IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

HEALTHCARE STRATEGIES, INC., Plan Administrator of the Healthcare Strategies, Inc. 401(k) Plan and the Healthcare Strategies, Inc. CBU 401(k) Plan, On Behalf of Itself and All Others Similarly Situated,	:	
and	:	
The DEROSA CORPORATION, Plan Administrator of The DeRosa Corporation 401K PS Plan, On Behalf of Itself and All Others Similarly Situated,	:	
Plaintiffs,	:	
vs.	:	No. 3:11-cv-00282 (WGY)
ING LIFE INSURANCE AND ANNUITY COMPANY,	:	
Defendant.	:	April 11, 2014

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

I. INTRODUCTION

Plaintiffs, Healthcare Strategies, Inc. ("HSI") and The DeRosa Corporation ("TDC") (collectively, "Plaintiffs"), on behalf of themselves and the Class certified in this case, respectfully submit this Memorandum of Law in Support of their Motion for Preliminary Approval of Settlement with Defendant, ING Life Insurance and Annuity Company ("Defendant" or "ILIAC" or "ING"). For the reasons set forth below, the proposed Settlement Agreement is fair, reasonable and adequate and should be granted preliminary approval so that notice can be

provided to the Class.[1] The proposed settlement ("Settlement")[2] is the product of protracted, arm's-length negotiations between counsel for the Class and Defendant, all of whom have significant experience in matters arising under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*.[3]

As the Court is aware, this is a class action in which Plaintiffs challenge Defendant's receipt of revenue sharing payments from mutual funds and similar entities. The Settlement provides the following substantial and meaningful relief to the Class:

- Defendant will deposit $14,950,000 in a common fund to provide compensatory relief to the Class;
- Defendant will make a number of changes to its business practices that directly benefit the Class. Such changes include:
- Defendant-Initiated Changes to Product Menus
  - Additions. Defendant will specifically identify to plan sponsors, via

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[1]The Settlement Agreement provides Class members with an additional opportunity to opt-out of the Class, as well as an opportunity to object to any part of the proposed settlement.

[2]All capitalized terms herein have the same meaning as set forth in the Parties' Settlement Agreement.

[3]Lead Counsel in this case, Shepherd Finkelman Miller & Shah, LLP ("SFMS") has extensive experience litigating cases challenging revenue sharing practices under ERISA. In *Phones Plus, Inc. v. Hartford Life Ins. Co.*, 3:2006-cv-01835 (D. Conn.), SFMS, on behalf of its client and a nationwide class of plan sponsors, achieved the first settlement of its kind under ERISA in 2010 challenging the practice of life insurance service providers accepting and receiving revenue sharing payments under certain circumstances. The *Phones Plus* settlement was reached after class certification and summary judgment had been fully submitted to the Court. While Class Counsel have achieved a significant settlement in this case and *Phones Plus*, it bears noting that some similar actions against insurance company service providers have been entirely unsuccessful. *See Leimkuehler v. American United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013)(holding that a 401(k) service provider was not a fiduciary with respect to its receipt of revenue sharing from mutual fund companies). Thus, Plaintiffs also faced substantial risk in litigating this case on behalf of the Class.

ILIAC's plan sponsor website, any addition of a fund to a Plan's Product Menu at the time of the addition. Defendant will update its new customer proposals, prospective plan sponsor booklets and plan sponsor website to inform plan sponsors that such additions are identified on the plan sponsor website.

- Removals. Defendant will provide to plan sponsors written notice of any removal of a fund from a Plan's Product Menu. Such notice shall be published on ILIAC's plan sponsor website at least thirty (30) days prior to the removal, and shall state the effective date of the removal. Defendant will update its new customer proposals, prospective plan sponsor booklets and plan sponsor website to inform plan sponsors that such deletions are identified on the plan sponsor website.

- Substitutions. ILIAC will not exercise any authority to make a substitution of one fund for another (i.e., transfer current investment in existing Fund A to Fund B) or to delete/remove a fund from a Plan's Product Menu if the Plan already offers such fund on its Plan Menu, and shall modify its contracts to eliminate any such authority to the extent applicable.

- Disclosures of Fund-Related Fees and Expenses

Defendant will revise and amend its disclosures relating to Mutual Fund related fees and expenses contained in new customer proposals, plan sponsor booklets, and ILIAC's plan sponsor website as follows:

- ILIAC shall provide on the plan sponsor website a disclosure, in the form of Exhibit "G" to the Settlement Agreement with respect to fund fees and expenses, including revenue paid to ILIAC, if any, for each fund available within the Plan's Product Menu. Defendant shall discontinue use of the report in the form of Trial Exhibit 16 for any purpose (*see* Exhibit "H" to the Settlement Agreement).

- Defendant shall eliminate language that Revenue Sharing Payments neither directly nor indirectly increase mutual fund expenses and replace it with language that Revenue Sharing Payments may have a direct impact or indirect impact on mutual fund expenses and the share class chosen by ILIAC.

- Defendant shall add language that ILIAC offers various Product Menus to retirement plan customers depending on the amount of direct fees they choose to pay and other factors, and that these various Product Menus have varying degrees and magnitude of Revenue Sharing associated with them (including one Product Menu that pays no Revenue Sharing of any

kind and is paid for entirely by direct fees assessed to the plan and/or its participants). Defendant shall add language that, if a plan sponsor wishes to pay all fees to Defendant directly by choosing a Product Menu for which Defendant does not accept any Revenue Sharing Payments from mutual funds, the plan sponsor or its representative should contact Defendant about available options and pricing, including the information regarding the investment options available on such menu(s) and the expense ratios associated with those investments.

- Defendant shall add language that ILIAC chooses to offer various share classes of mutual funds on different Product Menus, that only one share class of each mutual fund investment is typically offered on a given menu in light of pricing and product requirements, and that the primary difference between share classes of a given mutual fund is generally the expense ratio of the mutual fund (*i.e.*, the amount that the plan's participants pay as a fund expense) and the amount of Revenue Sharing that ILIAC receives from the mutual fund, which is paid from the mutual fund expense ratio.

- Defendant shall advise Plans that fund fee adjustments ("FFA(s)") are utilized to increase (and, for certain menus, decrease) the revenue received by ILIAC for certain mutual funds that do not offer sufficient (or, in some case, offer more than sufficient) Revenue Sharing Payments to otherwise be offered on a given Product Menu (depending on the Revenue Sharing requirements, if any, applicable to the Product Menu) and that, although FFAs do not always "normalize" or "neutralize" the effect of Revenue Sharing Payments in total, that is their object and intent.

- Defendant shall advise Plans that more detailed information regarding the share classes available on various menus offered by ILIAC, as well as the Revenue Sharing associated with those share classes, and the Revenue Sharing received and fund fee adjustments in connection with the Plan's investments, shall be provided upon written request to ILIAC.

- Other Provisions

  - Future Plan customers shall be offered the specific opportunity to pay all fees to Defendant directly by choosing a Plan Menu (or, to the extent applicable, more than one Plan Menu) for which Defendant does not accept any Revenue Sharing Payments from mutual fund companies.

  - As part of the Settlement, each of the Plans would be deemed to have elected to reinvest all mutual fund dividends from the date of initial group annuity contract/group funding agreement. Defendant's point of sale disclosures will now provide that, as a result of entering into a contractual relationship with Defendant through a group annuity contract or group funding agreement, each Plan is consenting to reinvestment of mutual fund dividends, that reinvestment of dividends may result in undesirable concentration in certain investments over time, and that Defendant makes available certain tools to re-balance investment portfolios.

  - Defendant agrees to provide thirty (30) days' written notice of any change in the amount of an FFA.

Defendant will begin to implement these changes to its business practices within six (6) months of Final Approval of the Settlement and will make diligent and good faith efforts to ensure that the implementation of the changes set forth above are concluded within twelve (12) months of Final Approval. In addition, Defendant agrees that the above actions will remain in effect for a minimum of five (5) years from Final Approval unless there is a change in applicable law that renders any change or practice unlawful.[4] As explained herein, Plaintiffs have established all

[4]As Plaintiffs will detail in connection with their submission in connection with seeking final approval of the Settlement following notice to the Class and an opportunity to opt-out or object to the Settlement, Plaintiffs' expert estimates that the changes being made to Defendant's business practices, including the specific opportunity to choose a menu for which no Revenue Sharing Payments are received by ILIAC, and the information being provided by Defendant to the Class, has an extremely significant value independent of the monetary relief being provided as part of the Settlement. The Settlement provides for payment of up to $6,815,000 in attorneys' fees and costs, which is less than Class Counsel's total lodestar in this matter (*i.e.*, the costs and fees, based on Class Counsel's normal hourly rates, expended in prosecuting this case for over the past three (3) years, including through trial) and which Plaintiffs' expert estimates to be less than ten percent (10%) of the total value of the Settlement and closer to if not less than five

necessary prerequisites for preliminary approval of the Settlement. In addition, in connection with seeking final approval of the Settlement, Plaintiffs also will provide the Court with additional expert and independent opinions that further establish the inherent fairness and reasonableness of the Settlement under all of the circumstances.

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percent (5%) of the total value of the Settlement to the Class. As Plaintiffs will explain in full detail in connection with seeking final approval of the Settlement, they believe the amount of attorneys' fees and costs is fair and reasonable under applicable law. *See, e.g., Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir. 2000) ("The question of whether a particular fee is reasonable must be guided by consideration of such factors as "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy"); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005)("Consistent with these guidelines, a reasonable attorneys' fee may be calculated using either the percentage method or the lodestar method, though the recent trend in this Circuit has been to use the percentage method"*); In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3rd Cir. 2005)(awarding 25% of value of settlement and multiplier of 4.5 to 8.5). Finally, the Settlement provides for the payment of Case Contribution Fees to Plaintiffs in recognition of their invaluable contributions to the prosecution of this action. Such awards are commonplace in class actions, especially where, as here, Plaintiffs have made significant contributions to the Settlement, and are intended "to compensate the named plaintiff for any personal risk incurred ... or any additional effort expended by the [named plaintiff] for the benefit of the lawsuit." *Dornberger v. Metropolitan Life Ins. Co.*, 203 F.R.D. 118, 124 (S.D.N.Y. 2001) (citation omitted); *see, e.g., In Re Publication Paper Antitrust Litig.*, No. 3:04-MD-1631 (SRU), 2009 WL 2351724, at *1 (D. Conn. July 30, 2009) (same); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 (HB), 2005 WL 1041134, at *3 (S.D.N.Y. May 5, 2005) (same; approving "incentive awards" of $25,000 for each named plaintiff who was deposed and $15,000 for each class representative), *vacated and remanded on other grounds*, *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007); *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL), 2003 WL 21136726, at *2 (S.D.N.Y. May 15, 2003) (same; approving $25,000 "incentive award" to named plaintiff in recognition of its intimate involvement in the litigation). In connection with seeking final approval of the Settlement, Plaintiffs will submit more detailed information, including affidavits regarding the time and expenses devoted to this matter and the time spent by Plaintiffs in prosecuting this class action litigation, in support of the request for an award of attorneys' fees and expenses, as well as the case contribution fees.

II. FACTUAL BACKGROUND RELEVANT TO PRELIMINARY APPROVAL

A. Procedural History And History Of Settlement Negotiations

The Parties' Settlement Agreement was reached after over three years of litigation, including extensive discovery involving the production of hundreds of thousands of pages of documents, over twenty (20) fact and expert depositions, full class certification and summary judgment proceedings, and a trial with respect to liability that spanned the course of almost four (4) weeks. The Settlement terms were arrived at following several full days of mediation with Mark E. Segall, Esquire of JAMS in New York, NY during the Summer and Fall of 2013, and direct and protracted negotiations over a period of several months following the trial through liability for which closing arguments occurred in early October, 2013. The Settlement also was reached after extensive consultation with well-regarded experts and a full evaluation of the evidence, as well as after hearing, digesting and evaluating the Court's considered perspective on issues related to both liability and damages as communicated during the trial and closing arguments. The Parties were fully aware of the issues and risks associated with their respective claims and defenses.

The Settlement Agreement is the result of arm's-length, protracted negotiations that began soon after the filing of the Complaint. During the course of these negotiations, the Parties and their respective counsel had discussions concerning the best manner in which this Litigation could be resolved, as well as the risks attendant in connection with the theories being advanced in the prosecution and defense of this case. As a result of those discussions, which were informed by the significant experience of Class Counsel and Defendant's counsel in such matters, Plaintiffs and Defendant, by and through their respective counsel, and with the

assistance of an experienced mediator during the course of negotiations, ultimately reached agreement as to all material terms and then memorialized those terms in the Settlement Agreement.

The Parties exchanged substantial documentation, engaged in complete and comprehensive discovery, briefed and completed class certification and summary judgment pretrial proceedings and proceeded to trial with respect to liability so as to evaluate and fully test the merits of their respective claims and defenses. Plaintiffs and Defendant also retained, consulted with and produced reports for experts regarding potential theories of liability and damages. Thus, the Settlement was reached after considerable investigation, protracted litigation and careful consideration and discussions by the Parties.

B. The Settlement Provisions

The full terms of the Settlement are embodied in the Settlement Agreement attached hereto as Exhibit "1." The Agreement clearly is fair and reasonable to the Class, as it provides significant and meaningful benefits to all members of the Class. Moreover, the terms of the Settlement have been carefully crafted. In sum, the Settlement calls for a significant monetary payment to the Class and provides substantial and meaningful benefits to the Class in the form of significant changes in the manner in which Defendant conducts its business and the provision of clear, detailed information regarding revenue sharing payments, as well as direct fees and expenses paid by the Class' retirement Plans. Finally, the Settlement provides the Class with a means to pay all compensation to ILIAC through direct fees by choosing an investment menu containing mutual funds and share classes that do not pay revenue sharing to ILIAC.

III. ARGUMENT[5]

A. The Class Notice Is The Best Practicable Under The Circumstances

To comport with the due process rights of absent members of the Classes, notice must be the best practicable given all the circumstances. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). Here, the Settlement provides for direct notice by first class mail or email to all identifiable members of the Classes. There is no question that such notice is the best notice practicable and is adequate. *See, e.g., Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bourlas v. Davis Law Associates*, 237 F.R.D. 345, 356 (E.D.N.Y. 2006)(delivery of the notice by first class mail to each individual class member in a class action is deemed the best notice practicable under the circumstances, where there is no indication that any of the class members could not be identified through reasonable efforts). Moreover, publication notice of the Settlement also will be provided in the *Wall Street Journal*, thereby supplementing and improving the direct notice that the Settlement contemplates.

The proposed notices (*i.e.*, the Long Form Notice that will be mailed and emailed, as well as the Summary Notice that will be published) describe the Settlement in "plain English," explain Plaintiffs' claims and the Litigation, inform members of the identity of Class Counsel, and detail the Class Members' rights and obligations, and how to obtain additional information. Thus, the class notice meets all requirements of applicable law with respect to notice. *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*, 2001 WL 987840 at ** 9, 20 (S.D.Ind.

[5]Since the Court already has certified the Class in this case, there is no need to certify a class for purposes of settlement in this case. Notably, however, even though Class members already were given notice and an opportunity to opt-out of the Class before trial, the Settlement provides them with another opportunity to exclude themselves from the Class at this time if they choose to do so.

Aug. 28, 2001)(noting that notice should be clear and comprehensive while attaining "a reasonable balance between lawyerly precision and plain English").

B. The Settlement Agreement Merits Preliminary Approval

The issue now before the Court is whether the Settlement is within the range of what might later be found to be fair, reasonable and adequate, so that notice of the proposed Settlement should be given to Class Members and a hearing scheduled to consider final approval of the Parties' Settlement Agreement. *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D.Pa. 2007)(Although "[t]he ultimate approval of a class action settlement depends on 'whether the settlement is fair, adequate, and reasonable,' *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir.1983), [i]n evaluating a proposed settlement for preliminary approval ... the Court is required to determine only whether 'the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval'"); *Spann v. AOL Time Warner Inc.*, 2005 WL 1330937 (S.D.N.Y. June 7, 2005)(same).

Courts favor the settlement of class action litigation and will approve a settlement if it is "fair, reasonable, and adequate" when viewed in its entirety. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Spann v. AOL Time Warner Inc.*, *supra* at * 6 ("public policy favors settlement, especially in the case of class actions"). "In evaluation of a proposed settlement, the court recognizes that the 'essence of settlement is compromise'" and will not represent a total win for either side. *Id*. at 1200 (*quoting Armstrong v. Board of Sch. Dir.*, 616 F.2d 305, 315 (7th Cir. 1980)). "Accordingly, the court is not called upon to determine whether the settlement reached

by the parties is the best possible deal, not whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted).

The approval of a class action settlement is a two-step process, whereby the court first grants preliminary approval of the negotiated settlement. *See Armstrong v. Bd. of School Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980) (*citing* Manual For Complex Litigation, §1.46, at 53-55 (West 1977)(footnote omitted), *overruled on other grounds, Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also Spann v. AOL Time Warner Inc.*, *supra*. In the second step, the court holds a fairness hearing before granting final approval of the settlement agreement. *Id*. The goal of the ultimate fairness or final approval hearing is "to adduce all information necessary to enable the judge intelligently to rule on whether the proposed settlement is 'fair, reasonable, and adequate.'" *Id*. (*quoting* Manual For Complex Litigation at 57); *see also Diaz v. Romer*, 801 F. Supp. 405, 407 (D. Colo. 1992), *aff'd* 9 F.3d 116 (10th Cir. 1993), *citing Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (granting final approval of the settlement if it is fair, reasonable, and adequate); *Spann v. AOL Time Warner Inc.*, *supra* at * 6 (same).[6]

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[6]In assessing the fairness, reasonableness and adequacy of a class settlement at a final approval or fairness hearing, the court must balance the following nine factors:

(a) the complexity, expense and likely duration of the litigation;
(b) the reaction of the class to the settlement;
(c) the stage of the proceedings and the amount of discovery completed;
(d) the risks of establishing liability;
(e) the risks of establishing damages;
(f) the risks of maintaining the class action through the trial;
(g) the ability of the defendants to withstand a greater judgment;
(h) the range of reasonableness of the settlement fund in light of the best possible recovery; and
(i) the range of reasonableness of the settlement fund to a possible recovery in

As is the case here, "[t]here 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 Herbert B. Newberg And Alba Conte, Newberg On Class Actions, §11.41, at 11-88 (3d ed. 1992); *see also Hispanics United v. Village of Addison,* 988 F. Supp. 1130, 1150 n.6 (N.D. Ill. 1997) ("A strong initial presumption of fairness attaches to the proposed settlement when it is shown to be the result of this type of a negotiating process." (citation omitted)). The standard for granting preliminary approval of the proposed settlement is a determination of "whether the proposed settlement is 'within the range of possible approval.'" *Armstrong*, 616 F.2d at 314. The purpose of the preliminary approval process is for the court to ascertain whether reason exists to proceed by notifying the class members of the settlement and to hold a fairness hearing. *Id*. In considering whether to grant a motion of preliminary approval of a proposed settlement agreement, the Court utilizes a "threshold inquiry" intended merely to disclose conspicuous defects. *See In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330,

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> light of all the attendant risks of litigation and the strength of plaintiff's case, weighed against the settlement offer.

Spann v. AOL Time Warner Inc., *supra* at * 6 (stating the factors outlined in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir.1974)); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d at 1014 (articulating similar standard); *see also Armstrong*, 616 F.2d at 314 (*citing* Manual For Complex Litigation 56 (1977) and 3B James Wm. Moore et al., Moore's Federal Practice 23.80(4), at 23-521 (2d ed. 1978)). At this time, as the only question before the Court is whether to grant preliminary approval to the proposed Settlement, the Court's consideration of these factors should await the final approval (*i.e.*, the fairness) hearing. In other words, the standard at the preliminary approval stage is different. *Armstrong*, 616 F.2d at 314. Preliminary approval is given before class members are notified that a settlement agreement has been reached. Thus, the pre-notification preliminary approval process requires a less rigorous standard of judicial scrutiny than the final fairness hearing. *Odon USA Meats, Inc. v. Ford Motor Credit Corp.*, 1994 WL 529339 at * 7 (N.D. Ill. Sept. 27, 1994).

337-38 (N.D. Ohio 2001). Thus, preliminary approval is appropriate:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval....

Manual For Complex Litigation §30.41 at 265 (3d ed. 2000). Unless the Court's initial examination "disclose[s] grounds to doubt its fairness or other obvious deficiencies," the Court should order that notice of a formal fairness hearing be given to class members under Rule 23(e). *Id*. Considering the issues, evidence and nature of the settlement negotiations in this case, preliminary approval clearly is proper in this instance.

1. The Settlement Agreement Is A Result Of Non-Collusive Negotiations

The proposed Settlement Agreement is a product of "serious, informed, non-collusive negotiations." Manual For Complex Litigation §30.41 at 265 (3d ed. 2000); *see also Armstrong*, 616 F.2d at 314. Settlement discussions occurred over a period of almost one (1) full year, which occurred before, during and after the trial with respect to liability. As the Court knows, this case has been hard fought, and the settlement negotiations were extensive and adversarial in nature. Moreover, the Parties were able to reach the settlement only after working with a respected mediator (Mark E. Segall, Esquire of JAMS in New York) for several full days, and then engaging in direct negotiations based upon the evidence adduced at trial and their independent assessments, which were assisted by the Court, regarding the merits and risks of this litigation. There plainly was no collusion with respect to this proposed Settlement Agreement.

As a distinguished commentator on class actions has noted:

> There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel

> for the class, is presented for court approval
>
> * * *
>
> The initial presumption of fairness of a class settlement may be established by showing:
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> 1. That the settlement has been arrived at by arm's length bargaining.
>
> 2. That sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently; and
>
> 3. That the proponents of the settlement are counsel experienced in similar litigation.

Herbert B. Newberg and Alba Conte, Newberg On Class Actions §11.41 at 11-88, 11-91 (3d ed. 1992); *see also City P'ship Co. v. Atl. Acquisition ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). In this case, as explained above, the terms of the Settlement Agreement were reached during extensive arm's-length negotiations by experienced counsel after thorough investigation. In addition, the Parties have vigorously litigated this case and have thoroughly explored the issues in this Litigation. Finally, counsel for Plaintiffs and Defendant are experienced in ERISA and class action litigation. Therefore, the Court should find that an initial presumption of fairness exists to support preliminary approval of the Settlement Agreement.

2. <u>The Settlement Has No Obvious Deficiencies</u>

The terms of the Settlement Agreement are fair and reasonable and adequately resolve the dispute as to Defendant, particularly in light of the risks posed to each side by continued litigation. The Settlement provides substantial and meaningful benefits in the form of cash payments and changes in business practices and the disclosure of important, meaningful information regarding revenue sharing, as well as regarding expenses, and an opportunity for

Plans to invest in mutual funds that do not pay Defendant revenue sharing, while paying for services through direct and transparent charges. There are no obvious deficiencies in the proposed Settlement.

3. Class Counsel Recognize That The Litigation Was Hard Fought, The Outcome Was Far From Certain And That A Possibility Existed That Continued Litigation Against Defendant Could Have Resulted In Little Or No Recovery

It is Class Counsel's considered opinion that the recovery from ING under this Settlement is fair and reasonable. Although Plaintiffs and Class Counsel would have obviously sought more in any trial if the Parties had reached a damages phase, the value of the Settlement constitutes a substantial recovery under all of the circumstances. Moreover, notwithstanding the confidence of Class Counsel in the merits of the Plaintiffs' claims, Class Counsel are cognizant that no case is a sure winner at trial and that ING had arguments and potential defenses available to it, including potential arguments and defenses to substantially limit any damages recovered by the Class if Plaintiffs were successful in securing a judgment as to liability (which, of course, also constituted a significant risk despite Plaintiffs' belief that they were correct on the merits). Indeed, during the trial, the Parties fully explored and tested the merits of each other's claims and defenses regarding liability. Under all of these circumstances, Plaintiffs respectfully submit that the proposed Settlement Agreement is clearly fair, reasonable, and adequate.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of the Settlement with ILIAC and that the Court approve the form of Class Notice and establish a date for a final approval hearing. In order to provide sufficient time for notice to the Class and an opportunity to object or opt-out of the Settlement, the Parties respectfully and jointly request that the Court schedule a date for a final approval hearing on or after August 14, 2014 that is convenient to the Court.

Dated: April 11, 2014

Respectfully submitted,

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