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)(JCF)

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)

DEFENDANTS' RESPONSE IN OPPOSITION
TO SUBMISSION BY NON-CLASS MEMBER ROSALYN BINDAY

I. Introduction

Phoenix Life Insurance Company and PHL Variable Insurance Company (collectively, "Phoenix") submit this memorandum in response to the letter from Rosalyn Binday requesting that she be included within the Settlement Class despite not meeting the criteria agreed to in the parties' Settlement or approved by the Court. The request should be denied for three reasons: (1) Binday is simply not part of the Settlement Class as approved by the Court or the putative class defined in either Complaint; (2) based on the unique and individualized allegations Binday asserts here, Binday would not have properly been part of any class action; and (3) Binday's late-submitted letter is procedurally deficient and should not operate to delay the conclusion of the Settlement and this case.

II. Binday Is Not Part of the Class

As set forth in the Decision and Order Approving Class Action Settlement, the

> "Class" or "Settlement Class" means the Owners of PAUL Policies for which Phoenix sent notice that the Policy was subject to the 2010 Adjustment or 2011 Adjustment (the "Class Policies").

Order at 7, *Fleisher*, ECF No. 318. The Settlement Class definition has two components: the policy owner must have: (1) been sent notice by Phoenix that (2) the Policy was subject to the rate Adjustments.[1] Binday meets neither of these requirements.

Binday does not allege receipt of the notice letter sent by Phoenix to the over 1,000 policyholders affected by the 2011 Adjustment, which included policies that received decreased

[1] Indeed, Binday does not even meet the requirements of the putative class subject to either Complaint in these actions. As a Florida policy, the Binday policy was not part of the New York class in the *Fleisher* action. Compl. at ¶¶ 36–7, *Fleisher*, ECF No. 1. The nationwide class alleged in the *SPRR LLC* complaint applied only to PAUL policies "subjected to a cost of insurance rate increased announced by PHL to go into effect on a policy's next anniversary date on or after November 1, 2011." Compl. at ¶ 28, *SPRR LLC v. PHL Variable Ins. Co.*, No. 14-cv-8714, ECF No. 1. For the same reasons the Binday Policy was not "subject" to the 2011 adjustment as required by the Settlement Class, it was not "subjected" to the adjustments for purposes of the putative classes.

COI rates. Indeed, the Binday Policy is not included on the mailing list Phoenix used in connection with the 2011 Adjustment (*see* Ganer Decl. at ¶ 2-3) and Binday admits the Binday Policy lapsed months before these notices were mailed starting in September 2011. Rather, Binday asserts that "we became aware that Phoenix was increasing the COI . . . on the class of policies that included ours." This is not the same as being sent notice by Phoenix, which is required by the definition of the Settlement Class.

More critically, Binday does not allege (nor could she) that the Binday Policy "was subject" in any way to the 2011 Adjustment. The Binday Policy lapsed in July 2011 and was never reinstated. Under the terms of the applicable policy form, the Binday Policy terminated when the policy lapsed. *See* Ex. A to Ganer Decl. at § 12 ("This policy will terminate automatically on the earliest of: . . . (2) the date the grace period expires without payment of sufficient premium as provided in Section 11"). The policy owner had the ability to request reinstatement subject to several conditions, including providing evidence of insurability and payment of premiums. *Id.* at § 13. As Binday never submitted the required premium, the Binday Policy was not reinstated and has remained terminated since July 2011. As such, it was never "subjected" to the COI increase announced two months later, a prerequisite for inclusion in the Settlement Class or within the putative class identified in the *SPRR* complaint. Simply put, policies that terminated before the COI increase was even announced were never the subject of this action, the settlement negotiations between Phoenix and the named plaintiffs, or the Settlement approved by this Court.

III. Binday's Unique Allegations Are Not Properly Part of a Class Action

Binday wants to be included within the "lapse class" that will share in a $2 million fund established under the Distribution Plan. Decision and Order Approving Class Action Settlement at 9, *Fleisher*, ECF No. 318. The thrust of Binday's argument for inclusion in the Settlement

Class appears to be that after becoming aware of the increase through discussions with an unidentified insurance broker, Binday did not complete the reinstatement process to bring the Binday Policy back into force from an already terminated state, somehow causing unspecified damages.[2] This is separate and distinct from the "lapse class," where a generally common fact pattern existed with an owner of an in-force policy having a policy lapse after being sent notice of the 2010 or 2011 Adjustments. Binday seeks to reduce distributions to the lapse-class members without showing any commonality with these class members or the rest of the Settlement Class, besides being the holder of a PAUL policy.

Indeed, Binday points to the five-year reinstatement period following termination to argue that an owner of a policy that lapsed well before the increase could simply seek reinstatement today, voluntarily subject their policy to the COI increase, and "indisputably" become part of the Class for purposes of receiving funds from this Settlement. *See* Ex. A to Ganer Decl. at § 13. Not only is this absurd on its face, it perfectly exemplifies why Binday cannot be permitted to enter the Settlement Class. There are many other PAUL policies that lapsed and terminated years prior to PHL announcing the increase that were simply never "subject" to the 2010 or 2011 Adjustments, were never part of this litigation, and are not included within the Settlement Class definition.

IV. Binday's Letter Is Procedurally Deficient

As a non-class member, Binday has not moved to intervene or filed a pleading that would remotely comply with the procedural requirements for having the Court consider any objection to her non-inclusion within the Settlement Class certified by the Court. Binday has also failed to submit admissible evidence that the Binday Policy should properly have been included within

[2] Binday does not mention a subsequent reinstatement request in early 2012 that was closed after a required medical examination was not completed. *See* Ex. B to Ganer Decl.

the Settlement Class certified by the Court. As such, the Court should deny the request out of hand.

V. Conclusion

The Court should properly disregard the procedurally deficient letter submitted by Binday and enter final approval of the Distribution. Should the Court be inclined to consider Binday's request, Phoenix respectfully submits that the undisputed facts show that the Binday Policy is not included within the definition of the Settlement Class.

Dated: December 1, 2015

Respectfully submitted,

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