THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 1:18-CV-01897-DDD-SKC

PHT Holding I LLC,
on behalf of itself and all others similarly situated,

Plaintiff,

v.

SECURITY LIFE OF DENVER INSURANCE COMPANY,

Defendant.

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

After four-and-a-half years of hard-fought litigation, Plaintiff obtained a phenomenal settlement less than 36 hours before trial. The Settlement provides the following benefits to the Class:[1]

- **CASH:** A $30 million cash payment. This is not a claims-made settlement. Checks will be mailed directly to class members and settlement funds do not revert to SLD.
- **COI RATE SCHEDULE INCREASE FREEZE**: A prohibition on any new cost of insurance ("COI") scale increase for five years.
- **VALIDITY STIPULATION AND STOLI WAIVER**: An agreement by SLD not to challenge the validity and enforceability of policies on the grounds of lack of an insurable interest, stranger originated life insurance ("STOLI"), or misrepresentation.

The cash alone is exceptional: It represents approximately 50% of Plaintiff's maximum damages model and approximately 87% of an alternative model that Plaintiff intended to present at trial. It thus provides a far better recovery than another COI settlement that a court recently described as "quite extraordinary." *See 37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:10 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI*") (approving COI settlement with cash fund of 42% of overcharges and no quantified non-monetary benefits). The cash is particularly noteworthy because the Court permitted SLD to argue to the jury that there were essentially no damages. Sklaver Decl., Ex. 4 ("2/9 Tr.") at 5:3-14. And the non-cash component adds even more value and provides benefits the Class could not have obtained even with a trial victory.

Plaintiff was able to achieve these extraordinary results by litigating to the brink of trial, only after obtaining key pretrial victories that greatly enhanced the value of the case in Defendant's

[1] Unless otherwise noted, capitalized terms mean the same as in the Settlement Agreement, which is attached as Exhibit 2 to the Declaration of Steven G. Sklaver.

eyes, including a key victory on jury instructions for *contra proferentem*, the denial of SLD's motion to decertify, and the denial of SLD's motion to strike Plaintiff's damages model. 2/9 Tr. at 3:10, 3:25-4:3, 5:3-5; Dkt. 219-2 at 18-19. On preliminary approval, the question is whether the Court "will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). The Settlement easily surpasses that bar.

BACKGROUND

I. The Litigation

In 2015, SLD raised COI rates on two universal life insurance products: Strategic Accumulator Universal Life (SAUL) and Life Design Guaranteed Universal Life (LDGUL). Plaintiff filed a putative class action lawsuit in July 2018 challenging that rate hike.[2]

Class Counsel invested enormous effort, obtaining and analyzing over 80,000 pages of documents, including over 1,000 spreadsheets and many technical actuarial tables and memoranda; worked with liability and damages experts; issued 13 third-party subpoenas to SLD's reinsurers and actuarial advisors; and took and defended 15 technical depositions. *See* Sklaver Decl. ¶ 9. Class Counsel's efforts included discovery concerning the non-uniformity of the COI Increase at issue for trial—the fact of which was not apparent from any public information. *Id.* ¶ 15.

The Court initially denied Plaintiff's motion for class certification without prejudice. Dkt. 81. The Court asked whether different state rules regarding the "role of extrinsic evidence in interpreting" form contracts "would be manageable." *Id.* at 15-16. Plaintiff filed a renewed motion providing over 50 pages of surveys marshaling the law across the nearly nationwide class on state

[2] Advance Trust & Life Escrow Services, LTA initially filed the action. The Court later granted the parties' stipulation to substitute PHT Holding I LLC as Plaintiff and Class Representative. Dkt. 205.

rules of contract interpretation and synthesized that law into a manageable approach for trial. Dkt. 87. Concluding that Plaintiff had "done its homework," the Court certified the Class. Dkt. 141 at 19. Simultaneously, the Court granted in part and denied in part SLD's summary judgment motion, dismissing two of Plaintiff's three theories but holding that triable issues remained with respect to the "uniformity" theory. Dkt. 141.

Following class certification, the Court approved the proposed notice plan and Class Members were notified and given a 45-day window to opt out. Dkt. 148, Dkt. 142-1 ¶ 15. No class member opted out. Intrepido-Bowden Decl. ¶ 15.

The Court set the trial for February 13, 2023, and the parties prepared intensely for it, including readying trial examinations, deposition designations, exhibit lists, witness lists, stipulations, jury instructions, and verdict forms. Sklaver Decl. ¶ 17; Dkt. 161. Each party filed a trial brief and briefed nine motions *in limine*, including one SLD filed to exclude Plaintiff's damages model. Dkts. 168, 170, 183, 186, 187, 193; Sklaver Decl. ¶ 17. Before this, on October 12, 2022, Plaintiff conducted a mock trial in Denver, involving dozens of local residents acting as jurors. Sklaver Decl. ¶ 8. Following the pretrial conference, the Court ordered supplemental briefing on how the jury should be instructed on *contra proferentem*. Dkt. 199. Within days, Plaintiff filed 56 pages of briefing on the issue. Dkts. 203, 206. Then, with trial six days away, SLD moved to decertify the class. Dkt. 208. The Court asked for briefing on another question regarding class certification. Dkt. 211. Plaintiff filed a 15-page response. Dkt. 212. On February 9, the Court announced it would deny SLD's motions to decertify the class and to exclude Plaintiff's damages model, and issued rulings on jury instructions. 2/9 Tr. at 3:10, 3:25-4:3, 5:3-5; Dkt. 219-2 at 18-19.

II. Settlement Negotiations

The parties executed a term sheet with trial less than 36 hours away. Sklaver Decl. ¶¶ 5-6. The negotiations that led to that settlement were arm's length. Throughout the case, the parties exchanged numerous offers and counteroffers and engaged in a good faith, though ultimately unsuccessful, mediation with Retired Chief U.S. Magistrate Judge Arthur Boylan. Sklaver Decl. ¶ 7. Following the February 9, 2023 trial preparation conference, with virtually all pre-trial issues resolved, and while preparing for the fast-approaching trial, counsel negotiated over the subsequent two days, including an in-person meeting, which led to a term sheet. *Id.* A long-form settlement agreement was negotiated and agreed to thereafter. *Id.* ¶¶ 5-6.

III. The Settlement

A. Consideration and Class

SLD will fund a $30 million cash Settlement Fund. Sklaver Decl., Ex. 2 ("Settlement Agreement") § 2.1. No portion will revert to SLD. *Id.* § 2.8. The Settlement also provides two forms of non-cash relief. *First*, SLD will not increase the COI rate schedules on the class members' policies above the schedule imposed in 2015 at any time prior to March 31, 2028. *Id.* § 3.1. *Second*, SLD will not challenge the validity and enforceability of any class policies on the grounds of lack of an insurable interest, STOLI, or misrepresentation. *Id.* § 3.2.

The Class is the class the Court already certified: "[a]ll owners of [SAUL] . . . policies subjected to [SLD's COI] rate increase announced in September 2015, excluding owners whose policies issued in Alaska, Arkansas, New Mexico, Virginia, and Washington, and SLD, its officers and directors, members of their immediate families, and their heirs, successors, or assigns." Settlement Agreement § 1.4.

B. The Release

The Class will release SLD from "all SAUL Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures

to act that were alleged or could have been alleged in the Action related to the COI Rate Increase." Settlement Agreement § 1.36. The release excludes, among other things, claims that arise from a future COI rate schedule increase, claims to enforce a death benefit, and claims arising out of the COI Rate Increase imposed on the LDGUL policies. *Id.* § 1.17. The parties agreed to propose a final judgment that expressly preserves Plaintiff's right to pursue an appeal with respect to the LDGUL policies' dismissed theories. *Id*. § 4.7.

C. Fees, Costs, and Awards

Plaintiff will move for attorneys' fees not to exceed 33 1/3% of the $30 million cash fund and reimbursement of all expenses incurred or to be incurred. Plaintiff may request a service award up to $35,000 for services on behalf of the Class. Settlement Agreement § 5.1. The Settlement is not conditioned on the Court's approval of these requests. *Id.* § 5.4.

IV. Notice and Distribution Plan

Under the proposed notice plan, as it did previously, the Court would appoint JND as administrator. Within 30 days of preliminary approval, JND will mail a short-form notice to the Class Members' addresses in SLD's files. Intrepido-Bowden Decl. ¶ 32; *id.*, Ex. B. JND will also post a copy of a long-form notice to the website it established following class certification and will maintain a toll-free number for Class Members to obtain information. *Id.* ¶ 35; *id.*, Ex. C. Class Members will be notified of their right to object and the timeline and manner to do so. *Id.*, Exs. B, C. Because Class Members were previously given the opportunity to opt out and none did, there is no proposed second opt-out period.

The proposed plan of allocation distributes proceeds directly to class members on a *pro rata* basis after a minimum settlement payment is made. Sklaver Decl., Ex. 5 (plan of allocation). Each class member's *pro rata* share of the Net Settlement Fund will be its share of the total COI overcharges reflected in the Supplemental Report of Robert Mills—*i.e.*, the difference between the

COI charges assessed on the policy since the 2015 COI increase and the COI charges that would have been assessed but for the 2015 COI increase. Sklaver Decl. ¶ 29. Each class member will receive its check in the mail automatically, without needing to complete a form. *Id.*

ARGUMENT

I. The Settlement Warrants Preliminary Approval

A. Legal Standard

A class action settlement is subject to approval under Rule 23(e). "Approval of a proposed settlement is committed to the sound discretion of the trial court." *O'Dowd v. Anthem, Inc.*, 2019 WL 4279123, at *12 (D. Colo. Sept. 9, 2019) (citing *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984)). "The presumption in favor of voluntary settlement agreements is especially strong in class actions." *Id.*

Preliminary approval of a class action is a "provisional step" and requires "at most a determination that there is probable cause to submit the proposal to class members and hold a full-scale hearing as to its fairness." *Suaverdez v. Circle K Stores, Inc.*, 2021 WL 4947238, at *2 (D. Colo. June 28, 2021), *report and recommendation adopted*, 2021 WL 5513740 (D. Colo. Oct. 19, 2021). At this stage, the Court must direct notice of the settlement "if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, provides that a court may approve a proposed class settlement "only on finding that it is fair, reasonable, and adequate after considering whether" a variety of factors are satisfied, discussed in detail below.

These factors, introduced to Rule 23 in December 2018, "are not intended to displace the considerations that the Circuits apply to assess proposed settlements." *O'Dowd*, 2019 WL

4279123, at *12. Instead, they "'focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'" *Id.* (quoting Rule 23, 2018 Advisory Note, Subdivision (e)(2)). "A proposed settlement of a class action should therefore be preliminarily approved where it appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to class representatives." *Hunter v. CC Gaming, LLC*, 2020 WL 13444205, at *6 (D. Colo. May 12, 2020) (internal quotation marks omitted).

B. The Settlement Satisfies Rule 23(e)(2)

1. The Class Representative and Class Counsel Have Adequately Represented the Class

Adequacy involves "two questions": whether "the named plaintiffs and their counsel have any conflicts of interest with other class members" and whether "the named plaintiffs and their counsel" have "prosecute[d] the action vigorously on behalf of the class." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002).

The Court already held that the class representative and Class Counsel adequately represent the Class. Dkt. 205; Dkt. 141 at 22-23. Proceeds will be distributed on a *pro rata* basis after a minimum settlement payment is made to all class members. All class members share an overriding interest in obtaining the largest monetary recovery possible, *see Paulson v. McKowen,* 2022 WL 168708, at *6-7 (D. Colo. Jan. 19, 2022) (class representative adequate where plaintiff and class members "share the same interest in maximizing their recovery from defendants"), and Plaintiff and Class Counsel vigorously litigated this case to the brink of trial.

2. The Parties Negotiated at Arm's Length

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." Where a settlement has "resulted from arm's length negotiations between experienced counsel after

significant discovery had occurred," a court "may presume the settlement to be fair, adequate, and reasonable." *Lucas v. Kmart Corp*., 234 F.R.D. 688, 693 (D. Colo. 2006). Here, the settlement is the result of arm's-length negotiations among competent, experienced counsel with substantial COI class action experience and the settlement occurred after completing all discovery.

3. The Relief Is Adequate

i) Costs, Risks, and Delay of Trial and Appeal

To assess the adequacy of relief under Rule 23(e)(2)(C)(i), "courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." Rule 23, 2018 Advisory Note, ¶¶ (C) & (D).

Here, substantial risks existed as to both liability and damages. At issue were technical actuarial disputes that the jury could decide either way. Plaintiffs' proof relied on expert evidence that was controverted by Defendant's expert and that the jury might not have accepted. *See Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *9 (S.D.N.Y. Sept. 9, 2015) (noting, in light of competing expert opinions concerning actuarial concepts in COI case, it was "unclear how a jury would decide these disputed issues at trial"); *In re Bear Stearns*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured.").

Moreover, the Court permitted SLD to argue to the jury that the proper measure of damages would be, at most, "the delta between what COI rates were and what they would have been had the rate increase been spread uniformly." Dkt. 170 at 4. If the jury accepted that argument, it would have wiped out virtually all of the Class's damages. Even if Plaintiff prevailed at trial, the case would likely have been tied up in years of post-trial briefing and appellate practice. *See Fleisher*, 2015 WL 10847814, at *6.

ii) Proposed Method of Distributing Relief

The second Rule 23(e)(2)(C) subfactor considers "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). Under this subfactor, the court examines whether the claims processing method "facilitates filing legitimate claims" and "whether the claims process is unduly demanding." *Montgomery v. Cont'l Intermodal Grp.*, 2021 WL 1339305, at *6 (D.N.M. Apr. 9, 2021). Plaintiff's proposed plan of distribution requires nothing of the class members: The class members are identified from SLD's records and each member is sent a check in the mail automatically. *See* Sklaver Decl. ¶ 29; Intrepido-Bowden Decl. ¶ 32.

iii) Proposed Award of Attorneys' Fees

The third Rule 23(e)(2)(C) subfactor considers "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Plaintiff will move for attorneys' fees not to exceed 33 1/3% of the $30 million settlement fund, and reimbursement for all expenses incurred or to be incurred, payable only from the Settlement Fund. *See, e.g.*, *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1264 (10th Cir. 2023) (affirming 33% fee award, noting that such an award "falls within the range of fee percentages awarded in securities class actions and other comparable complex class actions in this Circuit"); *Lucken Fam. Ltd. P'ship, LLLP v. Ultra Res., Inc.*, 2010 WL 5387559, at *5 (D. Colo. Dec. 22, 2010) (customary to award class counsel fee of one-third of economic benefit to class in common fund settlement).

iv) Agreements Required to Be Identified Under Rule 23(e)(3)

The final subfactor, Rule 23(e)(2)(C)(iv), considers "any agreement required to be identified under Rule 23(e)(3)." Rule 23(e)(3) requires the "parties seeking approval" to "file a statement identifying any agreement made in connection with the proposal." There are no agreements beyond the Settlement Agreement.

v) The Relief

The $30 million cash component of the settlement alone is an extraordinary recovery given the risks faced at trial on both damages and liability. Liability would have been a battle of the experts, and SLD advanced numerous arguments that would have dramatically reduced, if not eliminated, the Class's damages. Plaintiff's *maximum* damages model, which set damages as the total class-wide COI overcharges, equaled $59,420,913. Sklaver Decl. ¶ 23. Plaintiff's alternative damages model calculated damages as $34,441,536. *Id.* Defendant's argument that damages at most were "the delta between what COI rates were and what they would have been had the rate increase been spread uniformly" would have resulted in damages that were substantially less. Given the risks the class faced, a $30 million cash fund—over 50% of the maximum damages model, and approximately 87% of the alternative damages model—is a phenomenal result.

The non-monetary benefits make the relief even more exceptional. The COI freeze gives class members certainty on what their COI obligations will be through ***March 2028***, which is 13 years after the COI increase at issue in this case. Thus, the class is protected from further COI increases, such as those that have recently been announced by other carriers in the wake of COVID. Sklaver Decl. ¶ 27. The validity agreement also substantially benefits the class, as SLD is giving up its right to challenge the validity of policies, thereby helping ensure that the death benefits otherwise owed to the class members will be paid.

In approving a prior COI class action settlement, the Southern District of New York described a settlement that provided for a cash fund equal to 42% of overcharges, with no quantified non-monetary benefits, as "quite extraordinary." *Hancock COI*, Dkt. 164 at 20:10. This settlement provides far better cash relief, plus substantial non-monetary benefits on top. When compared to other class actions, the settlement is even more favorable. For example, when granting final approval and awarding a 33% fee in *Voulgaris*, this Court explained that the settlement—

which provided the class between 25% and 35% of total recoverable damages—"dwarf[ed] the median class action settlement for similar cases in the Tenth Circuit." 2021 WL 6331178, at *6. The median percentage for securities class actions with damages between $25 million and $74 million, this Court recounted, was 7.6%, *id.*, further establishing that this Settlement that provides ***50%*** of the total recoverable damages and ***87%*** of the class's alternative damages model is an extraordinary result. *See also Marshall v. Northrop Grumman Corp.,* 2020 WL 5668935, at *2, *12 (C.D. Cal. Sept. 18, 2020) (concluding that settlement for "approximately 29% of Plaintiffs' claimed damages" was "an exceptional result," awarding 33% fee, and collecting seven cases where settlement fund approved as percentage of recovery was lower than 29%).

4. The Proposal Treats All Class Members Equitably

The final Rule 23(e)(2)(D) factor focuses on equitable treatment of class members, which is easily satisfied because the proposed plan of allocation distributes settlement proceeds on a *pro rata* basis using each class member's share of the total damages after a minimum settlement is made to all class members. Sklaver Decl. ¶ 29; *O'Dowd*, 2019 WL 4279123, at *14 (finding that a "Plan of Allocation [that] provides for distribution to Settlement Class Members based on a pro rata calculation that applies to every member" satisfies the equitability factor). The releases are also equitable, as they treat all class members equally and do not affect apportionment of damages.

5. Class Counsel Believes the Settlement Is Fair and Reasonable

The Tenth Circuit has identified an additional factor that does not directly overlap with the Rule 23(e)(2) factors: "the judgment of the parties that the settlement is fair and reasonable." *Rutter*, 314 F.3d at 1188. Under this factor, "the recommendation of a settlement by experienced plaintiffs counsel is entitled to great weight." *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288-89 (D. Colo. 1997). Class Counsel has extensive experience in complex class actions,

including nearly a dozen COI cases, and it is Class Counsel's unequivocal opinion that this settlement is fair, reasonable, and adequate. Sklaver Decl. ¶¶ 3-4, 32.

C. The Court Need Not Re-Certify the Class

"If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted." Rule 23, 2018 Advisory Note, Subdivision (e)(1). Here, the Settlement does not call for any such changes.

II. The Proposed Form and Manner of Notice Is Appropriate

Rule 23(e)(1)(B) requires that notice be directed "in a reasonable manner to all class members who would be bound by the proposal." That rule, as well as the Due Process Clause, requires that notice be the "best [] practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005).

Plaintiff's proposed notice plan is substantially the same as the one the Court previously approved and should be approved for the same reasons. *See* Dkt. 148. Notice delivery by first-class mail is specifically authorized by Rule 23 and was approved by the Court. *See* Rule 23(c)(2)(B); *id.*. The Court also previously approved JND as the Notice Administrator. Dkt. 148. JND adequately discharged its duties in that role. Sklaver Decl. ¶ 16. The notices will plainly inform class members about the settlement terms, the plan of distribution, the allocation of fees and expenses, their right to object, and the final approval hearing. *See* Intrepido-Bowden Decl., Exs. B, C.

The only substantive difference from the previous Court-approved plan is that this one does not propose a second opt-out period. None is required. Cases in which courts order a second opt-out period are "rare," and nothing here warrants an exception from that general practice. *See*

Principles of the Law of Aggregate Litigation § 3.11, Reporters' Notes, *cmt. a*; *see also, e.g.*, *Low v. Trump University*, 246 F. Supp. 3d 1295, 1310-1311 (S.D. Cal. 2017) (approving settlement without second opt-out opportunity, rejecting argument that second opt-out period was required), *aff'd*, 881 F.3d 1111 (9th Cir. 2018); *Hainey v. Parrott*, 617 F. Supp. 2d 668, 679 (S.D. Ohio 2007) (rejecting second opt-out period, which "would result in additional administrative costs, which in turn reduces the amount available for distribution").

III. Proposed Schedule

Plaintiff proposes the following schedule:

Event	Days from Preliminary Approval[3]
Deadline to send notice to Class Members	30 days
Deadline to file motion for award of attorneys' fees, expenses, service awards	60 days
Deadline to object to Settlement	75 days
Deadline to file final approval motion	90 days
Deadline to file any reply brief in support of any motion	103 days
Final Approval Hearing	110 days

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court (i) preliminarily approve the proposed Settlement, plan of allocation, and the form and manner of notice; (ii) direct notice to the Class; (iii) adopt Plaintiff's proposed schedule; and (iv) schedule a final approval hearing.

[3] SLD is also required to serve notice of the proposed Settlement upon the appropriate officials within 10 days after this motion is filed. 28 U.S.C. § 1715.

Dated: March 31, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

/s/ Zachary B. Savage

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, a true and correct copy of the foregoing document was served on all parties of record via the Court's CM-ECF system.

/s/ Zachary B. Savage