlement Fund of these settlement administration costs, including any future costs that become due.

In addition, Class Counsel filed its Motion for Attorneys' Fees and Payment of Litigation Expenses on August 19, 2015. (Dkt. 316). Since the preparation of that motion, Class Counsel has advanced additional unreimbursed expenses of $11,606.88 related to this case. As detailed in the attached Declaration of Steven G. Sklaver, the expenses are for expert costs relating to final approval and distribution to class members. These expenses were reasonable and necessary in this litigation and of the type typically billed by attorneys to paying clients. Because they were incurred after the expenses were calculated for the August 19, 2015 motion, these expenses were not included in the motion for expenses, and Class Counsel respectfully requests authorization for such reimbursement from the Settlement Fund.

III. Distribution of Funds to Class Members and Release of Claims

In the Decision and Order, this Court approved the following proposed Distribution Plan as fair and reasonable:

> The cash payment will be allocated *pro rata* as follows, which was fully explained in the Notice: (1) $2 million will be distributed to those whose policies lapsed after receiving notice of a COI increase but before ever paying an overcharge, and (2) the remaining funds, after reduction for fees, costs, incentive awards, will be distributed among those who paid a COI overcharge. Exley Decl. Ex. A, at 5. Eligible lapsed policyholders will be paid in proportion to the premiums each paid before termination, relative to the premiums paid by all such policyholders. Eligible COI overcharge policyholders will be paid in proportion to their share of the overall COI overcharges paid by Class members through March 2015. *Id.* For uncashed or returned checks, after the time to request reissuance for any lost checks expires, an escheatment process will follow consistent with applicable state law.

Dkt. # 318, at pp. 25-26.

Class Counsel, working with the Settlement Administrator and its retained experts, and using data provided by Defendants, has determined the amount owed to each Class Member under the terms of the approved Distribution Plan. *See* Sklaver Decl. ¶ 4. This is an objective determination. The Court is requested to authorize the Settlement Administrator to make these distributions.

To permit this distribution to occur, Class Counsel also requests that the Court bar Class Members from making any further claims against the Settlement Fund, and release and discharge all persons, including the Settlement Administrator, Plaintiffs and Class Counsel, and Defendants and Defendants' counsel, involved in the processing of the claims discussed herein from any claims arising out of such involvement. *See, e.g,. In re Gilat Satellite Networks, Ltd.*, 2009 WL 803382, at *7 (E.D.N.Y. Mar. 25, 2009) (barring "further claims against the net settlement fund" and releasing "[a]ll persons involved in the administration of the fund … from any claims arising out of their involvement."). A future application to this Court may be necessary to approve the handling of any balance remaining in the Net Settlement Fund after distribution, which the

Settlement Administrator estimates can begin within three weeks after entry of the proposed Order and Judgment.

IV. Request for Resolution of a Disputed Claim by Mr. Binday

There is only one unresolved dispute regarding a claim to share in the settlement funds. Michael Binday, with whom this Court is already familiar due to another matter tried in this Court, recently contacted Class counsel asserting that a Phoenix policy insuring the life of his father, which is owned by a Rosalyn Binday, should be in the class and receive settlement funds. Sklaver Decl. ¶ 6. The Settlement Class defines "Class" to mean, in relevant part, "the Owners of PAUL Policies for which Phoenix sent notice that the Policy was subject to the 2010 or 2011 Adjustment." Dkt. 299-2 at ¶ 14. For the reasons below, Class Counsel and Phoenix believe that Mr. Binday's father's policy is not in the Class, and the Settlement Administrator has confirmed that this policy is not on the list of Class Policies submitted by Phoenix. Sklaver Decl. ¶ 6. However, this Court has the exclusive authority to make any final determination as to whether the owner of Mr. Binday's father's policy has a valid claim to share in the settlement funds. Class Counsel hereby requests the Court to make that determination.

After Class Counsel relayed Mr. Binday's concerns to Phoenix, Phoenix informed Class Counsel that it never sent a letter announcing the COI increase to this policy's owner because this policy lapsed in July 2011, several months *before* the applicable 2011 COI increase was announced. Sklaver Decl. ¶ 6. Class Counsel told this to Mr. Binday, who does not appear to contest that this policy lapsed before the relevant increase was first announced. Mr. Binday argues, rather, that the policy received "notice" of the increase because the owner of the policy, Rosalyn Binday, later applied for reinstatement of the policy, and when Phoenix approved reinstatement, "[t]he premium demanded by them for the reinstatement reflects the COI increase,

and as such serves as notice." *Id.* Mr. Binday forwarded this reinstatement letter to Class Counsel. *Id.* Counsel sent this letter to Phoenix, and communicated Mr. Binday's allegation that the premium demanded included the increased COI adjustment and thus constituted notice of the COI increase. Phoenix then informed Class Counsel that the letter and the premium amount stated therein do not reflect the COI increase; as stated in the letter, the premiums would only constitute payment through January 3, 2012, and the policy—if it had been subject to the COI increase and had not instead lapsed—would not have made any higher payments until its policy anniversary on January 4, 2012. The letter offering reinstatement to Mr. Binday's father was sent on September 6, 2011, which was still before Phoenix sent any notice of the applicable COI increase (which began later that year). *Id.* Mr. Binday never followed through with the requirements necessary to complete reinstatement and the policy remained lapsed from July 2011. Counsel relayed these facts to Mr. Binday, along with the determination that this was not a Class Policy. Class Counsel also reminded Mr. Binday that he is free to raise this issue with the Court and told him that Class Counsel would also raise this issue with the Court for it to decide. *Id.*

Because this policy lapsed prior to the announcement of the COI increase, and there is no evidence that it received notice of the increase, it is respectfully submitted that this is not a Class Policy and therefore is not eligible to a distribution from the settlement funds.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed Order and Judgment, attached to the Notice of Motion as Exhibit 1.

DATED: November 10, 2015

Respectfully submitted,

/s/ Steven G. Sklaver
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