IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 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.

DECLARATION OF STEVEN G. SKLAVER IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

I, Steven G. Sklaver, declare as follows:

1. I submit this declaration in support of preliminary approval of the proposed class action settlement in this matter between Plaintiff, on behalf of itself and the proposed class, and Defendant Security Life of Denver Insurance Company ("Security Life" or "Defendant").

2. I am a partner in the law firm of Susman Godfrey L.L.P., which is counsel for Plaintiff and the Court-appointed Class Counsel (referred to herein as "Class Counsel") in the above-captioned matter. I am a member in good standing of the bar of this Court. I have personal, first-hand knowledge of the matters set forth herein and, if called to testify as a witness, could and would testify competently thereto.

3. Susman Godfrey has significant experience with insurance litigation and class actions, including cost of insurance ("COI") class actions and settlements thereof. Susman

Godfrey has been appointed sole Class Counsel in numerous cases seeking recovery of COI overcharges against insurers, including cases involving Phoenix Life Insurance Company, AXA Equitable Life Insurance Company, Genworth Life Insurance & Annuity Company, Voya Retirement Insurance and Annuity Company, Lincoln Life & Annuity Company of New York, ReliaStar Life Insurance Company, John Hancock Life Insurance Company (U.S.A.), North American Company for Life and Health Insurance, and PHL Variable Insurance Company.[1] A copy of the firm's profile in such cases, and the profiles of myself and my fellow Class Counsel, are attached hereto as **Exhibit 1**.

4. My firm's results in such cases have been lauded by federal judges as "superb." *Fleisher v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405 (S.D.N.Y. Sep. 24, 2015), Dkt. 319 at 3:9-11, "the best settlement pound for pound for the class I've ever seen," *id.*, and "quite extraordinary," *37 Besen Parkway, LLC v. John Hancock Life Insurance Co.*, 15-cv-9924 (PGG), Dkt. 164 at 20:10 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI*"). I also closely follow other class actions involving life insurance, particularly COI class actions. I am thus intimately familiar with the terms of settlement in these types of cases, how to evaluate the relative strengths and weaknesses in such cases, and what a successful result looks like.

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[1] The following is a non-exhaustive list of COI cases in which Susman Godfrey has been found to be "adequate" class counsel: *Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 12224042, at *12 (S.D.N.Y. July 12, 2013); *Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y.*, 2022 WL 986071, at *5 (S.D.N.Y. Mar. 31, 2022); *In re AXA Equitable Life Ins. Co. COI Litig.*, 2020 WL 4694172, at *16 (S.D.N.Y. Aug. 13, 2020); *Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374, 387 (S.D.N.Y. 2019); *Advance Tr. & Life Escrow Servs., LTA v. ReliaStar Life Ins. Co.*, 2022 WL 911739, at *11 (D. Minn. Mar. 29, 2022); *Advance Tr. & Life Escrow Servs., LTA v. N. Am. Co. for Life & Health Ins.*, 592 F.Supp. 3d 790, 809-10 (S.D. Iowa 2022); and *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15 Civ. 9924 (S.D.N.Y. Nov. 1, 2018), Dkt. 139 ¶¶ 7-8.

5. I was the principal negotiator of the proposed class action settlement with Defendant. Following extensive negotiations, the parties signed a binding term sheet early in the morning on February 12, 2023, less than 36 hours before jury selection was to start, and the final long-form Settlement Agreement was executed on March 29, 2023. I attach a true and correct copy of the Settlement Agreement as **Exhibit 2**. It is the opinion of Class Counsel that this settlement with SLD is fair, adequate, and reasonable. Indeed, given the unique risks and issues present in this case, the result here is on par, or even better than, the results in *Fleisher* and *Hancock COI*. Plaintiff similarly supports this settlement and believes it to be fair, adequate, and reasonable.

6. The Settlement Agreement is the result of extended discussions between the parties with a trial that was less than 36 hours away. Following the February 9, 2023 trial preparation conference, at which the Court directed counsel to make one more good faith attempt to resolve the case, counsel for both sides engaged in extensive discussions over the next 48 hours, including an in-person meeting between me and Security Life's lead lawyer, Clark Johnson, on the morning of February 11. By the end of that night, a term sheet had been agreed upon that resolved all material terms except for one (the length of the COI increase moratorium). The parties resolved that one remaining issue, and appeared in Court on February 13—the day the trial was set to begin—to report on the settlement and answer any questions the Court had. A long-form settlement agreement was negotiated and agreed to over the course of the following six weeks, and fully executed on March 29, 2023.

7. Throughout the life of the case, the parties exchanged numerous settlement offers and counteroffers and engaged in a good faith, though ultimately unsuccessful, mediation with Retired Chief U.S. Magistrate Judge Arthur Boylan, which was held before the

Court ruled on the then-pending renewed motion for class certification and motion for summary judgment. The parties' sharply different views about virtually all issues, including class certification, merits, damages, and what could be argued to the jury, however, made it extremely difficult to reach any agreement, or even come close to one. More than two years later, by February 11, 2023, however, the Court had resolved virtually all pre-trial issues, and the Court's comments at the final trial preparation conference helped encourage the parties to continue their ongoing settlement discussions.

8. It would be an understatement to say that Class Counsel was well informed of all material facts. This case had long advanced past class certification and summary judgment; full expert reports had not only been completed but supplemented with updated damage figures as of December 30, 2022; the parties' motions *in limine*, exhibit objections, and deposition designations had all been ruled upon; Security Life's motion for decertification had been denied; and the Court had already issued proposed jury instructions and a proposed verdict form after voluminous briefing by both sides. Throughout this case, Class Counsel took steps to ensure that we had all the necessary information to advocate for a fair, adequate, and reasonable settlement that serves the best interests of the Class. These efforts included a professionally-administered full-day mock trial in Denver on October 12, 2022 with over two dozen mock jurors from the local community. The settlement negotiations were hard fought and non-collusive. It is my unequivocal opinion that the Settlement is fair, adequate, and reasonable, and reflects a tremendous result for the Class, particularly given the risks faced at trial.

9. This case was originally filed more than four-and-a-half years ago on July 26,

2018. Fact discovery lasted until August 30, 2019, with supplemental discovery obligations under Federal Rule of Civil Procedure 26(e) continuing thereafter. Plaintiff and its experts analyzed over 80,000 pages of documents, which included extensive actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all Class Members' policies, and over one thousand spreadsheets. Plaintiff issued numerous requests for production, interrogatories, and requests for admissions, and engaged in multiple rounds of meet and confers with respect to these discovery requests, including extended negotiations over search terms, custodians, and other issues.

10. Plaintiff also issued thirteen subpoenas to relevant third parties, including SLD's reinsurers and actuarial and financial advisors. Plaintiff obtained thousands of pages of valuable documents from these subpoenas, much of which had not already been produced by SLD.

11. Plaintiff took and defended 15 highly technical fact depositions (some of which took place over two days).

12. Expert discovery lasted until June 17, 2020. Plaintiff designated two experts and produced expert reports from: actuarial expert Howard Zail and damages expert Robert Mills. Plaintiff produced opening expert reports from Zail and Mills on January 22, 2020. In rebuttal, Security Life designated actuarial expert Timothy Pfeifer. All three experts were deposed. Mr. Mills also supplemented his expert report on February 6, 2023 in accordance with the parties' agreement. Security Life then moved to strike portions of that expert report in the week leading up to trial, a motion that Plaintiff responded to within 48 hours. Collectively, the parties produced four expert reports that totaled 148 pages, with over 3,503 pages of exhibits

and appendices. Class Counsel also retained several consulting experts, who provided invaluable assistance to Plaintiff and the Class.

13. The Court initially denied Plaintiff's motion for class certification without prejudice, concluding that although "factual issues predominate[d]," there remained a "question" regarding whether "differences in state contract law defeat the predomination element" of the Rule 23(b)(3) inquiry. Dkt. 81 at 7, 15. The Court asked whether different state rules regarding the "role of extrinsic evidence in interpreting" form contracts "would be manageable," and invited additional briefing on that issue. *Id.* at 15-16.

14. In response, Plaintiff filed a renewed motion that provided over 50 pages of comprehensive surveys marshaling the law across the nearly nationwide class on state rules of contract interpretation and synthesized that law into a manageable approach for trial. *See* Dkt. 87. Concluding that Plaintiff had "done its homework," Dkt. 141 at 19, the Court certified the following class: "All owners of Strategic Accumulator Universal Life ('SAUL') . . . policies subjected to Security Life of Denver's ('SLD') cost of insurance ('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." The Court also appointed Susman Godfrey as Class Counsel, finding that "Susman Godfrey will adequately and fairly represent the class," and that it had "demonstrated that it will expend significant resources in representing the class." Dkt. 141 at 22. Simultaneously, the Court granted in part and denied in part SLD's motion for summary judgment, dismissing two of Plaintiff's three theories of breach but holding that triable issues remained with respect to the "uniformity" theory. Dkt.

141.

15. The alleged "uniformity" breach was not apparent from any publicly-available documents. The COI increase notice sent to Class Members stated that "We are applying this increase to all policies that are the same version as the policy you purchased." Plaintiff and other Class Members had no way of knowing that there were other SAUL policies with the same "premium class and whose policies have been in effect for the same length of time" that did not receive any COI increase. It was only through Class Counsel's efforts in discovery, including specific document requests, interrogatories, and deposition questions, that this theory of breach was even unveiled. Indeed, Security Life even argued that class certification could not be granted on the uniformity claim because it was not adequately pled in the Complaint.

16. Following class certification, the Court approved Class Counsel's proposed notice plan and appointed JND Legal Administration LLC ("JND") as the Notice Administrator. Dkt. 148. Class Members were given notice by first-class mail and were given a 45-day window in which to opt out. Dkt. 142-1 ¶ 15. JND also set up a website with information in a long-form notice, as well as a toll-free number that Class Members could call. *Id.* ¶ 13-14. No class members opted out. It is my opinion that JND adequately discharged its duties in its role as the Notice Administrator.

17. The Court then set a trial date for February 13, 2023, and the parties began trial preparation. In the lead-up to the final pretrial conference, which took place on January 25, 2023, the parties exchanged and submitted deposition designations, exhibit lists, witness lists, stipulations, proposed jury instructions, and proposed verdict forms. Each party filed a trial

brief, and the parties also briefed nine motions *in limine*, including a motion *in limine* filed by Defendant to exclude Plaintiff's damages model altogether. Dkts. 168, 170, 183, 186, 187, 193.

18. The transcript of the January 25, 2023 final pretrial conference is attached hereto as **Exhibit 3**.

19. Following the pretrial conference, the Court ordered supplemental briefing on whether and how the jury should be instructed regarding the *contra proferentem* rule of contract interpretation, which construes ambiguous contracts against the drafter. Simultaneous opening briefs were due six days later, on January 31, and responses were due three days after that, on February 3. Dkt. 199. After Plaintiff had filed 56 pages of supplemental briefing on the *contra proferentem* issue, on February 7, with trial six days away, SLD filed a motion to decertify the class. Dkt. 208. The Court ordered Plaintiff to respond to the motion to decertify by the following day, Dkt. 209, and then, on the day that Plaintiff's response was due, the Court asked for briefing on another question related to class certification and extended the deadline by a day, to February 9. Dkt. 211. Plaintiff filed a 15-page response. Dkt. 212.

20. On February 9, 2023 the Court held another conference. The transcript of that conference is attached hereto as **Exhibit 4**.

21. At the February 9 conference, the Court announced that it would deny SLD's motion to decertify, deny SLD's motion to exclude Plaintiff's damages model, and largely adopt Plaintiff's proposed jury instruction on *contra proferentem*. *See* Ex. 4 at 3:10, 3:25-4:3, 5:3-5. The following evening, the Court emailed the parties its proposed jury instructions, which included a *contra proferentem* instruction mirroring Plaintiff's proposed structure, and

which instructed the jury that, for certain states in the class, the jury "must adopt [Plaintiff's] interpretation of the contract." Dkt. 219-2 at 18-19; *see also* Dkt. 221 at 18-19. Thus, virtually all pre-trial issues had been resolved, and Class Counsel was fully prepared to pick a jury and try this case starting on February 13.

22. As discussed above, at the February 9 conference, the Court also directed the parties to make one final good faith effort to settle the case. Those efforts were successful, and a term sheet was executed early on February 12, approximately 36 hours before jury selection was set to begin.

23. The certified Class consisted of 293 policies. Plaintiff had several alternative damage models, and there also remained the risk that the jury, even if it found breach, would not award any damages, or only minimal damages. Plaintiff's top-end damage model was for $59,420,913.14, which was the sum all the incremental COI charges on all Class Policies through December 30, 2022. Plaintiff's secondary damages model was for $34,441,535.58.

24. The specific terms and conditions of the settlement are set forth in the Settlement Agreement, which is attached as **Exhibit 2**. The principal terms of the settlement are as follows:

- **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 scale increase until March 31, 2028.
- **VALIDITY STIPULATION AND STOLI WAIVER**: An agreement by SLD not to challenge the validity and enforceability of class members' policies on the grounds of lack of an insurable interest, stranger originated life insurance ("STOLI"), or misrepresentation.

25. The cash portion of the Settlement alone is, in my view, exceptional: It represents over 50% of Plaintiff's maximum damages model, and approximately 87% of the alternative damages model that Plaintiff intended to present at trial. The average amount attributable to each Class Policy, before deducting fees, expenses, and any incentive award, is $102,389.078.

26. The cash portion is particularly noteworthy given that the Court permitted SLD to argue to the jury that there were essentially no damages. Ex. 4 at 5:3-14. And, of course, a finding of breach was far from a given: this case turned on conflicting expert testimony on technical actuarial issues, such as the interpretation of Actuarial Standard of Practice No. 2. *See* Dkt. 141 at 15-17 (discussing ASOP 2 § 3.4 and holding that factual disputes as to its meaning and application "renders summary judgment inappropriate on this theory of breach").

27. The non-monetary benefits provide additional, real value to the Class. The COI Rate Schedule Increase Freeze ensures that the Class is protected against any new rate action until March 31, 2028 at the earliest (almost 13 years after the last increase), at a time when other insurers continue to impose new COI increases.[2] The Validity Stipulation and STOLI Waiver prevent Security Life from nullifying the benefits provided in this settlement by challenging the validity of any Class Policy. Class Counsel will provide an expert valuation of these benefits in connection with its forthcoming Motion For Attorneys' Fees, Expenses, and Incentive Award, but as an illustration, in *Fleisher,* the court adopted an expert valuation of virtually identical benefits (albeit for a much larger class) for $93.4 million. 2015 WL

[2] Class Counsel is aware of at least two insurers who have imposed massive COI rate increases in the past year alone.

10847814, at *10-11. Nonetheless, Class Counsel has committed to only seeking a maximum of 1/3 of the cash amount (*i.e.*, $10 million) in fees, and this is reflected in the proposed notices.

28. In Class Counsel's experience, this is an outstanding recovery, particularly given the complexity of COI cases, the conflicting expert testimony on technical actuarial issues that a jury would be required to weigh, and the inherent uncertainties of litigation.

29. Class Counsel recommends the proposed plan of allocation described in the Notice and attached in full as **Exhibit 5**. This distribution plan treats all class members equitably because it distributes settlement proceeds on a *pro rata* basis using each class member's share of overcharges (as calculated in the Mills Supplemental Report), with a minimum payment of $100 to each class member. Each class member will receive its settlement check in the mail automatically, without needing to complete a claim form.

30. The releases are also equitable, as they treat all class members equally and do not affect apportionment of damages. Importantly, the Class is not releasing any claims relating to the COI increase on the LD GUL policies, and Plaintiff's right to appeal the dismissal of those claims is expressly preserved.

31. There are no agreements beyond the Settlement Agreement.

32. In sum, it is my strong opinion that the proposal is fair, adequate, and reasonable, especially in light of Class Counsel's detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 31, 2023

/s/ Steven G. Sklaver
Steven G. Sklaver

EXHIBIT 1

Insurance

Susman Godfrey has a long history of litigating and winning significant insurance matters on both sides of the "v." For plaintiffs, this includes representing insureds, policy owners, and businesses in national class actions, life insurance disputes and business interruption matters against some of the nation's largest insurers. For the insurance industry, this includes defending companies such as ACE Limited and ACE Bermuda (now Chubb), Equitas, and the members of the London Insurance Market against millions of dollars of potential exposure when litigation arises.

Insurance Class Actions

- ***Leonard et al. v. John Hancock Life Insurance Co. of New York et al.*** Secured a settlement valued at $143 million, before fees and expenses, including a cash fund of over $93 million and an agreement by John Hancock Life Insurance Company not to impose a higher cost of insurance rate scale for 5 years (even in the face of a worldwide pandemic), on behalf of a class of approximately 1,200 policyholders who alleged that Hancock breached the terms of their respective life insurance policies and overcharged them for life insurance. When granting final approval, the Court held that the settlement provided an "absolutely extraordinary" recovery rate for the class, and lauded Susman Godfrey's "extraordinary work."
- ***Helen Hanks v. Voya Retirement Insurance and Annuity Company.*** Negotiated settlement worth $118 million, before fees and expenses, including a cash fund of over $92 million and an agreement by Voya not to impose a higher rate scale for 5 years, on behalf of a certified class of 46,000+ policyholders over allegations that Voya improperly raised cost-of-insurance charges. Over the course of litigation, the team from Susman Godfrey secured certification of the nationwide class and defeated summary judgment. The Court recognized the quality of the work, stating: "I want to commend you all for the work done on the pretrial order and motions in limine . . . I'm very happy to have you as lawyers appearing before me."
- ***37 Bensen Parkway v. John Hancock Life Insurance Company.*** Secured a $91.25 million settlement all-cash, non-reversionary settlement (before fees and expenses) for insurance policy owners against John Hancock Life Insurance Company. The Honorable Paul Gardephe described the settlement as a "quite extraordinary . . . result achieved on behalf of the class."
- ***Fleisher v. Phoenix Life Insurance*.** Served as lead counsel to plaintiffs in a case that challenged Phoenix Life Insurance Company's and PHL Variable Insurance Company's decision to raise the cost of insurance ("COI") nationwide on life insurance policy owners. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final pretrial conference—less than two months before trial with terms that included: a $48.5 million cash fund ($34 million after fees and expenses), a COI freeze through 2020, and a covenant by Phoenix not to challenge the policies, worth $9 billion in face value, when the policies mature on the grounds of lack of insurable interest or misrepresentations in the application. At the final approval hearing, the Court concluded: "I want to say publicly that I think this is an excellent settlement. I think this

is a superb—this may be the best settlement pound for pound for the class that I've ever seen."

- ***Brach Family Foundation et al. v. AXA Equitable Life Insurance*.** Serving as lead counsel in a case challenging AXA's decision to raise cost of insurance rates on life insurance policies nationwide, and alleging that AXA made misrepresentations to policyholders in its insurance illustrations leading up to the cost of insurance increase. The Court certified two nationwide classes, one for policy-based claims and one for misrepresentation-based claims.
- ***Hanks et al. v. The Lincoln Life & Annuity Company of New York, et al.*** Serving as lead counsel in a case challenging Voya Life Insurance Company's decision to raise cost of insurance rates on life insurance policies nationwide. The Court certified a nationwide breach of contract class.
- ***In re Lincoln National COI Litigation*.** Serving as co-interim-lead counsel in two cases challenging Lincoln National's decision to raise cost of insurance rates nationwide.
- ***Brighton Trustees et al. v. Genworth Life and Annuity Insurance Company*.** Serving as interim lead class counsel in a case challenging Genworth's decision to raise cost of insurance rates nationwide.
- ***AvMed Inc. et al. v. BrownGreer, US Bancorp, and John Does*.** Represented a group of more than forty health plans (who between them comprise more than 70% of the US market for private health insurance) asserting healthcare reimbursement liens against claimants to the $4.85 billion Vioxx compensation fund. Susman Godfrey reached a groundbreaking settlement with the Vioxx Plaintiffs' Steering Committee, guaranteeing them certain payouts on their liens covering participating plaintiffs. *American Lawyer* magazine featured this settlement in the "Big Suits" column at the time of this decision

Life Insurance

- ***The Lincoln Life and Annuity Company of New York v. Berck;*** and ***Berck v. The Lincoln Life and Annuity Company of New York*.** Won a reversal in a $20 million life settlement rescission lawsuit against Lincoln Life & Annuity Company of New York as trial and appellate counsel for a group of investors. Lincoln's lawsuit was based on allegations that the insurance policies lacked an insurable interest because they were procured by third-parties for investment purposes and because there was net worth and other misrepresentations in the applications. The appellate court ordered that the trial court enter judgment in favor of the trust affirmed the trial court victory that Lincoln's fraud claim was time barred because the policies were incontestable. The $20 million policy matured before the trial court entered judgment in favor of the policy owner. We then sued the insurance carrier to effectuate payment of the $20 million policy. The case was the feature cover story in the publication, *California Lawyer*, at the time of this decision.
- ***The Lincoln Life and Annuity Company of New York v. Janis and Berck*.** Represented Jonathan Berck, as Trustee of the Rosamond Janis Insurance Trust, in a $5 million rescission claim brought by the Lincoln Life and Annuity Company of New York for alleged violations of

New York's insurable interest laws and other "STOLI" (stranger originated life insurance) related claims. In this matter summary judgment was granted in favor of our client.

- ***In re James V. Cotter, Living Trust, Ellen Marie Cotter, Margaret Cotter, Petitioners, v. James J. Cotter, Jr., Respondent*.** Achieved a successful verdict invalidating a will on grounds of both undue influence and incapacity in this trust and estates case in Los Angeles Superior Court.

Other Significant Insurance Caces

- ***Universal Cable Productions v. Atlantic Specialty Insurance.*** Represented Universal Cable Productions (UCP)—a subsidiary of NBC Universal—in its dispute with insurance carrier, Atlantic, which claims it was not required to provide coverage when Hamas bombing forced UCP to relocate filming of the TV miniseries "Dig" out of Jerusalem. After a successful appeal to the Ninth Circuit by Susman Godfrey on the scope of the exclusions, UCP then received a full win in the district court which found in its favor on all remaining liability issues. The case—which was set for trial on the amount of damages Atlantic owed to UCP for the relocation, whether Atlantic's denial of coverage was done in bad faith and the amount of punitive damages owed to UCP—was settled favorably on the eve of trial.
- ***Alley Theater v. Hanover Insurance*.** Secured a partial summary judgment win for Houston's historic Alley Theatre in an insurance coverage lawsuit the firm handled pro bono. The suit claimed the theatre was not properly reimbursed by Hanover Insurance Company for claims related to business interruption losses sustained during Hurricane Harvey. The firm later scored its second victory for the theater when they settled the final piece of the litigation–terms of this settlement are confidential.
- **Insurance Litigation for Walmart.** Lead counsel for Walmart on insurance coverage claims against certain of its insurers, regarding the settlement of claims arising out of an accident on the NJ Turnpike that injured comedian Tracy Morgan and others.
- ***LyondellBasell v. Allianz Insurance*.** Secured a confidential recovery (ultimately disclosed in an SEC filing as more than $100 million) for LyondellBassell Industries in a London arbitration over business interruption losses arising from Hurricane Ike. Lyondell sought coverage for losses caused by a hurricane, but faced a $200 million deductible self-insured retention, which the insurers claimed exceeded any losses. We handled all coverage, accounting, and engineering issues (which included significant damage to refinery equipment and delays to turnaround construction projects). The case settled on the eve of the final evidentiary hearing after we won key disputes regarding certain insurance coverage and claim quantification issues.
- **Confidential Private Transportation Company Litigation.** Hired to represent a private transportation company against its insurer for bad-faith failure to settle. The firm was engaged after a South Texas jury returned a $25+ million verdict on personal injury claims against our client, far in excess of the insurance policy limits. The matter was resolved without the need to file a lawsuit, and without the client paying anything out of pocket on the verdict.

- ***Sabre v. The Insurance Company of the State of Pennsylvania.*** Hired months before trial to represent the worldwide travel technology leader in a $100 million insurance coverage dispute. Successfully settled the case on the eve of trial.
- ***Aetna v. Ace Bermuda*.** Represented Ace Bermuda Insurance (now part of Chubb) in a $25 million coverage claim brought by the bankruptcy estate of Boston Chicken in bankruptcy court in Phoenix, Arizona. The case raised novel issues of bankruptcy procedure, international law, and the enforcement of arbitration agreements involving a bankruptcy trustee.
- **London Insurance Market Asbestos Cases.** Defended insurance groups in the London Insurance Market including Equitas, a Lloyds of London runoff company, in litigation regarding asbestos insurance coverage, including bankruptcy adversary proceedings regarding Dresser Industries, a Halliburton subsidiary; Babcock & Wilcox Co., a McDermott International subsidiary; and Pittsburgh Corning Corp., a PPG Industries subsidiary. The firm tried the Babcock & Wilcox matter to the bench for many weeks and won. In both the Dresser Industries and the Babcock & Wilcox matters, our team ultimately achieved settlements for the London Market at very large discounts from the exposed policy limits, saving the firm's clients hundreds of millions of dollars. Pittsburgh Corning ultimately withdrew the bankruptcy plan to which our clients were objecting.
- ***City of Houston v. Hertz*.** Won a no liability verdict for The Hertz Corporation in a high-profile jury trial in which the plaintiff alleged violations of state insurance licensing laws and unfair and deceptive practices. In less than an hour of deliberations, the jury found for Hertz on all issues and rejected plaintiff's claims for attorneys' fees.

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Overview

Named one of *Lawdragon's* 500 Leading Lawyers since 2020, a recipient of the California Lawyer Attorneys of the Year award in 2017 and selected as "Top Plaintiff Lawyers in all of California" in 2016 and 2017 by *The Daily Journal;* Steven Sklaver has secured substantial litigation victories for both plaintiffs and defendants. For plaintiffs, Sklaver was lead counsel for a certified class of insurance policy owners, helping them achieve what the Court in the Southern District of New York described as "the best settlement pound for pound for the class that I've ever seen." You can read the Court's statement in full here. You can also read more about the case in The Deal's profile on the litigation here. Sklaver was also lead trial and appellate counsel for investors against an insurance company that resulted in a complete victory and full pay-out of a $20 million life insurance policy. A copy of the appellate court decision is available here. To listen to Sklaver's appellate oral argument, click here. That matter was the feature cover story of the April 2012 California Lawyer.

Sklaver also represents the former members of the legendary rock group The Turtles in ***Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*** (C.D. Cal.) in a certified class action lawsuit against Sirius XM that settled less than 48 hours before the jury trial was scheduled to begin. Sirius XM agreed to pay at least $25.5 million (over $16 million after fees and expenses) and royalties under a 10-year license that is valued up to $62 million (over $41 million after fees and expenses) as compensation for publicly performing without a license Pre-1972 sound recordings. The settlement was approved by the Court, and has received widespread media coverage from publications such as The New York Times, Billboard, The Hollywood Reporter,Law360, Rolling Stone, Variety, Reuters and Managing IP.

Within six months after the Sirius XM class action settled, so did Sklaver's copyright class action brought on behalf of artists owed mechanical royalties for compositions made available by Spotify, the leader in digital music streaming. Spotify agreed to a class action settlement valued at over $112 million (over $95 million after fees and expenses), a settlement for which the district court granted final approval and remains subject to a pending appeal. You can read more about this matter in *Billboard*.

Sklaver's many significant and widely covered class action results in 2016 helped secure Susman Godfrey's recognition as *Law360*'s "Class Action Group of the Year" in early 2017. You can read that article announcing the award here.

For defendants, Sklaver has handled numerous employment class actions across the country. He served, along with the Managing Partner of Susman Godfrey, as trial counsel for Wal-Mart, the world's largest retailer, trying a large employment class action in California. He also successfully defended and defeated class certification in numerous, substantial wage and hour matters for Alta-Dena Certified Dairy, LLC, dairy producers for Dean Foods, one of the leading food and beverage companies in the United States. Copies of the pro-employer decisions are available here, here, and here.

Sklaver has tried complex commercial and class action disputes — including jury trials and bench trials in federal and state court, as well as arbitrations. Sklaver graduated cum laude from Dartmouth College, magna cum laude and Order of the Coif from Northwestern University School of Law, and clerked for Judge David Ebel on the United States Court of Appeals for the Tenth Circuit. Sklaver also won the National Debate Tournament for Dartmouth College, and is just one of four individuals in debate history to win three national championships at the high school and collegiate level. From 2010-2022, Sklaver has been recognized every year as a "Super Lawyer" in Southern California, awarded to no more than the top 5% of the lawyers in the state of California (Law & Politics Magazine, Thomson Reuters).

Sklaver currently serves on the Board of Directors for the Western Center on Law & Poverty, the Los Angeles Metropolitan Debate League, and the Association of Business Trial Lawyers. Sklaver was also selected as the 2016-2017 Ninth Circuit Judicial Conference Lawyer Representative.

Education

- Dartmouth College (B.A., *cum laude*)
- Northwestern University School of Law (J.D., *magna cum laude* and Order of the Coif)

Clerkship

Law Clerk to the Honorable David M. Ebel, United States Court of Appeal for the Tenth Circuit

Honors and Distinctions

- *Lawdragon* 500 Leading Litigator (2022)
- Litigation Star, Benchmark Litigation (2022, Euromoney)
- Recommended Lawyer – Litigation – Labor and Employment, Best Lawyers in American (2020 – 2023, Woodward White, Inc.)
- Southern California California Super Lawyer (2010 – 2022, Thomson Reuters)
- *Lawdragon* 500 Leading Lawyers in America (2020, 2021, 2022, 2023)
- *Lawdragon* 500 Leading Plaintiff Financial Lawyers (2019, 2020, 2021, 2022)
- Outstanding Antitrust Litigation Achievement in Private Law Practice by the American Antitrust Institute (2019) for work on *In re: Automotive Parts Antitrust Litigation*.
- California's Lawyer Attorneys of the Year in 2017 by *The Daily Journal.* Click here for a photo of Sklaver, along with co-counsel, receiving the award.
- Top 30 Plaintiff Lawyers in all of California in 2016 by *The Daily Journal*
- Southern California "Super Lawyers" awarded to no more than the top 5% of the lawyers in the state of California (2010 – 2021, *Law & Politics Magazine*, Thomson Reuters)
- Northwestern Law Review member and editor
- National Debate Tournament (NDT) collegiate championship winner

Articles and Speeches

"Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism," 32 Ind. L.

Rev. 71 (1998) (with Martin H. Redish, Professor, Northwestern University School of Law).

Speaking Engagements

- "Compliance Track: Cost of Insurance Litigation Overview" – The 24th Annual Fall Life Settlement and Compliance Conference (Orlando, Florida)
- "Cost of Insurance" – The Life Settlements Conference 2018 (New York City, NY)
- "Cost of Insurance: What Has Been Filed and Decided and What Will Happen Next?" Anticipating Tomorrow – A Symposium on Emerging Legal Issues in Life Insurance. (Philadelphia, PA)
- "Current COI Increases – What's it All About? The Legal Perspective." ReFocus2017 Conference (Las Vegas, NV)
- "Litigation Update: Will the Arthur Kramer Insurable-Interest Decision Lift the Cloud Over Much of the Litigation in the Market?" The 2011 International Life Settlements Conference (London, England)
- "Seeking Interlocutory Appellate Review of Class-Certification Rulings: Tactics, Strategies, and Selected Issues." Bridgeport 10th Annual Class Action Litigation Conference (Los Angeles, CA)
- PwC 2010 Securities Litigation Study Luncheon. (Los Angeles, CA)
- Life Settlement Litigation Update. 2010 Life Settlement Compliance Conference and Legal Round Table (Atlanta, GA)
- "Litigation: What are the Legal Trends Affecting the Market?" The Life Settlements Conference 2010 (Las Vegas, NV)

Professional Associations and Memberships

- United States Supreme Court
- United States Court of Appeals for the Ninth and Tenth Circuits
- United States District Courts for the Central, Southern, Northern, and Eastern Districts of California and District of Colorado
- Admitted to state bars of Illinois, Colorado, and California
- Board of Directors, Los Angeles Metropolitan Debate League
- Board of Directors, Western Center on Law & Poverty

Notable Representations

Class Actions

- ***Copyright Infringement:*** Sklaver serves as co-lead counsel with the Gradstein & Marzano firm representing Flo & Eddie (the founding members of 70's music group, The Turtles) along with a class of owners of pre-1972 sound recordings for copyright violations by music provider Sirius XM. The day before trial was to commence before a California jury in federal court in late 2016, Flo & Eddie reached a landmark settlement with Sirius XM on behalf of the class in a deal potentially worth $99 million. The Court granted final approval of the settlement in May 2017. Click here for more. Sklaver with his co-leads were recently named "California Lawyer Attorneys of the Year" by *The Daily Journal* for their outstanding legal work on this case.
- In May 2017, Sklaver, as co-lead counsel with Gradstein Marzano, secured a deal valued at$112 million to settle a class-action lawsuit with Spotify brought on behalf of music copyright owners. The suit alleged that Spotify made music available online without securing mechanical rights from the tracks' composers. Under the terms of the deal, Spotify will pay songwriters $43.45 million for past royalties, as well as commit

to pay ongoing royalties that are valued at $63 million. Read more about the case here and see Billboards coverage of it here.

- ***Insurance***: In a seminal insurance class action filed in the Southern District of New York, resolved in September 2015, Mr. Sklaver served as lead counsel in a case that challenged Phoenix Life Insurance Company's and PHL Variable Insurance Company's decision to raise the cost of insurance ("COI") nationwide on life insurance policy owners. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final Pretrial Conference — less than two months before trial. Settlement terms included: $48.5 million cash fund ($34 million after fees and expenses), COI freeze through 2020, and a covenant by Phoenix not to challenge the policies, worth $9 billion in face value, when the policies mature on the grounds of lack of insurable interest or misrepresentations in the application. At the final approval hearing, the Court concluded, ***"I want to say publicly that I think this is an excellent settlement. I think this is a superb – this may be the best settlement pound for pound for the class that I've ever seen."*** You can read the statement in full on page 3 here. You can also read more about the case in *The Deal's* feature on the matter here.

- ***Antitrust:*** *In In re Automotive Parts Antitrust Litigation.* In the largest price-fixing cartel ever brought to light, Mr. Sklaver and a team of Susman Godfrey lawyers run a massive MDL litigation in which the firm serves as co-lead counsel for a class of consumer plaintiffs in multidistrict price-fixing cases pending in a Detroit, Michigan federal court. The actions, alleging anti-competitive conduct, were brought by indirect purchasers of component parts included in over 20 million automobiles, and involve parts such as wire harnesses, instrument panel clusters, fuel senders, heater control panels and alternators.The Department of Justice has imposed fines exceeding $2.6 billion pursuant to guilty plea agreements with some of the defendants, and its investigation is still ongoing. The Susman Godfrey team together with its co-lead counsel has defeated multiple motions to dismiss. Settlements have been reached with a certain defendants for a combined $620 million thus far. Final settlement (after fees and expenses) has not yet been determined. The case remains ongoing against the remaining defendants.

LIFE SETTLEMENTS

- Represented Jonathan Berck, as Trustee of the Rosamond Janis Insurance Trust in a $5 million rescission claim brought by the Lincoln Life and Annuity Company of New York for alleged violations of New York's insurable interest laws and other "STOLI" (stranger originated life insurance) related claims. RESULT: Summary judgment granted in favor of my client. A copy of the summary judgment order is available here.
- Won reversal in a $20 million life settlement rescission lawsuit against Lincoln Life & Annuity Company of New York. Lincoln's lawsuit was based on allegations that the insurance policies lacked an insurable interest because they were procured by third-parties for investment purposes and because there were net worth and other misrepresentations in the applications. The appellate court ordered that the trial court enter judgment in favor of the trust. The appellate court also affirmed our trial court victory that Lincoln's fraud claim was time barred because the policies were incontestable. The case is Lincoln Life & Annuity Co. of New York v. Jonathan Berck, as Trustee of the Jack Teren Insurance Trust, Court of Appeal Case No. D056373 (Cal. Ct. App. May 17, 2011). A copy of the appellate court decision is available here. To listen to Mr. Sklaver's appellate oral argument, click here. The *Teren* case was the feature, cover story of the April 2012 *California Lawyer*.
- Represents investors, trusts, trustees, brokers, and insureds in life settlement and STOLI litigation across the country against insurance companies seeking to rescind policies with face values worth more than $125 million. Mr. Sklaver is also a frequent speaker and commentator on life settlement and STOLI litigation, in both trade publications and conferences.

FINANCIAL FRAUD

- Represented Royal Standard Minerals, which was the plaintiff in a federal securities lawsuit against a "group" of more than ten dissident shareholders for failing to file Schedule 13-D disclosures. RESULT: Preliminary injunction granted and final judgment entered that, among other things, required for three years

the votes of all shares owned by any of the defendants to be voted as directed by the Board of Directors of my client.

- Represented plaintiff who held millions of WorldCom shares as an opt-out to the class in In re WorldCom Securities Litig. RESULT: Settled on confidential terms.
- Represented plaintiff Accredited Home Lenders in a TRO and breach of contract action over a wrongful default declared by Wachovia in a credit re-purchase agreement. RESULT: The case was resolved favorably, following the entry of a TRO.
- Represented Walter Hewlett in his challenge to the Hewlett-Packard/Compaq merger. In preparation for that trial, Mr. Sklaver deposed Compaq's former CEO Michael Capellas about his famous handwritten journal note which, describing the merger, stated "at our course and speed we will fail." Mr. Capellas was right.

EMPLOYMENT

- Represented one of the world's largest retailers in the defense of a four month long jury trial, wage and hour class action pending in California. One of the world's largest retailers appointed Susman Godfrey L.L.P. to be its national trial counsel for wage and hour litigation.

ANTITRUST

- Lead day-to-day lawyer for the class in White, et al. v. NCAA, a certified, antitrust class action alleging that the NCAA violated the federal antitrust laws by restricting amounts of athletic based financial aid. ESPN Magazine coverage of the lawsuit may be found here. RESULT: The NCAA settled and paid an additional $218 million for use by current student-athletes to cover the costs of attending college, paid $10 million to cover educational and professional development expenses for former student-athletes, and enacted new legislation to permit Division I institutions to provide year-round comprehensive health insurance to student-athletes.

ENTERTAINMENT

- Represented NAACP image award winner Morris Taylor "Buddy" Sheffield in his breach of contract lawsuit against ABC Cable Networks Group regarding the creation of Hannah Montana. RESULT: Defendant settled less than four weeks before trial.

PRO BONO

- Appointed to represent Carl Petersen, who was charged by the United States Attorney's Office with being a felon in possession of a firearm — a charge that carries a five-year prison sentence and an 89% conviction rate. RESULT: Acquittal. Jury deliberation lasted less than four hours.Appointed by the United States Court of Appeals for the Tenth Circuit as appellate counsel in five cases, including: United States v. Petersen; United States v. Blaze (specifically noting Mr. Sklaver's "good workmanship"); and Sorrentino v. IRS (appointed as amicus curiae by and for the Court)

SUSMAN GODFREY L.L.P.

Seth Ard

Partner

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Overview

Seth Ard, a partner in Susman Godfrey's New York office and a member of the firm's Executive Committee, has secured substantial litigation victories for both plaintiffs and defendants. For plaintiffs, Ard was co-lead counsel for a certified class of insurance policy owners, helping them achieve what the Court in the Southern District of New York described as "the best settlement pound for pound for the class that I've ever seen." For defendants, Ard has obtained take-nothing judgments for NASDAQ and Dorfman Pacific in contract and intellectual property actions seeking tens of millions of dollars. Since 2019, Mr. Ard has been named one of the country's Leading Plaintiff Financial Lawyers by *Lawdragon*.

Before joining the firm, Mr. Ard clerked for the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York, and for the Honorable Rosemary S. Pooler of the United States Court of Appeals for the Second Circuit. Mr. Ard graduated magna cum laude from Harvard Law School and completed his undergraduate work first in his class with a perfect GPA from Michigan State University, with dual degrees in philosophy and French literature. For the past three years, Ard has been recognized as a "Rising Star" in New York by Super Lawyers magazine.

Education

- Michigan State University, first in class, highest honors (B.A., Philosophy & French Literature, 1997)
- Northwestern University (M.A., A.B.D., Philosophy, 2003)
- Harvard Law School, magna cum laude (J.D. 2007)

Clerkship

Law Clerk to the Honorable Shira A. Scheindlin, United States District Court for the Southern District of New York, 2008-2009

Law Clerk to the Honorable Rosemary S. Pooler, United States Court of Appeals for the Second Circuit, 2007-2008

Honors and Distinctions

- *Lawdragon* 500 Leading Litigator (2022)
- *Lawdragon* 500 Leading Plaintiff Financial Lawyers (2019, 2020, 2021 2022)

- New York Super Lawyer (2022, Thomson Reuters)
- New York Rising Star (2013-2018, Thomson Reuters)
- Teaching and Research Assistant for Professor Arthur Miller (Harvard Law School)
- Teaching Assistant for Professor Jon Hanson (Harvard Law School)
- Editorial Board, Harvard Civil Rights/Civil Liberties Law Review

Professional Associations and Memberships

State of New York

Notable Representations

In re LIBOR-Based Financial Instruments Litigation (SDNY) Along with Bill Carmody, Marc Seltzer, and Arun Subramanian, Ard serves as co-lead counsel for the class of over-the-counter purchasers of LIBOR-based instruments, directly representing Yale University and the Mayor and City Council of Baltimore as named plaintiffs. We reached a $120 million settlement with Barclays, and pursue claims against the rest of the 16 LIBOR panel banks.

In re Municipal Derivatives Litigation (SDNY) Along with Bill Carmody and Marc Seltzer, Ard serves as co-lead counsel to a class of municipalities suing 10 large banks and broker for rigging municipal auctions. On behalf of the class and class counsel, Ard argued final approval and fee application motions approving cash settlements in excess of $100 million, as well as several key discovery motions against defendants and the DOJ that paved the way for those settlements.

Fleisher et al. v. Phoenix Life Insurance Company (SDNY) Along with Steven Sklaver and Frances Lewis, Ard served as class counsel in a seminal action challenging 2 cost of insurance increases by Pheonix. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final Pretrial Conference in a settlement valued by the Court at over $140 million. Judge Colleen McMahon praised Susman Godfrey's settlement of the case as "an excellent, excellent result for the class," which "may be the best settlement pound for pound for the class that I've ever seen."

Globus Medical v. Bonutti Skeletal (EDPA) Along with Jacob Buchdahl and Arun Subramanian, Ard represents defendant Bonutti Skeletal in patent litigation brought by Globus Medical. Ard successfully argued a partial motion to dismiss the patent complaint, defeating claims of indirect infringement, vicarious liability and punitive damages.

Sentius v. Microsoft (NDCA) Along with Max Tribble and Vineet Bhatia, Ard represented plaintiff Sentius in a patent infringement suit against Microsoft. A few weeks before trial, Ard successfully argued a Daubert motion that sought to exclude plaintiff's survey expert. The case settled on highly favorable terms within 24 hours of that motion being denied. Previously, Ard had successfully argued an early summary judgment motion and supplemental claim construction, both of which would have gutted plaintiff's claims.

Jefferies v. NASDAQ Arbitration (New York) Along with Steve Susman and Steve Morrissey, Ard represented NASDAQ and its affiliate IDCG in an arbitration in New York. The plaintiff, Jefferies & Co., sought tens of millions of dollars in damages based on a claim that it was fraudulently induced to clear interest rate swaps through the IDCG clearinghouse. After a one week arbitration trial in the fall of 2012, at which Ard put on NASDAQ's expert and crossed Jefferies' expert, the Panel issued a decision in January 2013 denying all of Jefferies' claims and awarding no damages. The arbitrators were former Judge Layn Phillips, Judge Vaughn R. Walker, and Judge Abraham D. Sofaer.

GMA v. Dorfman Pacific (SDNY) Along with Bill Carmody and Jacob Buchdahl, Ard obtained a complete defense victory on summary judgment in a trademark infringement dispute before Judge Forrest in SDNY.

We were hired after the close of discovery and after our client had suffered significant discovery sanctions that threatened to undermine its defense. We were able to overturn those sanctions, reopen discovery and obtain key admissions during a deposition of Plaintiff's CEO, and win on summary judgment (without argument and based on briefing done by Ard).

Washington Mutual Bankruptcy (Bkrtcy. Del.) Along with Parker Folse, Edgar Sargent, and Justin Nelson, Ard represented the Official Committee of Equity Holders in Washington Mutual, Inc. at two trials contesting $7 billion reorganization plans that would have wiped out shareholders stemming from the largest bank failure in American financial history. Both plans were supported by the debtor and all major creditors. After the first trial, at which Ard put on the Equity Committee's expert and crossed the debtor's expert, the Judge denied the plan of reorganization. The debtors and creditors negotiated a new reorganization plan that again would have wiped out shareholders. After the second trial, at which Ard put on the Equity Committee's expert, crossed the debtor's expert, and conducted a full-day cross examination of hedge fund Appaloosa Management that held over $1 billion in creditor claims and that was accused of insider trading, the Court again denied the plan of reorganization, finding that the Equity Committee stated a viable claim of insider trading against the hedge funds. The Equity Committee then negotiated with the debtor and certain key creditors a resolution that provided shareholders with 95 percent of the post-bankruptcy WaMu plus other assets in a package worth hundreds of millions of dollars – an outstanding result especially given that when we were appointed counsel, the debtor tried to disband the equity committee on the ground that equity was "hopelessly out of the money" without any chance of recovery.

Lincoln Life v. LPC Holdings (Supreme Court Onandaga, New York) Along with Steven Sklaver and Arun Subramanian, Ard represented an insurance trust in STOLI litigation against an insurance company seeking to rescind a life insurance policy with a face value of $20 million. After Ard argued and won a hotly contested motion to compel in which the Court threatened to revoke the pro hoc license of opposing counsel, Lincoln settled the case on very favorable terms.

SUSMAN GODFREY L.L.P.

Ryan Kirkpatrick

Partner

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Overview

Ryan Kirkpatrick rejoins Susman Godfrey after spending four years as General Counsel and Senior Managing Director of McCourt Global, an alternative asset management firm. In that role, Ryan served as head of the New York office where he oversaw all legal affairs of the firm and its business verticals, including a $1 billion commercial real estate development joint venture, MG Sports & Media (which owns the LA Marathon and co-owns Global Champions Tour and Global Champions League), and MG Capital (owner of a private direct lender and registered investment adviser).

Ryan's experience at McCourt equipped him with a deep understanding of how to successfully manage and direct a wide variety of multi-national legal matters. Ryan obtained or negotiated billions of dollars in judgments, settlements, and transactions while at McCourt. Working on both the plaintiff and defense sides, Ryan also developed a deep understanding of and how to successfully leverage litigation (and the threat of it) to accomplish financial and business objectives while at the same time managing and mitigating the financial and operational costs of litigation to a business. For example, while serving as director of Global Champions League, Ryan initiated an EU competition law action against Fédération Equestre International, the international governing body for equestrian sports. After obtaining a landmark preliminary injunction that was upheld by the Brussels Court of Appeals—and has implications for all international sports federations—Ryan helped negotiate a highly favorable settlement with the FEI. As of 2017, Global Champions League has now sold/licensed 18 team franchises and holds 15 events around the world. This use of EU competition law to effect worldwide relief for a client was reminiscent of one of Ryan's first cases at Susman Godfrey, where he and Steve Susman guided start-up mainframe manufacturer Platform Solutions, Inc. to a $200 million buy-out by IBM following years of contentious of antitrust, patent infringement, and copyright infringement proceedings in both the Southern District of New York and the European Commission.

Ryan was first elected to the Susman Godfrey partnership in 2011. At the time, he was representing Frank McCourt and the Los Angeles Dodgers in connection with Mr. McCourt's highly-publicized divorce and the team's bankruptcy. This three-year representation culminated in a favorable settlement of the divorce, the sale of the Dodgers to Guggenheim Partners for $2.15 billion—the highest amount ever paid for a professional sports franchise—and the formation of a $550 million joint venture with affiliates of Guggenheim Partners. Ryan has been interviewed and quoted by numerous media outlets regarding the case, including the Wall Street Journal, Bloomberg News, the Los Angeles Time, ESPN, the National Law Journal, the Associated Press, KABC, and KTLA. Shortly following the sale, Mr. McCourt asked Ryan to help lead McCourt Global.

Ryan was named among Lawdragon's 500 Leading Litigators in America in 2022. Prior to his time at Susman Godfrey, Kirkpatrick clerked for the Hon. Ruggero J. Aldisert of the US Court of Appeals for the Third Circuit.

Education

- Yale University (B.A., Political Science, 2001)
- University of California, Los Angeles (J.D., Order of the Coif, 2005)

Clerkship

- Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit (2005-2006)

Notable Representations

During his previous tenure at Susman Godfrey, Kirkpatrick led numerous successful litigation matters in a variety of legal areas including intellectual property, insurance, securities, antitrust and class actions. For example,

- Successfully represented various hedge funds investing in "stranger-owned life insurance," including obtaining complete defense victory for a hedge fund in a case in which an insurer sued to rescind a $20 million life insurance policy for alleged fraud and lack of an insurable interest, and initiating a class action against an insurer relating to cost of insurance increases that resulted in a settlement valued at $134 million.

- Obtained a $45 million damages judgment on behalf of Masimo Corporation in an antitrust case against Tyco Healthcare involving pulse oximetry products, which judgment was upheld by the Ninth Circuit on appeal, with the client receiving a net recovery of approximately $27 million.

- Defeated class certification of a putative wage and hour class action brought against a subsidiary of Dean Foods.

- Obtained a $16.5 million settlement for a group of investors in Seattle-based Dendreon Corporation in a case alleging securities fraud and insider trading, with the class receiving approximately $12 million.

- Guided start-up mainframe manufacturer Platform Solutions, Inc. to a $200 million buy-out by IBM following years of contentious of antitrust, patent infringement, and copyright infringement proceedings in both the Southern District of New York and the European Commission.

- Represented Frank McCourt and the Los Angeles Dodgers in connection with Mr. McCourt's highly-publicized divorce and the team's bankruptcy. This three-year representation culminated in a favorable settlement of the divorce, the sale of the Dodgers to Guggenheim Partners for $2.15 billion—the highest amount ever paid for a professional sports franchise—and the formation of a $550 million joint venture with affiliates of Guggenheim Partners.

Articles

"Rat Race: Insider Advice on Landing Judicial Clerkships," 110 *Penn. St. L. Rev.* 835 (2006) (co-authored with the Honorable Ruggero J. Aldisert and James R. Stevens, III)

Professional Associations and Memberships

- State Bar of New York
- State Bar of California
- District of Columbia Bar
- United States District Court for the Central District of California
- United States District Court for the Northern District of California
- United States Court of Appeals for the Seventh Circuit
- United States District Court for the Eastern District of Texas

SUSMAN GODFREY L.L.P.

Michael Gervais

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Overview

Michael Gervais is a skilled and accomplished trial lawyer who represents both plaintiffs and defendants in all types of high stakes commercial litigation. Gervais has amassed an impressive collection of litigation victories and favorable settlements for clients who vary from Fortune 500 industry leaders to classes of unfairly treated plaintiffs in several national high-profile lawsuits.

Landmark Litigation

Gervais worked alongside Managing Partner, Neal Manne, Partner Lexie White, and Partner Joseph Grinstein representing a class of indigent misdemeanor arrestees pro bono in a landmark case to challenge the money bail scheme in Harris County, Texas. Along with Civil Rights Corps and the Texas Fair Defense Project, Gervais's work helped secure a sweeping preliminary injunction from a Houston federal judge, who struck down Harris County, Texas' money bail system. The decision focused national attention on the countrywide practice of jailing poor people because they are unable to afford bail when arrested for minor offenses and has been covered by national outlets such as *The New York Times*, *The Houston Chronicle*, and *Lawdragon*. In the first year in which the injunctive relief was in effect, more than 12,000 people were released from jail.

In another high-profile class action, Gervais worked alongside Partners Kalpana Srinivasan, Steven Sklaver and Steve Morrissey representing Flo & Eddie, members of the 1960's rock group The Turtles, in addition to a class of copyright owners in a case against Sirius XM. In this landmark case it was established under California law, that these owners of sound recordings from before 1972 have the exclusive right to perform those recordings. Under a groundbreaking settlement, Sirius XM agreed to pay at least $25.5 million (over $16 million after fees and expenses) and royalties under a 10-year license that is valued up to $62 million (over $41 million after fees and expenses) as compensation for publicly performing without a license Pre-1972 sound recordings. The settlement was approved by the Court, and has received widespread media coverage from publications such as *The New York Times*, *Billboard*, *The Hollywood Reporter*, *Law360*, *Rolling Stone*, *Variety*, *Reuters* and *Managing IP*.

Additionally, Gervais won a complete dismissal for energy company, Vitol, of $10 billion antitrust case filed in federal district court in Miami by a litigation trust asserting claims against numerous defendants on behalf of a Venezuelan national oil company. Gervais' firm, Susman Godfrey, was tapped to take the lead in briefing and arguing the motion to dismiss for the multi-party joint defense group. This win was reported on by *Wall Street Journal* and *Law360*. The 11th Circuit Court of Appeals affirmed the district court's decision in 2021.

Gervais was appointed by the court to serve on the Steering Committee to represent plaintiffs in a Biometric Information Privacy Act class action MDL against TikTok and its parent company. In July 2022 this District Court gave final approval to a $92 million litigation-wide settlement. This marked one of the highest privacy-related settlements in the country.

U.S. Supreme Court Roots

Before joining Susman Godfrey, Gervais served as a clerk at both the Supreme Court of the United States and in the Ninth Circuit U.S. Court of Appeals. These experiences have given him a unique perspective and a valuable background that supports the success he brings his clients in federal, district and state courts as well as in arbitration and at every level of litigation.

Education

- Yale Law School (J.D.)
- American University (B.A., International Studies, *summa cum laude*)

Clerkship

Law Clerk to the Honorable Stephen Breyer, Supreme Court of the United States

Law Clerk to the Honorable Alex Kozinski, United States Court of Appeals for the Ninth Circuit

Notable Representations

CURRENT LITIGATION

In re: Telescopes Antitrust Litigation **(N.D. Cal.)** Appointed to serve as co-lead counsel to indirect purchaser plaintiffs in a class action lawsuit against global telescope manufacturers and suppliers for engaging in a conspiracy to fix prices and allocate the market for telescopes.

City of Sacramento v. Teva Pharmaceutical Industries, Ltd. et al. Represents the City of Sacramento in its opioid litigation that seeks to hold the major manufacturers and distributors of opioids responsible for the harm they've caused to the City.

IQVIA, Inc. v. Veeva Systems **(D.N.J.)** Represent Veeva Systems, a CRM and master data management technology company, in federal court antitrust litigation against healthcare data and information technology provider IQVIA, Inc. The case involves antitrust issues relating to master data management and alleged trade secrets.

PAST WINS

In Re: Tiktok, Inc Consumer Privacy Litigation **(N.D. Ill.)** Appointed by the U.S. District Court Northern District of Illinois to serve on the Steering Committee to represent plaintiffs in a Biometric Information Privacy Act class action MDL against TikTok and its parent company. In July 2022 this District Court gave final approval to a $92 million litigation-wide settlement. This marked one of the highest privacy-related settlements in the country.

Helen Hanks vs. Voya Retirement Insurance and Annuity Company **(S.D.N.Y.)** Negotiated settlement worth $118 million, before fees and expenses, including a cash fund of over $92 million and an agreement by Voya not to impose a higher rate scale for 5 years, on behalf of a certified class of 46,000+ policyholders over allegations that Voya improperly raised cost-of-insurance charges. Over the course of litigation, the team from Susman Godfrey secured certification of the nationwide class and defeated summary judgment. The Court recognized the quality of the work, stating: "I want to commend you all for the work done on the pretrial order and motions in limine . . . I'm very happy to have you as lawyers appearing before me." The *Wall Street Journal* wrote about this case here (subscription required).

David McLaughlin v. HomeLight, Inc. et al. **(C.D. Cal.):** Successfully obtained on behalf of HomeLight a

dismissal with prejudice a Lanham Act claim brought in California federal court. Read the Court's order here.

***PDVSA US Litigation Trust v. Lukoil Pan Americas LLC et al* (S.D. Fl.)** Won a complete dismissal for Vitol of $10 billion antitrust case filed in federal court in Miami by a litigation trust, represented by David Boies, asserting claims on behalf of the Venezuelan national oil company. Susman Godfrey was tapped to take the lead in briefing and arguing the motion to dismiss for the multi-party joint defense group. The 11th Circuit Court of Appeals affirmed the district court's decision in 2021.

ODonnell et al. v. Harris County, et al. In this landmark constitutional case coming out of Harris County, Texas, won a landmark ruling in 2017, and was later affirmed in 2018, by the U.S. Court of Appeals for the Fifth Circuit, that the system of cash bail used in Harris County, Texas, violated the Due Process and Equal Protection rights of the thousands of misdemeanor arrestees. Gervais served on this case pro bono and was an active and critical part of the team from the filing of the Complaint to the consent decree entered by the district court following settlement.

***Flo & Eddie v. Sirius XM* (C.D. Cal.)** Served on a team from Susman Godfrey that was co-lead counsel to Flo & Eddie (the founding members of 70's music group, The Turtles) along with a class of owners of pre-1972 sound recordings for copyright violations by music provider Sirius XM. Flo & Eddie settled with Sirius XM on behalf of the class in a deal worth millions and approved by the Court in May 2017. Sirius XM agreed to pay at least $25.5 million (over $16 million after fees and expenses) and royalties under a 10-year license that is valued up to $62 million (over $41 million after fees and expenses)

***Bahnsen et al. v. Boston Scientific Neuromodulation Corp* (D.N.J.)** Secured favorable settlement for whistleblower clients against Boston Scientific Neuromodulation Corp. Gervais was instrumental in obtaining critical deposition testimony and document discovery, defeating the defendant's motion for summary judgement, and arguing and winning crucial motions in limine that ultimately led to settlement.

Honors and Distinctions

- Future Star, *Benchmark Litigation* (2023 Euromoney)
- 40 and Under Hot List, *Benchmark Litigation* (2022 Euromoney)
- "They've Got Next: The 40 Under 40" *Bloomberg Law* (Bloomberg, 2021)
- "How I Made Partner" *Law.com* (ALM, July 2021)
- Minority Leader of Influence: Attorneys, *Los Angeles Business Journal* (2021)
- Founding Member, 1844. 1844 is a group of black male lawyers practicing primarily in BigLaw and in-house legal departments around the country. The group's name "1844" is in reference to the year that the first black person, Macon Bolling Allen, was admitted to practice law in America. The purpose of 1844 is to build genuine relationships between its members and leverage those relationships to help them develop personally and professionally and give back to their communities. 1844 has been widely lauded for its exceptional work, including the New York City Bar Association's 2016 Diversity and Inclusion Champion Award.
- Founding Member, Black BigLaw Pipeline ("BBP"). BBP's purpose is to serve as a powerful and unique resource for reshaping diversity and, specifically, the experience of Black attorneys in the legal profession.
- Former Chairperson, Susman Godfrey Diversity Committee
- Term Member, Yale Law School Executive Committee
- Southern California Rising Star, Super Lawyers (2020, 2021, 2022 Thomson Reuters)
- 2017 Fellow, Associate Leadership Institute (NYC Bar)

Professional Associations and Memberships

California State Bar

New York State Bar

SUSMAN GODFREY L.L.P.

Zach Savage

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Overview

A former law clerk for U.S. Supreme Court Justice Elena Kagan, Zach Savage is a trial and appellate lawyer who litigates complex, bet-the-company business disputes across the country.

His clients have ranged from industry leaders such as General Electric and Walmart to smaller businesses and individuals in the financial, media, sports, and technology sectors. He has litigated cases across a wide range of areas, including breach of contract, co-founder disputes, class actions, defamation, employment, insurance, international disputes, and trade secrets.

Several of his matters have attracted substantial media attention, including his current representation of Dominion Voting Systems in its defamation suits against Fox News and others, as well as his current representation of the former shareholders of Yukos Oil against the Russian Federation seeking to confirm $50 billion in arbitral awards. Zach was named to Benchmark Litigation's 40 and Under Hot List in 2022.

Some of Zach's notable results and representations are:

- ***Dominion Voting Systems Defamation Suits***: Zach is representing Dominion Voting Systems in its ongoing suits against Fox News (Del. Super.) and Mike Lindell (D.D.C.). In the Lindell suit, Zach secured complete dismissal of Lindell's counterclaims against Dominion; you can read Zach's winning briefs here and here.
- ***PHT Holding I LLC v. Security Life of Denver Insurance Company (D. Colo.)***: Zach represents a class of life insurance policyholders in breach-of-contract suit against Security Life of Denver challenging increases to cost-of-insurance charges. Zach secured class certification of a 31-state class on a state law breach-of-contract claim.
- ***GE v. Nebraska Investment Finance Authority*** **(S.D.N.Y.)** Zach won a breach-of-contract jury verdict for General Electric, obtaining relief valued at over $100 million. The suit, against the Nebraska Investment Finance Authority, concerned above-market interest payments under the parties' investment contracts. The verdict was affirmed on appeal by the Second Circuit. *See GE Funding Capital Markets Services, Inc. v. Nebraska Investment Finance Authority*, 767 Fed. App'x 110 (2d Cir. 2019).
- ***Leonard v. John Hancock*** **(S.D.N.Y)** Zach secured final approval of a $123 million settlement on behalf of a class of life insurance policyholders in breach-of-contract suit against John Hancock challenging its increases to cost-of-insurance charges. Zach spoke to *Law360* about the settlement in its coverage of the case (subscription required).
- ***Avi Dorfman v. Compass*** **(N.Y. Supreme)** Zach represented Avi Dorfman in a co-founder dispute against real estate brokerage Compass. After seven years of litigation, the parties settled on confidential terms, with Compass acknowledging Dorfman's role as a founding team member.

- ***Hulley Enterprises v. Russian Federation* (D.D.C.)** Zach represents the former investors in Russian oil and gas company Yukos, seeking confirmation of a $50 billion arbitral award against the Russian Federation.

Education

New York University School of Law (J.D., *magna cum laude*, 2013)
Princeton University (A.B., *summa cum laude*, 2008)

Clerkship

Law Clerk to the Honorable Elena Kagan, Supreme Court of the United States
Law Clerk to the Honorable Anthony J. Scirica, United States Court of Appeals for the Third Circuit
Law Clerk to the Honorable Jesse M. Furman, United States District Court for the Southern District of New York

Notable Representations

Business Disputes

- **Confidential investment fund arbitration.** Represented individual against former investment fund employer in confidential arbitration concerning multi-million dollar partnership dispute.
- ***Synergy Global Outsourcing LLC v. Hinduja Global Solutions, Inc*.** Defending U.S. subsidiary of publicly traded Indian company, Hinduja Global Solutions, Inc in breach-of-contract and fiduciary duty litigation in Texas state court.
- **Confidential sports agency arbitration.** Representing sports agency in confidential arbitration concerning departure of agents to competing agency.
- ***Hulley Enterprises v. Russian Federation* (D.D.C.)** Representing the former investors in Russian oil and gas company Yukos, seeking confirmation of a $50 billion arbitral award against the Russian Federation.

Mass Actions

- ***Leonard v. John Hancock* (S.D.N.Y.)** Secured preliminary approval of a $123 million settlement on behalf of a class of life insurance policyholders in breach-of-contract suit against John Hancock who challenged its increases to cost-of-insurance charges. Read more (subscription required).
- ***Farneth v. Walmart* (W.D. Pa.)** Represented Walmart in a certified class action in Allegheny County, Pennsylvania challenging Walmart's collection of sales tax on certain in-store transactions.
- **Baltimore Opioid Litigation.** Represented City of Baltimore in litigation against nationwide opioid manufacturers and distributors.
- ***Advance Trust & Life Escrow Services v. Security Life of Denver* (D. Colo.)** Representing a class of life insurance policyholders in breach-of-contract suit against insurer Security Life of Denver, challenging increases to cost-of-insurance charges. Successfully obtained nationwide class certification on state law breach-of-contract claim.

International Disputes

- ***Vertical Aviation v. Government of Trinidad & Tobago* (S.D.N.Y)** Represented international aviation financing and leasing company Vertical Aviation in a breach-of-contract action against the Government of Trinidad & Tobago. The parties settled on confidential terms.
- ***U.S. v. Prevezon Holdings Ltd* (2nd Circ.)** Secured writ of mandamus from the Second Circuit on behalf of third-party hedge fund client Hermitage Capital, disqualifying its former counsel from representing the

defendant in a forfeiture action brought by the United States.

Honors and Distinctions

- 40 and Under Hot List, *Benchmark Litigation* (2022, Euromoney)
- Managing Editor, *NYU Law Review*
- Order of the Coif
- Pomeroy Scholar
- Weinfeld Prize for Scholarship in Procedure and Courts
- Furman Academic Scholarship

Professional Associations and Memberships

- State of New York
- United States District Court for the Southern District of New York
- United States District Court for the Eastern District of New York
- United States District Court for the Eastern District of Michigan
- United States Court of Appeals for the Second Circuit
- Associate Member, Federal Bar Council American Inn of Court

SUSMAN GODFREY L.L.P.

Lora Krsulich

Associate

Los Angeles
(310) 789-3145
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Overview

Lora Krsulich represents plaintiffs and defendants in complex commercial litigation across the United States. She has won courtroom battles and helped secure multi-million-dollar settlements for her clients, who range from large corporations to small businesses and individuals.

Equally as diverse as her client roster is the legal areas in which Lora is experienced. She has handled cases related to intellectual property, False Claims Act, fraud, insurance, and shareholders & securities. No matter the subject, Lora instills trust in her team and clients by confidently tackling complex subject matter and translating it into compelling arguments to her audience.

Results

Lora and a team from Susman Godfrey previously represented relators in their California False Claims Act suit against a large construction contractor in California State Court. Taking the lead on depositions of the contractor's project managers, business managers, and experts and drafting a successful motion for summary adjudication, Lora was instrumental in securing a favorable settlement for the relators.

Lora served as counsel to antenna technology company and repeat Susman Godfrey client, Fractus SA, in a patent infringement case against ZTE Corp. Traversing the globe, Lora handled key depositions, both in the United States and abroad, and then briefed and won a motion to compel ZTE's sales data and an opposition to a motion to strike. Fractus later agreed to settle its claims for a multi-million-dollar settlement.

Background

Lora joined Susman Godfrey after working as a law clerk to Judge Kim McLane Wardlaw on the U.S. Court of Appeals for the Ninth Circuit and to Judge Philip S. Gutierrez on the U.S. District Court for the Central District of California.

She graduated from UC Berkeley School of Law in 2016, where she served as editor-in-chief of the *California Law Review* and co-chair of Berkeley Law's First-Generation Professionals group.

Before law school, Lora worked as a senior policy advisor for the Office of Prisoner Reentry in Newark, New Jersey, where she won and managed more than $7 million in federal and private grants.

When not working, Lora enjoys spending time at the beach with her husband and two-year-old son, William.

Education

- University of California, Berkeley, School of Law (J.D., Order of the Coif)
- New York University, Robert F. Wagner Graduate School of Public Service (Master of Public

Administration)

- Boston College (B.A., Political Science, magna cum laude)

Clerkship

- Law Clerk to Judge Kim McLane Wardlaw, U.S. Court of Appeals for the Ninth Circuit
- Law Clerk to Judge Philip S. Gutierrez, U.S. District Court for the Central District of California
- Extern to Judge Charles R. Breyer, U.S. District Court for the Northern District of California

Notable Representations

- ***Moskowitz Family LLC v. Globus Medical*** **(E.D. Penn.)** Defending Globus Medical, Inc. in a patent infringement case brought by Moskowitz Family LLC. Playing a key role in the matter, Lora has taken a lead on deposition efforts and argued a key discovery motion. The matter is ongoing.
- ***Brighton Trustees, LLC as Trustee et al. v. Genworth Life & Annuity Ins. Co.*** **(E.D. Va.)** Representing policyholders in a putative class action against an insurance company that raised cost of insurance rates in violation of the terms of a contract with policyholders. Lora has taken and defended key fact witness and expert depositions in the case.
- ***Advance Trust & Life Escrow Servs. LTA v. Security Life of Denver Ins. Co.*** **(D. Colo.)** Representing a certified class of insurance policy owners against an insurance company that raised cost of insurance rates in violations of the terms of a contract with policyholders. Lora filed and won the motion for class certification and filed and defeated a motion for summary judgment.
- ***Granina v. Tarzana Emergency Medical Associates et al.*** **(LA Superior Court)** Representing consumers in a case against a Southern California hospital and medical group concerning the practice of surprise balance billing. The case, which is still in early stages, aims to recover overcharges consumers paid as a result of the defendants' balance billing practices.
- ***In re Pattern Energy Group Inc. Securities Litigation*** **(D. Del.)** Representing shareholders challenging a $6.1 billion go-private, all-cash sale of Pattern Energy Group, Inc. to Canada Pension Plan Investment Board.
- ***The Rawlings Group*** **(Kentucky State Court)** Defending Rawlings in various employment litigation matters pending in Kentucky State Court.

Honors and Distinctions

- Order of the Coif
- Thelen Marrin Law Award Recipient
- Finalist, McBaine Honors Moot Court Competition
- Prosser Prizes in Legislation & Statutory Interpretation, and Public Law & Policy
- Best Brief Award in Written & Oral Advocacy
- Commendation from the City of Newark, New Jersey City Council for Contributions to Newark's Prisoner Reentry Program
- NYU President's Service Award for outstanding leadership of a student group (Students for Criminal Justice Reform)

Publications

- Note, *Polluted Politics*, 105 Calif. L. Rev. 501 (2017)
- Comment, *Diminishing State Power in Nuclear Energy Regulation*, 41 Ecology L.Q. 629 (2014)

Professional Associations and Memberships

- State Bar of California
- Association of Business Trial Lawyers
- Women Lawyers Association Los Angeles

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 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.

JOINT STIPULATION AND SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED, subject to approval of the Court and pursuant to Rule 23 of the Federal Rules of Civil Procedure, by, between and among Plaintiff, individually and on behalf of the Class, and Defendant, that the cause of action and all matters raised by and related to the Strategic Accumulator Universal Life ("SAUL") insurance policies at issue in this lawsuit, as captioned above, are hereby settled and compromised on the terms and conditions set forth in this Joint Stipulation and Settlement Agreement and the releases set forth herein.

This Agreement is made and entered into by and among Plaintiff and Defendant and is intended by the Parties to fully, finally, and forever resolve, discharge, and settle the Action with respect to the SAUL Policies and Released Claims with prejudice upon and subject to the terms and conditions hereof.

1. Definitions

Capitalized terms in the Agreement shall have the meaning set forth below:

1.1 "Action" means the lawsuit, captioned *PHT Holding I LLC v. Security Life of Denver Insurance Company*, Case No. 18-cv-01897-DDD-SKC, currently pending in the United States District Court for the District of Colorado.

1.2 "Agreement" means this Joint Stipulation and Settlement Agreement.

1.3 "Claims" means any and all claims in equity or law, however denominated or presented, including Unknown Claims, whether direct or indirect, known or unknown, foreseen or not foreseen, accrued or not yet accrued, for any injury, damage, obligation, penalty or loss whatsoever.

1.4 "Class" means the class certified by the Class Certification and Summary Judgment Order, more specifically "[a]ll owners of Strategic Accumulator Universal Life ('SAUL') . . . policies subjected to Security Life of Denver's ('SLD') cost of insurance ('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." *See* Class Certification and Summary Judgment Order at 19, 24.

1.5 "Class Certification and Summary Judgment Order" means the Court's January 6, 2021 Order. (Dkt. 141).

1.6 "Class Counsel" means Susman Godfrey L.L.P., the attorneys appointed by the Court to serve as class counsel in the Class Certification Order.

1.7 "Class Counsel's Fees and Expenses" means the amount of the award approved by the Court to be paid to Class Counsel from the Settlement Fund for attorneys' fees and reimbursement of Class Counsel's costs and expenses.

1.8 "Class Member(s)" means the persons and entities that are included in the Class.

1.9 "Class Notice" means the notice of the Settlement approved by the Court to be sent by the Settlement Administrator, as described in Section 4, to the Class Members.

1.10 "Class Policy" or "Class Policies" means a policy or policies in the Class.

1.11 "COI Rate Increase" means the increase on cost of insurance rates that SLD announced in September 2015.

1.12 "Class Website" means the website that the Settlement Administrator set up concerning the Action.

1.13 "COI" means cost of insurance.

1.14 "Confidential Information" means material designated as "Confidential" in accordance with the terms of the Protective Order.

1.15 "Court" means the United States District Court for the District of Colorado, Hon. Daniel D. Domenico.

1.16 "Defendant" or "SLD" means Defendant Security Life of Denver Insurance Company and its predecessor and successor entities.

1.17 "Excluded Claims" means any LD GUL Claims, any claims that relate to any policies other than SAUL Policies owned by members of the Class, any claims that could not have been asserted against SLD in the Action because they arise from a future COI rate schedule increase imposed after February 13, 2023, any claims to complete the Settlement, any challenge to any new COI rate increase that SLD imposes, any claims to enforce a death benefit, any claims to otherwise enforce the terms of a Class Policy, and any other claims that do not arise out of the identical factual predicate of the Action (i.e., the COI Rate Increase).

1.18 "Fairness Hearing" means any hearing held by the Court on any motion(s) for final approval of the Settlement for the purposes of: (i) entering the Order And Judgment; (ii) determining whether the Settlement should be approved as fair, reasonable, adequate and in the best interests of the Class Members; (iii) ruling upon an application by Class Counsel for attorneys' fees and reimbursement of expenses and reasonable Incentive Award payments for the Plaintiff; and (iv) ruling on any other matters raised or considered.

1.19 "Final Approval Date" means the date on which the Court enters its Order And Judgment finally approving the Settlement.

1.20 "Final Class Members" means all persons and entities that are included in the Class, excluding, in the event that the Court requires a Second Opt-Out Period as a condition of approval of the Settlement, all owners of Class Policies who validly opt out of the class during the Second Opt-Out Period. For the avoidance of doubt, if the Court does not require a Second Opt-Out Period as a condition of approval of the Settlement, then the Final Class Members shall be the Class Members.

1.21 "Final Settlement Date" when referring to the Order And Judgment means exhaustion of all possible appeals other than the LD GUL Appeal, meaning: (i) if no appeal from or request for review of the Order And Judgment is filed other than the LD GUL Appeal, the day after the expiration of the time for filing or noticing any form of valid appeal from the Order And Judgment; or (ii) if an appeal or request for review other than the LD GUL Appeal is filed, the day after: (a) the date the last such appeal or request for review is dismissed; or (b) the date the Order And Judgment is upheld on appeal or review in all material respects other than concerning the LD GUL Appeal and is not subject to further review on appeal or by certiorari or otherwise other than in any respect concerning the LD GUL Appeal; provided, however, that no order of the Court or modification or reversal on appeal or any other order relating solely to the Class Counsel's Fees and Expenses or Incentive Award shall constitute grounds for cancellation or termination of this Agreement or affect its terms, or shall affect or delay the date on which the Order And Judgment becomes final.

1.22 "Funding Date" means thirty-five (35) calendar days after the Final Approval Date.

1.23 "Incentive Award" means the amount of an award approved by the Court to be paid to Plaintiff from the Settlement Fund, in addition to any settlement relief it may be eligible to receive, to compensate Plaintiff for its efforts undertaken by it on behalf of the Class.

1.24 "LD GUL Appeal" means any appeal of the entry of final judgment as to the LD GUL Claims.

1.25 "LD GUL Claims" means any claim arising out of the COI Rate Increase imposed on the LD GUL Policies.

1.26 "LD GUL Policies" means Life Design Guarantee Universal Life policies issued by SLD.

1.27 "Mills Supplemental Report" means the Supplemental Expert Report of Robert Mills served by Plaintiff in the Action on February 6, 2023.

1.28 "Net Settlement Fund" means the Settlement Fund less: (i) Settlement Administration Expenses; (ii) any Incentive Awards; and (iii) any Class Counsel's Fees and Expenses; and (iv) any other payments provided for under this Settlement or the Order And Judgment.

1.29 "Notice Date" means the date on which the Settlement Administrator mails the Class Notice.

1.30 "Opt-Out Policy(ies)" means any policy or policies that are validly excluded from the Class during any Second Opt-Out Period.

1.31 "Order And Judgment" means the Court's order approving the Settlement and entering final judgment. The judgment will include a provision for the retention of the Court's jurisdiction over the Parties to enforce the terms of the Settlement.

1.32 "Parties" means, collectively, Plaintiff and Defendant.

1.33 "Plaintiff" means PHT Holding I LLC, individually and as representative of the Class, and any of its assigns, successors-in-interest, representatives, employees, managers, partners, beneficiaries and members.

1.34 "Preliminary Approval Date" means the date on which the Court enters an order granting preliminary approval of the proposed Settlement.

1.35 "Protective Order" means the Stipulated Protective Order, entered by the Court in this Action on October 10, 2018. Dkt. 25.

1.36 "Released Claims" means 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. Released Claims do not include Excluded Claims.

1.37 "Released Parties" means SLD and its past, present, and future parent companies, direct and indirect subsidiaries, predecessors, successors and assigns, together with each of the their respective past, present, and future officers, directors, shareholders, employees, representatives, insurers, attorneys, and agents (including but not limited to, those acting on behalf of SLD and within the scope of their agency).

1.38 "Releasing Parties" means Plaintiff and each Final Class Member, on behalf of themselves and their respective agents, heirs, relatives, representatives, attorneys, successors, trustees, subrogees, executors, assignees, and all other persons or entities acting by, through, under, or in concert with any of them.

1.39 "SAUL Claims" means any claim arising out of the COI Rate Increase as imposed on SAUL Policies.

1.40 "SAUL Policies" means Strategic Accumulator Universal Life policies issued by SLD from 2003 to March 2006.

1.41 "Second Opt-Out Period" means any additional period required by the Court, as a condition of approval of the Settlement, in which Class Members are given a second opportunity to opt out of the Class.

1.42 "Settlement" means the settlement set forth in this Agreement.

1.43 "Settlement Administration Expenses" means all Class Notice and administrative fees, costs, or expenses incurred in administering the Settlement, including those fees incurred by the Settlement Administrator. Settlement Administration Expenses shall be paid from the Settlement Fund.

1.44 "Settlement Administrator" means the third-party settlement administrator of the Settlement who is consented to by the parties. Plaintiff shall be responsible for selecting the Settlement Administrator and consent from Defendant will not be unreasonably withheld. The Parties pre-approve JND Legal Administration LLC, which the Court previously approved in its Order Approving Form and Manner of Notice (Dkt. 148 at 2) to administer Class Notice, as the Settlement Administrator.

1.45 "Settlement Fund" means a cash fund consisting of the consideration provided pursuant to Section 2.1, less any reductions provided pursuant to Section 2.2.

1.46 "Settlement Fund Account" means any escrow account designated and controlled by Class Counsel at one or more national banking institutions into which SLD shall deposit the Final Settlement Fund pursuant to this Agreement.

1.47 "Unknown Claims" means any claims asserted, that might have been asserted, or that hereafter may be asserted concerning or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged in the

Action with respect to the Released Claims that one or more of the Releasing Party does not know or suspect to exist in his, her or its favor at the Final Approval Date, and which if known by him, her or it might have affected his, her or its settlement with and release of the Released Party, including his, her or its decision to object to the Settlement.

1.48 The terms "he or she" and "his or her" include "it" or "its," where applicable. Defined terms expressed in the singular also include the plural form of such term, and vice versa, where applicable.

1.49 All references herein to sections and paragraphs refer to sections and paragraphs of this Agreement, unless otherwise expressly stated in the reference.

2. Settlement Relief: Cash Consideration

2.1 Subject to Section 2.2 below, SLD shall fund the Settlement Fund by depositing $30,000,000 into the Settlement Fund Account by the Funding Date.

2.2 The Parties agree that the deadline to opt out of the Class expired on May 21, 2021. However, in the event that, as a condition of approval of the Settlement, the Court requires a Second Opt-Out Period as a condition of approval of the Settlement, the Settlement Fund shall be reduced by multiplying the amount of the Settlement Fund ($30,000,000) by a fraction where (1) the numerator is the total COI "overcharges" for the Class as calculated in Schedule 4 of the Mills Supplemental Report, less the combined "overcharges," as calculated in the Mills Supplemental Report, incurred by the Opt-Out Policies; and (2) the denominator is the total COI "overcharges" for the Class as calculated in Schedule 4 of the Mills Supplemental Report. In the event that the fraction described in the preceding sentence is less than .90, then the Settlement Fund shall be multiplied by .90.

2.3 Any disputes regarding the reduction of the Settlement Fund as provided in Section 2.2 above shall be presented to the Court for a determination. For the avoidance of doubt, if an owner (such as a securities intermediary or trustee) owns multiple policies on behalf of different principals, that owner may stay in the Class as to some policies and opt out of the Class for other policies. The Parties agree that the opt-out reduction methodology set forth in Section 2.2 above is proposed solely for settlement purposes and may not be used as an admission or evidence of the validity of any damages model regarding any alleged wrongdoing by SLD.

2.4 If any appeal of the Order And Judgment (other than the LD GUL Appeal) is filed before the Funding Date, SLD may, at its option, delay funding the Settlement Fund until the entry of a final non-appealable order approving the Settlement, in which case SLD shall pay interest on the Settlement Fund for the period between the Funding Date and the date on which SLD funds the Settlement Fund Account at a rate of 3% per annum, simple interest. The filing of the LD GUL Appeal is not grounds for SLD to delay funding the Settlement Fund Account.

2.5 The Settlement Fund shall be used to pay (i) Settlement Administration Expenses; (ii) any Incentive Award; (iii) any Class Counsel's Fees and Expenses; and (iv) all payments to Final Class Members.

2.6 The Settlement Fund, and all earnings thereon, shall be deemed to be in *custodia legis* of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds shall have been disbursed pursuant to the terms of this Agreement or further order of the Court.

2.7 The funds deposited in the Settlement Fund Account shall be invested in instruments, accounts, or funds backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof. Such permissible investments include investments in a United States Treasury Fund or a bank account that is either: (a) fully insured by the Federal Deposit Insurance Corporation; or (b) secured by instruments backed by the full faith and credit of the United States Government. The Parties and their respective counsel shall have no responsibility for or liability whatsoever with respect to investment decisions made for the Settlement Fund Account. All risks related to the investment of the Settlement Fund shall be borne solely by the Class.

2.8 The Parties agree that this is a non-reversionary settlement, and that after the Final Settlement Date, there will be no reversion of the Settlement Fund to SLD or any other person or entity funding the Settlement.

2.9 Neither Plaintiff nor SLD shall be liable or obligated to pay any fees, expenses, costs, or disbursements to any person in connection with the Action, this Agreement, or the Settlement, other than those expressly provided in this Agreement. For the avoidance of doubt, the Settlement Fund amount represents SLD's total and maximum contribution to this Settlement, inclusive of all relief to the Class, Class Counsel's Fees and Expenses, Incentive Awards, and Settlement Administration Fees.

3. Settlement Relief: Non-Cash Consideration

3.1 SLD agrees not to increase the COI rate schedules on the Final Class Members' SAUL Policies above the COI rate schedules that SLD adopted under the COI Rate Increase at any time prior to March 31, 2028. Plaintiff and the Class agree that SLD may continue to implement the COI Rate Increase on the SAUL Policies and further agree not to take any legal action or cause to take any legal action challenging (i) any COI rates and/or COI rate schedules for the SAUL Policies adopted under the COI Rate Increase or (ii) SLD's continued implementation of the COI Rate Increase on SAUL Policies. The covenant set forth in this paragraph shall not be interpreted to limit the scope of the Released Claims

3.2 SLD agrees to not take any legal action (including asserting as an affirmative defense or counter-claim), or cause to take any legal action, that seeks to void, rescind, cancel, have declared void, or seeks to deny coverage under or deny a death claim for any Final Settlement Class Member based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in applying for the policy. If Defendant breaches this covenant, it shall also be liable for reasonable attorneys' fees and costs in connection with any such attempted recission, cancellation, claim, or suit. The covenant set forth in this paragraph is solely prospective, and does not apply to any actions taken by SLD in the past. With the exception of the foregoing, nothing contained in this Agreement shall otherwise restrict SLD from: (i) following its normal procedures

and any applicable legal requirements regarding claims processing, including but not limited to confirming the death of the insured; determining the proper beneficiary to whom payment should be made in accordance with applicable laws, the terms of the policy and policy specific documents filed with SLD; and investigating and responding to competing claims for death benefits; (ii) enforcing contract terms and applicable laws with respect to misstatements regarding the age or gender of the insured; or (iii) complying with any court order, law or regulatory requirements or requests, including but not limited to, compliance with regulations relating to the Office of Foreign Asset Control, Financial Industry Regulatory Authority, and Financial Crimes Enforcement Network.

4. Approval and Class Notice

4.1 The Parties agree that Plaintiff shall move for an order seeking preliminary approval of the Settlement, which shall include a request to notify the Class of the Settlement, by March 31, 2023.

4.2 Plaintiff will, through the Settlement Administrator, notify Class Members of the Settlement by direct mailing to the last-known address of each Class Member, as recorded in SLD's administration system, as well through the Class Website. SLD shall provide all data reasonably necessary for Plaintiff to effectuate such direct mailing notice.

4.3 The mailing of a notice to any person or entity that is not in the Class shall not render such person or entity a part of the Class or otherwise entitle such person to participate in this Settlement.

4.4 If the Court requires a Second Opt-Out Period as a condition of approving the Settlement, the Class Notice shall advise Class Members of their right to opt out of the Class and the deadline to do so. To be valid, a request to opt out of the Class must be in writing and served on the Settlement Administrator no later than 45 calendar days after the Notice Date, or as otherwise determined by the Court. To be valid, a request to opt out must further (i) clearly state the Class Member's desire to opt out from the Class; (ii) identify the Policy or Policies to be excluded by policy number; and (iii) be signed by the Class Member or by a person providing a valid power of attorney to act on behalf of the Class Member.

4.5 Notwithstanding anything in this Agreement, if, in the event that the Court requires a Second Opt-Out Period as a condition of approving the settlement, the total percentage of the Class (as measured by the percentage of total amount of alleged "overcharges," as calculated in the Mills Supplemental Report) which submit timely and valid requests for exclusion from the Class during the Second Opt-Out Period, or on whose behalf timely and valid requests for such exclusion are submitted during the Second Opt-Out Period, exceeds ten percent (10%) , SLD shall have the option, but not the obligation, to terminate this Agreement no later than 14 days after the opt-out period contemplated by Section 4.4 expires.

4.6 Class Members may object to this Settlement by filing a written objection with the Court and serving any such written objection on counsel for the respective Parties (as identified in the Class Notice) no later than 45 calendar days after the Notice Date, or as otherwise determined by the Court. Unless otherwise ordered by the Court, the objection must contain: (1) the full name,

address, telephone number, and email address, if any, of the Class Member; (2) Policy number; (3) a written statement of all grounds for the objection accompanied by any legal support for the objection (if any); (4) copies of any papers, briefs, or other documents upon which the objection is based; (5) a list of all persons who will be called to testify in support of the objection (if any); (6) a statement of whether the Class Member intends to appear at the Fairness Hearing; and (7) the signature of the Class Member or his/her counsel. If an objecting Class Member intends to appear at the Fairness Hearing through counsel, the written objection must also state the identity of all attorneys representing the objecting Class Member who will appear at the Settlement Hearing. Unless otherwise ordered by the Court, Class Members who do not timely make their objections as provided in this Paragraph will be deemed to have waived all objections and shall not be heard or have the right to appeal approval of the Settlement. The Class Notice shall advise Class Members of their right to object and the manner required to do so.

4.7 In connection with the motion for preliminary approval, any motion for final approval, or any other motion in which a proposed judgment in this Action is submitted, the Parties agree to propose a final judgment that expressly preserves Plaintiff's right to pursue the LD GUL Appeal.

4.8 The fact that Plaintiff may appeal the entry of final judgment with regard to the LD GUL Policies shall have no effect on the Settlement, and regardless of the pendency and outcome of the LD GUL Appeal, SLD remains obligated to fund the Settlement Fund pursuant to Section 2 of this Agreement and otherwise comply with its obligations under this Agreement.

4.9 The Parties agree that if the Court finds that the Settlement does not meet the standard for preliminary approval, the Parties will negotiate in good faith to modify the Settlement directly or with the assistance of a mediator to resolve the issue(s) to the satisfaction of the Court.

4.10 Within 10 calendar days following the filing of this Agreement with the Court, Defendant shall serve notices of the proposed Settlement upon the appropriate officials in compliance with the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715.

5. Incentive Award, Fees, Expenses, and Allocation

5.1 Plaintiff will move for an Incentive Award from the Settlement Fund in an amount up to but not more than $35,000. SLD will not oppose Plaintiff's motion for an Incentive Award. The purposes of such an award shall be to compensate Plaintiff for efforts undertaken on behalf of the Class. The Incentive Award shall be made to Plaintiff in addition to, and shall not diminish or prejudice in any way, any settlement relief which it may be eligible to receive.

5.2 Plaintiff will move for attorneys' fees not to exceed 33 1/3% of the gross benefits provided to the Final Class Members by this Settlement, and reimbursement for all expenses incurred or to be incurred, payable only from the Settlement Fund. SLD agrees not to oppose Plaintiff's motion for Class Counsel's Fees and Expenses to the extent Plaintiff's request does not exceed the amounts set forth above.

5.3 Neither Plaintiff nor Defendant shall be liable or obligated to pay any fees, expenses, costs, or disbursements to any person, either directly or indirectly, in connection with

SAUL Claims at issue in the Action, this Agreement, or the Settlement, other than those expressly provided in this Agreement.

5.4 The Parties agree that the Settlement is not conditioned on the Court's approval of Incentive Awards or Class Counsel's Fees and Expenses.

5.5 The Net Settlement Fund shall be distributed to the Final Class Members pursuant to a plan of allocation to be developed by Class Counsel and approved by the Court. SLD agrees to not oppose any such proposed plan of allocation, or such plan as may be approved by the Court, and further agrees to not take any position on any claims administration process.

5.6 Class Counsel will, in its sole discretion, allocate and distribute the fees and costs that it receives pursuant to this Settlement among Class Counsel and any and all other counsel, if applicable.

6. Releases and Waivers

6.1 Upon the Final Settlement Date, the Releasing Party shall be deemed to have, and by operation of the Order And Judgment shall have, fully, finally, and forever released, relinquished and discharged the Released Party of and from all Released Claims.

6.2 The Releasing Party expressly agrees that it shall not now or hereafter institute, maintain, assert, join, or participate in, either directly or indirectly, on their own behalf, on behalf of a class, or on behalf of any other person or entity, any action or proceeding of any kind against the Released Party asserting Released Claims.

6.3 With respect to any Released Claims under this Agreement, the Parties stipulate and agree that, upon the Final Settlement Date, the Releasing Parties shall be deemed to have, and by operation of the Order And Judgment shall have expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of Section 1542 of the California Civil Code, which provides:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

The Releasing Parties shall upon the Final Settlement Date be deemed to have, and by operation of the Order And Judgment shall have, waived any and all provisions, rights, or benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code. The Releasing Parties may hereafter discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of the Released Claims, but the Releasing Parties upon the Final Settlement Date, shall be deemed to have, and by operation of the Order And Judgment shall have fully, finally, and forever settled and released any and all Released Claims, known or unknown, suspected or unsuspected, contingent or noncontingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct relating to the Released Claims that is negligent, intentional, with or without malice, or any breach

of any duty, law, or rule without regard to subsequent discovery or existence of such different or additional facts. The Parties expressly acknowledge and each other Releasing Party and Released Party by operation of law shall be deemed to have acknowledged that the inclusion of Unknown Claims among Released Claims was separately bargained for and a material element of the Settlement.

6.4 Nothing in this Release shall preclude any action to enforce the terms of this Agreement or the LD GUL Appeal.

6.5 The scope of the Released Claims or Released Party shall not be impaired in any way by the failure of any Class Member to actually receive the benefits provided for under this Agreement.

6.6 For purposes of clarification only, this Agreement shall not release Defendant from paying any future death benefits or surrender values that may be owed.

7. Tax Reporting and No Prevailing Party

7.1 Any person or entity receiving any payment or consideration pursuant to this Agreement shall alone be responsible for the reporting and payment of any federal, state and/or local income or other form of tax on any payment or consideration made pursuant to this Agreement, and Defendant shall have no obligations to report or pay any federal, state and/or local income or other form of tax on any payment or consideration made pursuant to this Agreement.

7.2 All taxes resulting from the tax liabilities of the Settlement Fund Account shall be paid solely out of the Settlement Fund.

7.3 No Party shall be deemed the prevailing party for any purposes of this Action.

8. Other Provisions

8.1 The Parties: (i) acknowledge that it is their intent to consummate this Agreement; (ii) agree to cooperate in good faith to the extent reasonably necessary to effect and implement all terms and conditions of the Agreement and to exercise their best efforts to fulfill the foregoing terms and conditions of the Agreement; and (iii) agree to cooperate in good faith to obtain preliminary and final approval of the Settlement and to finalize the Settlement.

8.2 The Parties agree that the amounts paid in the Settlement and the other terms of the Settlement were negotiated in good faith, and at arm's length by the Parties, and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

8.3 No person or entity shall have any claim against Class Counsel, the Settlement Administrator, Defendant's counsel or any of the Released Party based on actions taken substantially in accordance with the Agreement and the Settlement contained therein or further orders of the Court.

8.4 Defendant specifically and generally denies any and all liability or wrongdoing of any sort with regard to any of the Claims asserted or that could have been asserted in the Action

and makes no concessions or admissions of liability or misconduct of any sort. Neither this Agreement, nor the Settlement, nor any communications related thereto, nor any act performed or document executed pursuant to, or in furtherance of, the Agreement or the Settlement: (i) is or may be deemed to be or may be used as an admission, concession, presumption, proof or evidence of, the validity of any Claims, or of any fault, wrongdoing or liability of the Released Party, or of any damages to the Class or of any infirmity of any of Defendant's defenses; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault, liability, misconduct or omission of any kind whatsoever of the Released Party in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. Nothing in this paragraph shall prevent Defendant and/or the Released Party from using this Agreement and Settlement or the Order And Judgment in any action that may be brought against it in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

8.5 SLD agrees to provide all data reasonably necessary for Class Counsel to effectuate the distribution of Class Notice, any plan of allocation, and distribution of payments to Final Class Members.

8.6 The Parties agree that if this Agreement or the Settlement fails to be approved, fails to become effective, otherwise fails to be consummated, is declared void, or if there is no Final Settlement Date, then the Parties will be returned to *status quo ante*, as if this Agreement had never been negotiated or executed, except that no Settlement Administration Expenses shall be recouped. Each Party will be restored to the place it was in as of the date this Agreement was signed with the right to assert in the Action any argument or defense that was available to it at that time.

8.7 Nothing in this Agreement shall change the terms of any Policy. Nothing in this Agreement shall preclude any action to enforce the terms of this Agreement.

8.8 The Parties agree, to the extent permitted by law, that all agreements made and orders entered during the course of the Action relating to confidentiality of information shall survive this Agreement. To the extent Class Counsel or the Settlement Administrator requires Confidential Information to effectuate the terms of this Agreement, the terms of the Confidentiality Order shall apply to any information necessary to effectuate the terms of this Agreement.

8.9 The Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest. No waiver of any provision of this Agreement or consent to any departure by either Party therefrom shall be effective unless the same shall be in writing, signed by the Parties or their counsel, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No amendment or modification made to this Agreement pursuant to this paragraph shall require any additional notice to the Class Members, including written or publication notice, unless ordered by the Court. The Parties may provide updates on any amendments or modifications made to this Agreement on the Class Website.

8.10 Each person executing the Agreement on behalf of any party hereto hereby warrants that such person has the full authority to do so.

8.11 The Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Furthermore, electronically-signed PDF versions or copies of original signatures may be accepted as actual signatures, and will have the same force and effect as the original. A complete set of executed counterparts shall be filed with the Court.

8.12 The Agreement shall be binding upon, and inure to the benefit of, the successors, heirs, and assigns of the Parties hereto; but this Agreement is not designed to and does not create any third-party beneficiaries either express or implied, except as to the Class Members.

8.13 The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either party. No party shall be deemed the drafter of this Agreement. The Parties acknowledge that the terms of the Agreement are contractual and are the product of negotiations between the Parties and their counsel. Each of the Parties and their respective counsel cooperated in the drafting and preparation of the Agreement. In any construction to be made of the Agreement, the Agreement shall not be construed against any Party.

8.14 Other than necessary disclosures made to the Court or the Settlement Administrator, this Agreement and all related information and communication shall be held strictly confidential by Plaintiff, Class Counsel, and their agents until such time as the Parties file this Agreement with the Court.

8.15 This Agreement shall be governed by and interpreted in accordance with the laws of the State of Colorado, without reference to its choice-of-law or conflict-of-laws rules.

8.16 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Agreement and any discovery sought from or concerning objectors to this Agreement. All Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement embodied in the Agreement.

8.17 Whenever this Agreement requires or contemplates that one Party shall or may give notice to the other, notice shall be provided by e-mail and/or next-day (excluding Saturday and Sunday) express delivery service as follows:

(a) If to Defendant, then to:

Clark C. Johnson
Casey L. Hinkle
Michael T. Leigh
Burt A. (Chuck) Stinson
Kaplan Johnson Abate & Bird LLP
710 West Main Street, 4th Floor
Louisville, KY 40202
cjohnson@kaplanjohnsonlaw.com
chinkle@kaplanjohnsonlaw.com
mleigh@kaplanjohnsonlaw.com
cstinson@kaplanjohnsonlaw.com

(b) If to Plaintiff, then to:

Steven Sklaver
Michael Gervais
Lora Krsulich
SUSMAN GODFREY LLP
1900 Avenue of the Stars
Los Angeles, California 90067
ssklaver@susmangodfrey.com
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1301 Avenue of the Americas, 32nd Floor
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8.18 The Parties reserve the right to agree between themselves on any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

8.19 All time periods set forth herein shall be computed in calendar days unless otherwise expressly provided. In computing any period of time prescribed or allowed by this Agreement or by order of any court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Each other day of the period to be computed shall be included, including the last day thereof, unless such last day is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court on a day in which the court is closed during regular business hours. In any event, the period runs until the end of the next day that is not a Saturday, a Sunday, a legal holiday, or a day on which the court is closed. When a time period is less than seven business days, intermediate Saturdays, Sundays, legal holidays, and days on which the court is closed shall be excluded from the computation. As used in this Paragraph, legal holidays include New Year's Day, Dr. Martin Luther King Jr. Day, Lincoln's Birthday, Washington's Birthday, Presidents' Day, Memorial Day, Juneteenth, Independence Day, Labor Day, Columbus Day, Election Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by Federal law or New York Law.

Stipulated and agreed to by:

PHT Holding I LLC

By: DocuSigned by: Andrew Plevin 3458C3942B3B44E...

Title: Authorized Signer

Date: _____

pSecurity Life of Denver Insurance Company

By: Leigh A. McKenney

Title: SVP & Chief Administrative Officer

Date: _____

APPROVED ONLY AS TO FORM

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Counsel for Defendant Security Life of Denver Insurance Company

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01897-DDD

ADVANCE TRUST & LIFE ESCROW SERVICES, LTA, as securities intermediary for LIFE PARTNERS POSITION HOLDER TRUST, on behalf of itself and all others similarly situated,

Plaintiff,

vs.

SECURITY LIFE OF DENVER INSURANCE COMPANY,

Defendant.

REPORTER'S TRANSCRIPT
FINAL PRETRIAL CONFERENCE

Proceedings before the HONORABLE DANIEL D. DOMENICO, Judge, United States District Court for the District of Colorado, commencing at 1:35 p.m. on the 25th day of January, 2023, in Courtroom A1002, Alfred A. Arraj United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

STEVEN G. SKLAVER, MICHAEL GERVAIS, SUSMAN GODFREY L.L.P., 1900 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067-6029

SETH ARD, ZACH SAVAGE, SUSMAN GODFREY L.L.P., 1301 Avenue of the Americas, 32nd Floor, New York, NY 10019-6023

PAUL H. SCHWARTZ, SHOEMAKER GHISELLI & SCHWARTZ LLC, 1811 Pearl Street, Boulder, CO 80302

JULIE H. THOMAS, RMR, CRR, Official Court Reporter, 901 19th Street, Room A256, Denver, CO 80294, (303)335-2111

Proceedings reported by mechanical stenography; transcription produced via computer.

APPEARANCES: (Cont.)

For the Defendant:

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KATHRYN A. REILLY, CHUAN "CICI" CHENG, WHEELER TRIGG O'DONNELL LLP, 370 Seventeenth Street, Suite 4500, Denver, CO 80202

* * * * *

I N D E X

(Proceedings commenced 1:35 p.m., January 25, 2023.)

THE COURT: Good afternoon. Please take your seats.

This is a final pretrial conference in Case No. 18-cv-1897. Why don't we begin by letting everyone introduce themselves, get everyone to enter their appearances, and then we can go ahead and get started. Why don't we start with the plaintiff.

MR. SKLAVER: Good afternoon, Your Honor. Stephen Sklaver, for the plaintiff and the class, of Sussman Godfrey.

MR. SAVAGE: Good morning, Your Honor. Zach Savage, also of Sussman Godfrey, for plaintiff and the class.

THE COURT: Welcome.

MR. GERVAIS: Good morning, Your Honor. Michael Gervais, Sussman Godfrey, for plaintiff and the class.

MR. ARD: Good afternoon, Your Honor. Seth Ard, Sussman Godfrey, for plaintiff and the class.

MR. SCHWARTZ: Good afternoon, Your Honor. Paul Schwartz, Shoemaker Ghiselli & Schwartz, for the plaintiff and the class.

THE COURT: All right. Welcome. Thank you all.

For the defendant?

MR. JOHNSON: Good afternoon, Your Honor. Clark Johnson from Kaplan, Johnson, Abate & Bird, for the defendant Security Life of Denver. We also have Andrea Nelson, a

corporate representative from the company.

THE COURT: Welcome.

MS. HINKLE: Good afternoon, Your Honor. Casey Hinkle also for the defendant.

MS. REILLY: Good afternoon, Your Honor. Katie Riley with Wheeler Trigg O'Donnell, also for the defendant.

MS. CHENG: Good afternoon, Your Honor. CiCi Cheng, Wheeler Trigg O'Donnell, also on behalf of the defendant.

THE COURT: Thank you, everybody. Welcome.

I should thank you all for bearing with me last week. I apologize for the change of plans. And if you hear me sniffling or coughing, you will know why, but I am in compliance with our rules, so hopefully I don't cause any more problems, but I do appreciate everybody's bearing with me and rearranging.

I want to do a few things here today besides get to meet everybody. First, just give you a little bit of an outline of how I expect the trial to work, some of the housekeeping, and just kind of the procedural things. We are scheduled to have another pretrial conference, I believe, on February 9th at 12:30 p.m. where we can go over some of these details again. There will probably be a couple of things I ask you about or I mention today that we may leave open until then, but I at least want to get the basics out there. Then there will be a few substantive things I think that we can, if

not resolve today, at least discuss and make some progress on.

So, as I mentioned, we do have that trial prep conference on the 9th at 12:30 p.m. The trial is scheduled to begin on the 13th. It's scheduled for five days. The usual -- my practice typically will be to have the jury here from 9:00 to 5:00 every day. On the first day of trial, at least, counsel should be here at 8:30 in case there's anything we need to go over, and then obviously if we need to come in early or stay late on certain days, we'll do that, but if you could plan to be here at 8:30 for the first day of trial, and then if I don't say otherwise we'll start at 9 o'clock the rest of the week. Typically we will try to take an hour to an hour and a half for lunch each day, depending on how things are going, take at least one midmorning and midafternoon brief recess for everybody to stretch and go to the restroom.

That will be my basic plan. Obviously that will sort of depend on how things are going.

In this case, given the COVID, I used to have more jurors, but in a civil case I'm just going to have seven jurors in this case. And so we will -- the way I'll run voir dire, I will ask some of the questions you submit, potentially some of my own, do most of the voir dire myself, get down to 13 potential jurors who, after I have excused anybody for cause or for hardship, then I'll give each side 15 minutes to ask questions, and then you will each have three peremptory

challenges to get down to our seven.

The way we have done it -- you can sort of see the numbers on some of the chairs -- we are still having a little bit of our distancing in practice. I think we will probably continue that. So normally what we will do is have the 13 spread out among the chairs in the jury box and a few sit in front. I will mostly just ask them the questions. If somebody is excused, the alternate -- or the reserve, the rest of our panel will be in the back, and we will just call them up, and I will ask them any of the questions. So that's probably how the courtroom will be laid out for jury selection unless something changes, but I'll finalize that before the conference on the 9th.

So, as I mentioned, I'll do as much questioning as I think is necessary based on some of the questions you submit, some of my own, get down to where I think we're ready to go. Then each side will have 15 minutes to ask questions of anybody they want, and then we will do peremptory challenges. So that's how I plan to do jury selection.

Any questions about that or anything else so far?

MR. ARD: Yes, Your Honor. Will we get any information about jurors in advance of the morning, or --

THE COURT: No. We will just get it that morning. I don't get it either, so . . .

MR. ARD: Thank you, Your Honor.

THE COURT: Yeah.

I don't think -- other than that kind of seating, we're not really going to have a lot of COVID restrictions, I don't think. Keep an eye on the Court's website in case things change. As you know, things can change pretty quickly, but we're back to essentially operating trials as normal for the most part.

After this session make sure you talk to Mr. Keech about getting a training on courtroom technology, and I'd like everybody who is going to be using any of our technology to have a session with him to make sure it goes relatively smoothly.

Oh, as to jury selection, I think in a case like this to get seven jurors my plan would be to ask our jury people to invite 25. That seems like it should be enough to get us a panel. It doesn't seem like there should be a lot of people with conflicts or anything else. Does anybody think we need more than 25?

All right. Well, if you change your mind, let me know soon, but I will plan to ask for 25 potential jurors. These days they are asking -- we may end up with a few more because they get -- they are overinviting people given the excuses that we sometimes get these days.

The jurors, once we have a jury seated, will get a notebook that will have the preliminary instructions, any

stipulated facts from the final pretrial order, and just some, sort of, basics about the area and the courtroom. If you can stipulate to any additional facts, try to get those to us by the time of that next conference so we can be prepared for that.

Are the parties going to ask for witness sequestration under Rule 615? Is either party going to request that?

MR. SKLAVER: We are, Your Honor. We discussed with defendants the understanding that the experts wouldn't be sequestered, and that's fine.

THE COURT: Okay.

MR. JOHNSON: Your Honor, one of our witnesses is also going to serve as the corporate representative, so we have asked that he not be sequestered, but otherwise we have no issue with the sequestration.

THE COURT: Okay. So then we will enter the sequestration order, but you are responsible for also ensuring that your witnesses understand that order. Okay? All right. Thank you.

I think you should have seen in the practice standards that I'd prefer to have the exhibits just identified by number, not by party, and to avoid duplicate exhibits. They don't have to be consecutive, so you can reserve some space, if you need to, but they should just be numbered.

We should have binders, and you can work with Mr. Keech if you have any questions about this sort of thing, but they should be bound and labeled with the caption, the trial date, and two sets of exhibits, physical exhibits, one marked "Original," one marked "Copy," and then one electronic copy as well.

Before trial each party must submit an original and two copies of their final witness and exhibit lists. If these have changed from what is on the docket, you should file the amended lists on the docket as well.

We'll discuss in a little bit some of the objections that we have already received.

Those are most of the, sort of, just kind of basic procedural things I wanted to talk about. Does anybody have any questions or anything they wanted to bring up about process questions or what the trial is going to look like?

Actually, I did -- there's two more things I forgot to mention, now that I think about it.

One, I think, to make sure we stay with our one week of trial, I'd like to give you each an hour to use for opening and closing as you wish. If you don't think that that's going to work, we can talk about that at the trial prep conference.

And on openings if you are going to use any exhibits -- I don't want to have to deal with objections to exhibits during openings, so I prefer no exhibits. If you do

think you need to use an exhibit, you need to run it by opposing counsel, and we'll deal with any objections to it before trial starts. Okay? All right.

Anything else?

MR. SKLAVER: Yes, Your Honor, just a point of clarification. Is it an hour for opening and an hour for closing or an hour and we allocate it?

THE COURT: My hope would be an hour for you to allocate as you wish between the two.

MR. SKLAVER: And the second is dealing with the exhibits, and maybe it's better addressed later on, but are the exhibits to which there is no objection, the parties have agreed, are those going to be deemed preadmitted?

THE COURT: Yeah, what I would like you to do -- that's a good question. What I would like you to do is to the extent there are exhibits that you are going to stipulate the admission, obviously not anything beyond that, if at the beginning of trial you can just tell me on the record which exhibits those are, I will then admit -- say those are going to be admitted. You still have to -- if you want the jury to get them after the trial, you need to publish them. So you won't have to move their admission. You can just say: Exhibit 25 has been stipulated; would you publish it to the jury? You don't have to move it. But if you don't ever use it, it won't be admitted. So, yes, that's a good question.

Thank you.

Anything else?

Okay. I wanted to discuss kind of substantively -- I know that there are some motions in limine, there are some issues with the jury instructions in particular, and then objections to both the depositions and some of the exhibits. Well, there's also a couple of, kind of, things on the docket that I thought I could go ahead.

I'm going to grant the stipulated substitution of the plaintiff. I think I will do it -- it will be better if I do it in writing, but I am going to grant that.

There's also a motion for leave to restrict, which is number 178. I am going to grant that as well.

The sort of substantive things I thought we could at least discuss here today, I think I probably can rule on the motions in limine. The instructions I want to discuss later, as well as the objections.

So if we could talk about the motions in limine, I will tell you I think I am probably about ready to rule on those, if I can find my notes that I took on those particular items, but if that makes sense, we can start with the motions in limine. I think maybe that might help us with some of the objections, and then we can leave the instructions to the end.

Obviously, with motions in limine you can and, in some cases, may want to bring this up, but I think what I

would like to do is just give you my basic position based on what's been filed so far, and let maybe plaintiffs go first and just explain if I've made any terrible errors, and then let the defendant respond to that.

So my view of the plaintiff's first motion is that I'm inclined to deny that motion. I don't think this is unduly prejudicial. It seems relevant to me and is a proper subject, if necessary, for cross-examination. So my inclination is to deny the first motion on that basis.

The second motion, it seems to me that the defendants essentially have said that they wish to close the loop if it's brought in, so I'm going to -- my inclination is to deny that, subject, though, to the defendant's parameters that they put on that, that they only would bring this up if the communications with regulators have already been brought up as evidence about the scope.

The third motion, it seems to me that the defendant has said they aren't planning to introduce this evidence anyway, so I will grant that motion.

The fourth, I think I'm inclined to grant it unless the plaintiff alludes to this information themselves. If they open the door, I'll reconsider, but I don't think the defense can bring this up otherwise.

The fifth motion, as I understand it, this -- the defense position is now to allow Mr. Hartman to testify as a

fact witness, not an expert. I'm inclined to allow that, which I think would mean denying the motion.

The sixth motion I may want you to discuss a little bit, but I think, as I understand it, the parties can raise this information for the -- discussing consequential damages. So I think to the extent it's raised and the defense doesn't seem necessarily to elicit testimony that needs to be eliminated, I don't know if I should grant or deny that one on that basis.

The seventh motion I think is overbroad at this juncture. We can revisit some of the particulars brought up in the plaintiff's seventh motion later, but at this time I'm not going to grant it.

Same with the eighth motion. I think at this time it's probably premature to get into that. I don't think I know quite enough about what's going on.

And then as to the defendant's motion, I probably want to discuss this a little bit as we go.

So why don't I start, just based on the plaintiff's motion, let the plaintiff explain to me if any of those -- where I am on any of those really need to be discussed at this point or whether you think you can point out my errors later.

MR. SKLAVER: Your Honor, we have sort of divided up some of the motions ourselves, so with the Court's permission if other people are going to be arguing, there may be other

counsel arguing separate motions.

I'm handling the first motion in limine. And I don't want to contend that there was an error by the Court. I only want to -- this is the issue about contract provisions that are unrelated to the uniformity provision.

THE COURT: Right.

MR. SKLAVER: I just note that, given the Court's ruling, we at least would like to reserve the right, if necessary, to submit a curative instruction if, for example, the defendant does what it claimed it wasn't going to do, which is to argue compliance with the max rate provision means they didn't breach the uniformity provision. And so we would just defer that depending on what happens at the trial, given the Court's ruling.

THE COURT: Sure. I think that's perfectly fine, and I don't have any problem with that. Obviously we may need to clarify some of those things with regard to that. And I think the second might have a similar issue.

MR. SKLAVER: Yeah. And the other issue with the first motion is there are -- to the extent -- this will just have to be played out at the trial. One of the arguments we raised is the fact that the defendant complied with its determination policy is not relevant on the breach of uniformity provision. The Court already held on summary judgment compliance with the determination policy didn't

matter for other provisions in the contract. So I think we just have to see how that goes, and if they claim they have complied with the policy, we will have the right on cross-examination to explain that they didn't. We were hoping to avoid that motion in limine ruling, but we will just have to see how it plays out at trial.

THE COURT: Okay. I think that's fair.

Go ahead, if you have someone who wants to address the second. Make sure you bring the microphone over closer, though.

MR. GERVAIS: Your Honor, I don't think there's any issue with your ruling on the second. The one motion in limine that I would like to discuss a little bit further is the fifth motion in limine regarding Stephen Hartman.

THE COURT: Go ahead.

MR. GERVAIS: Your Honor, this was not presented squarely in our motion in limine because we didn't learn that Mr. Hartman would be relied on as a fact witness until the exchange of the pretrial order. The issue is that he was not disclosed in the initial disclosures as a potential witness that they may rely on at trial.

Rule 26(a), as you know, requires parties to identify witnesses who it may use to support its claims or defenses and the subjects of their discoverable information. This Court ordered the parties to exchange Rule 26 disclosures in October

of 2018. Mr. Hartman was not listed on those initial disclosures. Rule 26(e) also allows the parties to supplement their initial disclosures. There was no supplementation to identify Mr. Hartman.

Therefore, Rule 37 has a self-executing sanction that if a party fails to provide the information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence at trial unless the failure was substantially justified or is harmless. And that burden is on Security Life, and they have failed to meet that burden.

In their response, they justify the delay by relying on Rule 26(a)(3), which is a separate rule that deals with when the Court hasn't ordered the exchange of which witnesses that you are going to use at trial, this rule comes into effect. Rule 26(a)(3), however, is in addition to the requirements of Rule 26(a)(1). It is not meant to supplant Rule 26(a). It is meant to supplement Rule 26(a).

Next, in response on why they believe this is harmless, Security Life attempts to shift that burden to the plaintiffs. They argue that plaintiff's harm rings hollow and is insufficient. We obviously disagree with that. If we had known that Mr. Hartman had this -- was going to be brought to trial and the scope of his discoverable information, we could obviously probe that information at deposition, and we would

have had the opportunity to elicit additional testimony from other witnesses. Therefore, we think it is prejudicial to identify him as a trial witness on the eve of trial.

At this late stage, where Mr. Hartman was not disclosed until the eve of trial, I believe the appropriate sanction that is afforded by Rule 37 is to exclude his testimony as a fact witness.

THE COURT: Why don't I let the defense respond to that. Thank you.

Go ahead.

MR. JOHNSON: Thank you, Your Honor. Mr. Gervais says Rule 26(a) governs disclosure of witnesses. When this complaint was filed in 2018, there was no uniformity claim. In fact, there's no pleading that states the uniformity issue, the only issue remaining for trial. In fact, that issue first appeared in this litigation in August of 2019 in the initial motion for class certification. August of 2019 is the same month that Steve Hartman was deposed in this case as a fact witness. The reality that Mr. Hartman has a vast amount of knowledge about the issues in this litigation is no surprise to the plaintiff here. His name appears on dozens, if not hundreds, of key documents, exhibits that have been marked by both sides. They had the deposition.

In fact, the proof that there's no surprise that he's listed as a witness is that they filed this motion in limine

to exclude him before we were even required to exchange witness lists under Rule 23 -- excuse me -- 26(a)(3) -- 26(a)(3)(B), which requires only the disclosure of witnesses 30 days before trial absent some other order requiring an earlier disclosure, such as under Rule 16, which never happened in this case.

They had his deposition both as a fact witness, as an expert witness. The notion that they would have approached his deposition differently if we had filed some supplementary initial disclosure before they had even stated a uniformity claim makes no sense. And so we think this motion to exclude Mr. Hartman should be denied.

THE COURT: All right. Thank you.

So I think I agree with the defense, as I mentioned. I think that, given the course of the litigation, I don't think there -- first of all, I don't think they can show prejudice given the timing, given the fact that he was deposed fairly early on, and that he was -- it was not a surprise that he would have evidence in this case. So I am going to deny that.

Were there -- let's see. I think you still had a couple more you might want to address.

MR. SAVAGE: Yes, Your Honor. I just wanted to clarify what your inclination was on the sixth motion in limine. That's the one concerning exclusion of alternative

increases. I think what I understood Your Honor was saying, and this is how I read the defendant's response, was that they are not intending to elicit testimony concerning a different version of the increase. And if that's the case, you know, we submit that the motion should be granted, but I just wanted to clarify what Your Honor's inclination on that one was.

THE COURT: Why don't I get the defense to sort of clarify where they plan to go on this, and then that might help us all.

MR. JOHNSON: Thank you, Your Honor. The defendant has no intention of offering any kind of quantification of what a different increase would look like, and I think that was what we intended to indicate in our response to their motion. The notion that the actuaries have discretion to do different increases, as a concept, I think is something that we would want to reserve, but in terms of a quantification or calculation, we have no plan to do that.

THE COURT: Given that, what's your position?

MR. SAVAGE: Your Honor, I think the motion should be granted. I'm not quite sure what the caveat there was, that there should be some room for actuaries to say that, in general, different increases can be done. I think, in those general terms, I don't think we have an objection to that, but what we would have an objection to is to those actuaries testifying that, you know, had we included the guaranteed

issue policies in the 2015 increase, you know, this is what it would have looked like or just, you know, we would have done the increase on the guaranteed issue policies in 2015.

THE COURT: Mr. Johnson, why don't you --

MR. JOHNSON: Yeah, I'm not sure I fully follow that comment. The notion that actuaries have professional judgment is something I think is important to this case we want to elicit. Any testimony that the actuaries would have included the guaranteed issue contracts if they were required to somehow, I think all of the actuaries would fairly be able to testify that they intend to follow actuarial requirements and contract requirements. But, again, we don't intend to elicit any testimony that, you know, had guaranteed issue contracts been included in the increase, the delta on the increase for the fully underwritten contract would be X dollars. We are not going to do that.

And so I guess, you know, this may be something we are going to have to deal with as we get funneled to trial, but, you know, ultimately the damages issue, which I'm sure we are going to talk about, is a hypothetical question of what would the economics be had something different happened. Right? So we feel like we should have leeway, agreeing that we are not going to put up a different number, to explore them.

THE COURT: Okay. Thank you.

So here's where I am. We are going to discuss the damages question, because it ties in with some of the jury instructions. I will just say I'm going to deny it, obviously without prejudice at this point, based on what I've heard today. It seems relevant. I don't think it seems excludable under the rules based on what I've heard. Now, it may be that, as Mr. Johnson said, as we get closer, depending on kind of where we have gone with certain other things, that it may turn out that some of that may be unnecessary, but what I've heard so far sounds admissible and appropriate and really sort of more of a jury instruction fight. So for now I'm going to deny that, but we can revisit some of the issues it's raised.

Was there anything about the seventh or eighth that you wanted to discuss at this point?

MR. SKLAVER: No, Your Honor.

THE COURT: Thank you.

MR. JOHNSON: Your Honor, if I could touch on the second, the motion -- the communication with regulators issue.

THE COURT: Sure.

MR. JOHNSON: I understood Your Honor's ruling to be that if plaintiff raises communications with regulators, defendant will be allowed to close the loop on those communications. I think defendant has in mind a slightly different use of those communications. Closing the loop is a piece of it, but defendant itself would like to introduce

communications with regulators to the extent they touch on the question of the meaning of the uniformity provision. And to the extent we do introduce those communications, are permitted to do so on that issue, we'd like to be able to follow up with did the regulators have any questions about the information you were providing them. And that's it.

THE COURT: Okay.

MR. JOHNSON: Again, we think the communications are relevant to the meaning of the uniformity provision, and we think we should be able to close the loop out on those communications once we have shown them to the jury.

THE COURT: All right. Why don't you respond.

MR. GERVAIS: Your Honor, if Security Life is allowed to introduce this type of evidence, then the plaintiff should be permitted to present evidence in cross-examination on the facts that Security Life hid from regulators. I think this takes us down a dangerous path where we are going to end up in cross -- in mini trials on what was and what was not told to regulators. Frankly, I think it's a distraction from the issue that is left for trial, so we remain opposed to that position.

THE COURT: Okay. Do you want to respond, with that proposal, Mr. Johnson?

MR. JOHNSON: With respect to the notion that something was hid from regulators as to the uniformity issues,

I'm not aware of any such evidence.

To the extent that plaintiff wants to introduce evidence about the recapture of reinsurance treaty in relation to the nonparticipation clause, if the Court remembers, that has nothing to do with any of the issues in this case, and so we wouldn't think that would be an appropriate cross.

MR. GERVAIS: Your Honor, just a couple of examples. Security Life did not tell regulators that there were other SAUL policies issued on the same policy form that were exempted from the COI rate increase. It doesn't appear that Security Life disclosed the existence of guaranteed issue policies to most, if any, of the regulators. These are the types of things that we believe we could potentially get into if we start going down this path. Again, we think it's a distraction.

THE COURT: All right. Well, I appreciate that, and it may be a bit of a distraction. I think at this point, though, with the, sort of, warning that you have given about where it may lead, I'm going to deny the motion and allow the defense to go down that road if they want to, but with the understanding that I may be open to your proposal that that would open the door to certain other types of evidence as well.

Okay. Mr. Johnson, why don't we discuss your motion, then, unless there's something else you had on that.

MR. JOHNSON: Thank you, Your Honor. I have nothing else on plaintiff's motions that I want to address.

With respect to defendant's motion, Your Honor, obviously there are several pieces to that motion. I don't intend to take the Court's time to go through Exhibit A to discuss each of the exhibits that we think relates to a claim that's been dismissed, and I suggest the Court might direct the parties to, in light of the Court's observations, go through that exercise between now and February 9th, but it's a simple principle, and I don't think it's ultimately disputed, evidence as to claims that have been dismissed should not be admitted.

And I submit that one of the challenges we have here is kind of chasing each other's tail on what's background information and what's appropriate rebuttal to that background information.

And so, you know, ultimately at a high level we think we need to give the jury enough information to understand the process around the rate increase, the reasons for it, and what the company did in order to try to honor its obligations both as a matter of contract regulation and actuarial requirements. That's the background.

Now, that's a very general statement, so it's not super helpful as to what specific exhibits should come in or out. So, again, I submit maybe the Court could give its

observations on the background issue, and we can come back with additional issues. With that, and subject to questions on that point, I will turn to the damages question.

THE COURT: Yeah, go ahead.

MR. JOHNSON: Obviously, Your Honor, as we say in our motion, the measure of damages is a question of law for the Court, even if the amount of damage is ultimately to be decided by the jury. And under the Restatement and under, in fact, each side's proposed Instruction 17 the measure of damages that the parties have set forth is one that puts the plaintiff in as good a position as if the contract had been performed. That, by definition, is a hypothetical measure. It requires an assessment of, well, what would have happened if the contract had been performed, if the promise had been fulfilled.

The promise here at issue, obviously, is the one sentence in the contract that: *Any change in rates will apply to all individuals of the same premium class whose policy has been in effect for the same length of time.* And so applying the legal measure to that promise, the question for the jury can only be: How would the plaintiffs be better off? What position would the plaintiffs be in if this rate increase had applied to the guaranteed issue contracts as well?

The restitution measure of damages, the total overcharge evidence that plaintiffs want to submit, has no

bearing on the question of what position would the plaintiffs be in if the guaranteed issue contracts had been included in the rate increase? It's clearly a dressed-up disgorgement remedy which is not appropriate here.

Plaintiff cites a number of cases where in COI cases courts have, at least in the class cert context or in summary judgment context, considered the total overcharge as a potential measure, but if you look at those cases, and we talk about them at length in our motion, in several of them there was a California UCL claim where disgorgement is the appropriate remedy. In others, the series of breaches might arguably allow for a recoupment of the total amount of the overcharge, but we don't have that situation here. We have this discrete provision, and neither Mr. Mills nor a reference to the total amount of additional COI charges collected answer the question of what position would the plaintiffs be in if guaranteed issue contracts had been included.

Now, plaintiff argues that our motion supposes or assumes a disputed fact which is that perhaps Security Life would not have increased rates on the fully underwritten contracts if they were required to do so under the guaranteed issue contracts. Now, that's just, you know, out of thin air and irrelevant to the question. The question is what was promised, which is we will apply rates to all people in the same premium class. If there's a breach of that question, the

question is how would these plaintiffs be better off had we done that. In fact, there is no requirement, outside of arguably this contract, that we include the guaranteed issue contracts in the rate increase. As a matter of breach of contract law, the Court couldn't even order that we include guaranteed issue contracts in the rate increase. This is, you know, a classic situation of economic or efficient breach. If these contracts were required to be included in the increase, Security Life can decide not to include them, but it has to deal with the economic consequence of that, which is defined by the proper measure of money damages, again, not the total amount of the overcharge here.

Likewise, plaintiff's reference to the most favored nation contract cases don't really bear on this at all. In fact, under plaintiff's conception, a customer who has been promised a most favored nation price and overpays would be entitled to a total refund of the purchase price, not the delta between the most favored price and what they ultimately paid.

In fact, I think the best analogy for the Court to consider comes from the next sentence in this contract after the uniformity provision, which is the max rate provision, and that says: *The rates will never exceed those rates shown in the table of guaranteed rates.*

Under plaintiff's conception, consider this

hypothetical. The current rate is 7, the max rate is 10, and Security Life decides to raise to 15. Under plaintiff's view of the world, the measure of damages would be 8, the difference between 15 and 7. In fact, looking at that sentence, the real measure would be 5, the difference between what was promised, the max rate, and the extent to which the new rate exceeded the max.

The total refund measure has no basis in breach of contract law, Your Honor. And accordingly, under Rule 401 and 403, evidence of the total overcharge or any argument that that amount constitutes damage should be excluded.

THE COURT: All right. Why don't I get plaintiff's response to that.

MR. SAVAGE: Yes, Your Honor. I will take up the damages piece.

So there are really two independent reasons why this motion should be denied and we should be able to put in our damages measure of the full amount of the overcharge. And the first reason just flows from a basic point about what the underlying contractual right that the class is seeking to enforce is. And I don't think the defendant disputed this. In fact, the defendant read from the contract and has said this multiple times: The underlying contractual right that the plaintiffs are enforcing is a right of uniformity. It is a right that requires uniform treatment between the class

members and between the guaranteed issue policyholders who received zero increase. And so since the underlying right is a right of uniformity, the remedy has to match that right and has to restore uniformity as between the class members and the guaranteed issue policyholders who didn't get the increase.

And so once you accept that basic point, the motion fails because that is exactly what a full overcharge damages model does. If the class gets damages equal to the full overcharge, that effectively zeroes out the increase that the class members received, which is exactly the same as the increase that the guaranteed issue policyholders received. Zero for the class members, zero for the guaranteed issue policyholders, that's uniformity. And that is, in other words, exactly what -- and we agree on the basic measure of damages for contract law. It is to put the plaintiffs in the position they would have been in had the contract been honored, had the uniformity provision been complied with. And so it puts the class members in the position they would have been in had the uniformity provision been complied with.

And the MFN cases are exactly the same scenario. You know, that's another context where a party says to another party, I'm going to give you the same treatment as I would give a third party. So if a defendant treats the third party better than the way it treats the counterparty to the contract, the damages is the delta between the two. It just

so happens that the delta in this case is the full amount of the overcharge because the guaranteed issue policies received zero percent increase, but it's not some generic, you know, total refund measure of damages. It is the delta. The delta just happens to be the full overcharge.

And so the conception of damages that the defendant is offering here does not create uniformity at all and is legally flawed. So essentially what they are saying is that, you know, maybe the class members should get some small rebate off of the 42.3 percent increase because that's maybe what would have happened if the overcharge was spread to the guaranteed issue policies as well, but that still doesn't achieve uniformity because in that scenario the guaranteed issue policies would have received zero increase and the class members would have received an increase to, say, 38 percent or something like that. That's not uniform.

And you can see how wrong this is by just thinking about how it would play out in the MFN context. Like, you could imagine a case where, let's say, a plaintiff pays $100 and the third party pays $50. And it would be like a court saying, Well, actually, plaintiff, your damages are not equal to the $50 delta between what you paid and what the third party paid, but maybe if you could prove that had the defendant complied with the MFN clause and charged everyone $75, your damages -- maybe you could get $25 in that case.

But, of course, that's not how courts would treat that scenario in large part because the defendant never charged anyone $75. The defendant still charged the third party $50 and the plaintiff $100, and so the damage has to equal the full delta between the two, but that's essentially what Security Life is asking for.

And stepping back -- and, you know, I think counsel couldn't avoid but doing this, but the basic flaw with their argument is that they see the right the class is enforcing as a right concerning the allocation of the increase that necessarily was going to occur. In other words, they assume as a factual matter that in 2015 SLD was going to impose an increase and that the right we are enforcing has to do with how much of that increase the class should have gotten. I think I wrote it down. You know, the way that defense counsel framed it is, you know, if -- the damages measure as they framed it is if the rate increase had -- if it had applied to "the" increase. There didn't have to be an increase at all. Just to be clear, there's nothing in the contract that said they had to do an increase in 2015. There's nothing in Your Honor's summary judgment order that said, oh, they can -- they have free rein to impose an increase in 2015 if they wanted to for whatever reason they want.

And, in fact, the evidence suggests -- and we didn't pull it out of thin air; we actually put evidence in our brief

showing this -- that had SLD been put to the choice in 2015 of doing an increase on all the SAUL policies, including the GI policies, or none of them, they would have chosen to do none of them. I won't go through the evidence here, but in short it's not clear that such an increase would have been actuarially justified. And, also, it's not clear that such an increase would have been consistent with their business judgment, with their reputational concerns. They might not have done it at all.

I mean, what's really kind of aggressive about the position that Security Life is taking here is they essentially are saying that they are not going to put in any evidence about what the increase would have looked like had the GI policies been included in the increase. Instead, they are just asking Your Honor to rule as a matter of law that in the but-for world they would have done this increase on the GI policies. And that would be -- you know, that would be an erroneous legal conclusion and is very far afield from how courts have handled this issue in the past.

I mean, typically in the cases that we cited, like the Voya COI case, the U.S. Bank case, insurers come in and they want to offer testimony about what a hypothetical increase that complied with the contract would have looked like, and courts often say, no, you are not allowed to put that evidence in because it's too speculative.

But here they are not even asking to put that evidence in. Here they are just asking the Court to accept, again, as a matter of law, the factual premise underlying their damages argument when the only evidence that's before the Court on this issue suggests they would have not done that increase at all.

So we respectfully submit that that would be an erroneous conclusion both in terms of its understanding of how damages principles play out in this context and also on the factual assumption that undergirds the damages argument. So there's no -- of course, they can cross-examine Mr. Mills about the overcharge measure that he's come up with at trial, they can ask him whatever they want, but there's no legal justification to strike the overcharge remedy entirely.

THE COURT: Okay. Thank you.

Mr. Johnson, do you want to reply?

MR. JOHNSON: Very briefly. Mr. Savage says put to the choice, maybe there wouldn't have been an increase, but there was an increase. There's no dispute about that. There was an increase. Guaranteed issue contracts were not included. So the only question is had -- if there was a requirement to include guaranteed issue contracts, how are the fully underwritten contracts worse off for the exclusion of guaranteed issue. And that is plaintiff's burden to show. They are the party that must show how they are economically

worse off as a result of the failure to include guaranteed issue contracts in the rate increase. And so the total overcharge amount is unmoored from that.

Now, if appropriate, we would put in evidence, and we signaled this in our motion. Some of our witnesses have a sense of what the economic difference is as a result of the exclusion of guaranteed issue contracts. We didn't submit that as a nonretained expert opinion, which it is. The plaintiffs never developed the evidence to show their damages here, and that's because this claim was an afterthought that never showed up in a pleading. As a result, there was very little discovery on it and very little expert work on it by either side. That's ultimately their problem. They have the burden to prove damages. The measure is plain. And Mr. Mills doesn't answer the damages question.

THE COURT: So my basic view is I think I largely agree with the plaintiff's characterization of the damages question, that this is mainly something -- I mean, I agree with Mr. Johnson, it is their burden, but the one way, at least -- I'm not sure I agree that the only way of assessing damages would be through this total price increase measure, but it seems to me it's at least one way a jury could find it. We ask juries to, sort of, come up with damages numbers based on a lot less than that, sort of, certainty in all sorts of cases.

So my inclination is to just issue a simple jury instruction about the generic definition of damages and let you guys fight out what you just fought out in front of me with your evidence and explain to them why the evidence shows that your interpretation of what -- Mr. Johnson's right, the hypothetical -- what would have happened is the right one or why the full amount is the most appropriate measure of what would have happened.

But that brings me sort of to one thing -- and I think we are sort of getting into the jury instructions quite a bit already, and let me just tell you one thing I think -- I want to talk about this, the damages, but also the kind of categories, potential categories of state-by-state rules. And I'll just tell you at the outset, I think I could use a bit more specific briefing, not necessarily on each state at this point. Let me tell you kind of where I am on that.

I don't think I want to include in the instructions a bunch of lists of states. I don't think it's necessary for the jury to know that. I think it potentially confusing. So I don't need at this point necessarily everybody to fight out which state would go into which category, but what I do think I want, and I think I would benefit from some additional briefing on this and really also probably on the damages issue for the instructions, is probably a bit more briefing from each side about really some of your strongest cases about why

these are two or three distinct categories of questions, of ways the question has to be asked. So, you know, the plaintiff lists three categories, why those are three distinct ones, your sort of best, clearest explanation of the way the question would be asked in each of those three categories, if you think there are three. The second and third are, to me, a little bit hard to distinguish. Show me some real cases where those are distinguished. And obviously in the first category if you feel strongly that in those places my summary judgment order essentially already answered the question of ambiguity and all you have to do is add the presumption, why you think that should apply.

So what I think I'm asking for on the jury instruction issue is to have a little bit of a discussion here, but I think I'm going to have you -- each side file a supplemental brief by the 31st, which I think is a week from yesterday, and then you can respond to each other's by the 3rd on just sort of your position on these jury instruction questions.

So we've talked a little bit about the damages. As I said, my inclination on damages is to give a fairly generic damages instruction and let you guys explain how the facts fit into -- how the different facts -- the most likely way of putting the plaintiffs into the same position they would have been had there been no breach. But you can -- that's one

thing, but then I do want to discuss a little bit this sort of three categories of jury instructions or the three categories that the plaintiffs -- the three groups that the plaintiffs suggested.

You know, the first one I think the plaintiff's position is that essentially you really are -- on those it's really basically just a damages question. Is that right?

MR. SAVAGE: That's correct, Your Honor.

THE COURT: All right. So you can assess that. As I said, I don't need at this point, I don't think, a state-by-state breakdown, but some good examples of why that's true or from the defense point why actually it's not as strong necessarily a rule as that.

Then the other two, I'm just sort of analytically trying to think through the difference of how we would run the trial if we're really separating these two categories for states where the construction-against-the-drafter rule is just among the extrinsic evidence you can consider. Do the other ones -- do you not even raise the issue of the construction until after the jury has already said, well, based on everything we've heard we can't make a decision, or is it all kind of put out there, and you instruct them, you give them the presumption, and let them sort of apply it as they will? Because to me it's a little hard to figure out how those two would be treated differently unless you just want to

explicitly use the, like, tiebreaker language.

So what I -- I think I just want some clear case law. I know we're going to end up having to fit different states into each, but my inclination is not to tell the jury, Here are the states we are talking about, but to say -- question 1 would be -- I'm not even sure we would need to ask anything about Group 1, but potentially would be can you interpret -- can you resolve this question just on the basis of the contract language itself. If no, then can you resolve the dispute based on the contract language as supplemented by the evidence the parties have presented, and then taking into account this third -- or this presumption, is that -- can we do it just with one question? Do we really need three? And then we figure out, depending on their answers, well, they answered they couldn't find it, you know, they couldn't answer it just on the basis of the language, so all the category 1 ones go here. I'm just not sure we need all of them. But I want a little bit of an explanation of what you see as the differences between the three groups and how you actually think the jury should be instructed on the use of the presumption and, I guess, maybe potentially a little bit more about whether the presumption should apply at all. I'm fairly persuaded by the plaintiff's trial brief that it should be applied generally. I haven't seen a lot of case law that distinguishes this kind of a claim from other insurance cases.

But why don't I let the plaintiffs sort of give me at least a little more background on why you think this breakdown is right, not state by state, but why we need to separate the questions out that way.

MR. SAVAGE: Well, Your Honor, I think your suggestion, you know, I think some supplemental briefing probably would be useful on this question. There are, you know, clear distinctions among the states in terms of how this operates. Frankly, I think Your Honor may be correct that we don't actually need a question for Group 1 at all. It might -- we would just have to think about how that plays out in the -- in damages.

I think there is a difference between how states have the rule apply between Group 2, which is sort of part of a multifactor test, and Group 3 where it comes in sort of at the end. And I can't tell you right here that I have looked at jury instructions in every state in Group 3 and tell you exactly how the jury is instructed on how it works. You know, are they first told to look at everything, and then if they deadlock then they get the instruction? I'm just not quite sure at this point, Your Honor, but there are real distinctions between the groups, and I think it's worthwhile to at least try to break it down in terms of separate questions.

THE COURT: Okay. That's kind of my impression.

Yeah, go ahead.

MR. SKLAVER: And just to address some questions you asked, there wouldn't be a question, for example, ever I think that would just say, Based on the language of the contract has there been a breach, because the Court has already ruled that provision is ambiguous, and in all the states in Group 2 and 3 extrinsic evidence is permitted. I think the parties are in agreement with that. So you can't determine breach for Groups 2 and 3 just on the language. You would have to consider the whole mix, one of which includes the contra proferentem doctrine, and one of which it could be a tiebreaker. I just wanted to identify that issue given your example on the verdict form.

The second issue I had, and maybe we can just flush this out in the briefing, is we are amenable to, of course, the Court's suggestion about the listing of the states can be confusing, but what Mr. Savage was referring to about damages is, in theory, we would win on liability and damages for Group 1 and, in theory, could lose on Group 2, the jury would have to allocate damages, and that's done by state. Our expert has done this on a state-by-state basis and is going to do it on a group basis as well, given the Court's rulings.

So we will work on that issue, but that would be the only practical reason to have the states identified. Or it could just be defined by Group 1, 2, and 3 by our expert,

don't even list the states, and the jury does it that way, but it has to have an ability to allocate damages by group if necessary.

THE COURT: Okay. Yeah, we can -- you can flush this out, as you said, for me. Certainly at some point we are going to have to figure out who is in which group. I'm not 100 percent sure the jury needs to be told about it, but you can explain to me why they might need to.

MR. SAVAGE: And just on that last point about which state is in which group, we are certainly open to additional briefing on this, but the surveys that we have submitted with the class cert briefing and, frankly, which have not been challenged by the defendant at all are what we think are the proper groupings of the states.

THE COURT: Understood.

Mr. Johnson?

MR. JOHNSON: Miss Hinkle is going to address this issue.

THE COURT: Okay. Thank you.

Miss Hinkle.

MS. HINKLE: Thank you. First of all, Your Honor, we would welcome the opportunity to submit briefing on the contra proferentem issue and the instructions generally. We felt a little hamstrung by the plaintiff's use of their trial brief as really a motion in support of the jury instructions so

would like to respond to those arguments in writing.

As expressed in our summary judgment briefing, we believe that the form of contra proferentem advocated by the plaintiff really only should be applied in a coverage dispute. And we will be happy to explain to the Court why that is in our written submission and also welcome the opportunity to debate or argue over how the jury should be instructed in terms of interrogatories or the grouping that the plaintiffs proposed.

And I do want to clarify that we have challenged the groupings that the plaintiffs prepared both in our opposition to class certification and in meet and confers and in the authorities cited in our position in the jury instructions, but -- so we would welcome the opportunity to include that as well in our written submission.

THE COURT: Yeah, I think that would be good. And, you know, I understand that you probably dispute at least some of those, but if you are going to dispute their categorization, this would be the time to say, nope, here's the case that shows this state should be in this other category, so that this will be the time for that.

Why don't I then go ahead and just give you that chance for supplemental briefing. I think the timing that will work the best -- because what I want to do, especially in this case, I try to do it whenever I can, but given the

disputes especially in this case, I'd like to have time, if I can, before the next conference to review this, if I can to get you my draft jury instructions so we have something concrete to argue about at the next conference. So if I give you until the 31st for simultaneous briefs and then until the 3rd, I think, so Tuesday and Friday, for responses to each other's briefs, I think that's the best we can do, and then I'll have time to hopefully digest that and do what I can so we can have something more concrete to discuss at the conference on the 9th.

I will also -- as to the objections -- so I never actually ruled on the defense motion in limine, and I think I may take that one under advisement and go back and look at a couple of things and think about it. I may try to issue a written ruling on it. I mean, I do think I have a position about -- I don't think I'm going to grant it at least as to the damages thing, but I may want to try to give you a little bit clearer explanation of that. So I'm going to take that one under advisement.

As to sort of the objections, I don't want to go through all the objections to the depositions and everything. I do, I guess, if you -- if you want to take a few minutes to sort of hit some highlights or really focus me on some of that, my proposal will be in the next -- while you guys are working on those briefs, I would work on sort of my current

thoughts on the objections and get you something in writing about all the objections between now and the next conference, and we could discuss them then. But if you wanted to hit a few of the highlights, we could do that now too.

MR. SAVAGE: Your Honor, just one question before we move on to that. Will Your Honor's normal word limits apply to the supplemental briefing?

THE COURT: No, but don't make me too bored or tired.

MR. SAVAGE: We would never want to do that.

THE COURT: Judge Jackson's word limit is basically that he will stop reading when he loses -- when you lose his attention. So I will apply that word limit for these, but nothing specific.

MR. JOHNSON: So shorter than your normal word limit then.

THE COURT: Right. You can interpret that how you want.

So did you want to -- I guess I will start with the plaintiffs. Any of the objections that you really feel like we need to address right now, or would those be sort of better if you have seen my initial take on any of them?

MR. SKLAVER: There's two buckets, I guess. There's the exhibits themselves and the deposition designations. I guess we can summarize our high-level view on the exhibits is just that the Court should be careful on defendant's use of

the phrase "background." We have the explanation that this information is helpful background on a vast majority of the documents at issue. The way we broke it down is we said, look, on dismissed claims we agree there's a set of exhibits that relate only to dismissed claims, and that's out, which the defendant had moved to exclude evidence related to dismissed claims, although some of it, you know -- they are now defending the CIO increase based on actuarial justifications and compliance with the determination policies, so we do have a cherry-picking issue where the door may be opened. So we identified this in our brief, and we say, look, here's some that relate only to dismissed claims, we agree they can go out, and as to the others we give a line-by-line response. And most of their responses are it goes to background and helpful information. I think you will see, as you go through that, that a lot of that is not credible. But that's kind of a high level on the exhibits.

There are some deposition designations and maybe some other exhibit issues.

MR. ARD: I was just going to say, Your Honor, as far as the defendant's objections to plaintiff's exhibits, we are happy to rest on the papers that were submitted for now.

THE COURT: Yeah, okay. And we can discuss any that come up later, but I appreciate that.

MR. JOHNSON: Your Honor, very briefly, with respect

to defendant's objections to plaintiff's exhibits, I guess an overarching issue is the sheer volume of exhibits that plaintiff marked and proposed here. I think it's over 400 exhibits that they have listed, which Wright and Miller has a very nice quote about how you couldn't possibly introduce 400 exhibits in what will be four days of evidence in a trial like this. So we went through the process anyway. We objected. I think to the extent we get any guidance or clarity on this background issue, maybe plaintiffs would be willing to cut their list down to something reasonable. You know, we kind of -- I think we submitted 30 exhibits which we, you know, I think intend to use, subject to objection.

So that's an overarching issue, but I think Mr. Sklaver is right, and Mr. Ard as well, that most of the objections are tied to some of these issues we've been talking about in the motions in limine.

THE COURT: And I do appreciate that. And you are obviously right, we are not going to get 400 exhibits into evidence, so my hope is that we could come to a more reasonable number.

My general view is, you know, I try to let the parties present their cases. I try not to try to micromanage parties' choices, within the bounds of the rules, but I do have an obligation to not waste the jury's time, to not confuse them. And so, you know, my request and expectation is

that you will help me do that, given the knowledge that I sort of try to give you as much -- as loose a leash as I can, because my view is it's your case, and I just try to keep it under control. But I do -- that means I sort of have high expectations that you will do that yourselves.

So I appreciate that. I will go through and give at least my thoughts on the exhibits and the deposition issues given the rulings so far. I will look forward to the briefing on the jury instructions, the damages, and the categorization, the different kind of rules that apply in particular. And we will look forward to seeing those next week, and then we can discuss as much of that as possible on the 9th.

And I will do my best to get you a draft of the jury instructions before the conference so we can discuss it then. There may be a couple of open questions in there, but I will do my best.

Anything else that you wanted to raise today?

MR. SKLAVER: Not for the plaintiff, Your Honor.

THE COURT: Anything?

MS. HINKLE: Just one minor issue on the deposition objections. We noticed, in preparing for today's conference, that the plaintiff filed what was the meet-and-confer version of our objections when they made their responses to our objections, and I would ask that that just be amended to correct their responses so that they respond to the objections

that we did file, which were supplemented with some case law citations and references to rules that were not in sort of the meet-and-confer drafts that we shared. I think it's a minor issue. I just wanted -- before the Court starts ruling on those, I would like for our complete objections to be in front of you.

THE COURT: Okay.

MR. SKLAVER: No objection. We will get that fixed.

THE COURT: All right. I appreciate that.

Well, if there's nothing else, I will look forward to that.

Mr. Keech, anything?

COURTROOM DEPUTY: No, Your Honor.

THE COURT: All right. I will look forward to that, and we will be in recess.

(Proceedings concluded 2:47 p.m., January 25, 2023.)

REPORTER'S CERTIFICATE

I, JULIE H. THOMAS, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 29th day of January, 2023.

/s/ Julie H. Thomas
Official Court Reporter

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01897-DDD

ADVANCE TRUST & LIFE ESCROW SERVICES, LTA, as securities intermediary for LIFE PARTNERS POSITION HOLDER TRUST, on behalf of itself and all others similarly situated,

Plaintiff,

vs.

SECURITY LIFE OF DENVER INSURANCE COMPANY,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL PREPARATION CONFERENCE

Proceedings before the HONORABLE DANIEL D. DOMENICO, Judge, United States District Court for the District of Colorado, commencing at 12:36 p.m. on the 9th day of February, 2023, in Courtroom A1002, Alfred A. Arraj United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

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* * * * *

THE COURT: Good afternoon. Please take your seats.

We are here for a trial preparation conference in Case No. 18-cv-1897. Why don't I go ahead and get counsel to enter their appearances for the record.

For the plaintiffs?

MR. SKLAVER: Good afternoon, Your Honor. Steven Sklaver, Zach Savage, Michael Gervais, Seth Ard, Ryan Kirkpatrick, and Paul Schwartz for the plaintiff and the class.

THE COURT: Welcome. Thank you for being here.

For the defense?

MR. JOHNSON: Good afternoon, Your Honor. Clark Johnson, Casey Hinkle, Katie Reilly, and CiCi Cheng for the defendant.

THE COURT: All right. Thank you.

So there are a number of rulings I have to make. Let me just tell you, I appreciate everybody's hard work. The briefing obviously was somewhat compressed on some of these

issues, and I do appreciate the hard work that's gone into it. I think there has, on most of these, been plenty of briefing. I've read what's been submitted, and so I don't think -- my plan is to just let you know right now where I -- my ruling on a number of these things, and then I'll follow up with a bit of a written order, probably tomorrow it will probably come out, that will give a little more context to my rulings, but there are a number of things I just want to let you know where we're going to go so we can proceed.

I am going to deny the motion to decertify. I appreciate the issues raised, and I do think there are some nuances among the states. That is part of the reason for the delay in getting the jury instructions out. But overall I think both, at this stage, these issues could have been addressed perhaps earlier. I do appreciate that they have kind of come into focus more recently. That certainly is true, but the basics of this issue regarding application of the -- of this presumption have been underlying this case for quite a while.

I agree with the defense that this does make it harder to manage the class action than it would be without application of it, obviously. It's sort of the only remaining major kind of jury instruction issue. It would be easier if we didn't have to do it. On the other hand, I'm not convinced that it would be better not to do it this way. I think the

three categories appropriately capture the differences between the states that we can get all the states in the class into one of those categories. I do think I may have a couple of differences of opinion about certain states, which group they belong in. That will come out when I get you my jury instructions. But, in general, that will be denied.

As I said, that is affecting my preparation of my proposed jury instructions. I will get them out as soon as I can. I have a couple of things I want to tweak, but they're basically -- will be ready to go for your review tomorrow at the latest.

I'm also going to deny the -- well, I'm going to deny the motion to strike the expert testimony. It does seem to me that the plaintiffs are right that that is not a new opinion. It's just updated data that fits into the prior opinion. So I'll deny that.

Other issues that were still outstanding include both sides' prior motions to, sort of, restrict evidence based on the dismissed claims. Obviously we've talked about that a little bit. My position is I'm going to overrule those motions in general, with the possibility of specific objections if we're really getting outside the range of their relevance to the remaining issue. Obviously something could be -- I may sustain a specific objection, but in general I don't think it is warranted to completely exclude that sort of

evidence necessarily. So, in general, the sort of blanket objections are going to be overruled.

I'm going to deny the defendant's motion in limine seeking to -- seeking to exclude evidence about the total amount of loss. I think that if the plaintiffs can prove to the jury -- can convince the jury that that is the proper measure of how to make the plaintiffs whole, I don't think as a matter of law I can say that's not an appropriate measure, and it's something that the jury will have to prove. The jury instruction on damages will be sort of the generic jury instruction, and it will be up to the parties to prove to -- the plaintiffs, if that's their theory, to prove to the jury that that amount fits with that definition. So that will be denied.

I wanted to ask -- so I will also be, sort of, giving some specific rulings on the deposition and exhibit objections that you filed. For the most part, I'm likely to deny most of those, again, as a blanket matter, with a few exceptions, and, of course, with the possibility that if somebody doesn't open the door or something like that that I may rule the other way on a specific objection.

I did want to ask the parties, as to the depositions, how do you expect to use all these depositions? Are you going to read them into record? What is the plan for the depositions?

MR. SKLAVER: Your Honor, my understanding -- I guess we haven't fully expressly met and conferred, but they're captured by video, and so we would play the video for the jury of any deposition we want to use.

THE COURT: Okay. Is that your plan as well?

MR. JOHNSON: Yes.

THE COURT: Okay. So, all right, that makes sense.

So some of those objections obviously I may have to rule on sort of specifically if it depends -- like some of the responses are, well, if you use the corporate representative's deposition, I'm likely to allow the defendant to use it as well to rebut it if you have used it, but if you haven't used it -- so I can't -- I don't think I can, sort of, make a ruling on that, but I will try to explain that and let you go from there.

I think those are all the, sort of, specific rulings I wanted to mention. As I said, I will get you a written ruling on those specific, give a little more context later today, and specific rulings on those objections on the chart you provided -- the charts you provided as well.

I wanted to ask or mention, I think adding up the time proposed by the parties for witnesses, my view is for a one-week trial 24 hours of witness time is sort of the best we can generally hope for. I think your total times add up to a little bit more than that. I know everybody wants to

overestimate just so they don't get dinged for going over a little bit. But if you are willing to represent to me that you think those are -- that we will be able to stay within essentially 24 hours, I'm not going to start out by putting you on the clock, but if we get through Monday or Tuesday and we're way behind, I may have to impose some limits.

So does anybody think that's likely to become a problem? Mr. Sklaver?

MR. SKLAVER: You are saying for all of our witnesses in our case-in-chief the total would be 24 hours is the guideline?

THE COURT: Well --

MR. SKLAVER: If so, that's not going to be a problem.

THE COURT: 24 hours for everybody. Like six hours -- the way I -- my rough estimate is one day is taken up by jury selection, openings, closings, arguments. So you have four days essentially to present the case, both sides to present the case. And six hours of testimony -- you can sometimes go over, but on average my experience is that getting in six hours of actual witness time is a pretty good day. And so it really would be 24 hours for both. I don't have the numbers in front of me. I think your estimate, including cross, was something like 15 hours, I think, and the defense was 12 or something like that. So we're not far off,

but if you think you are really going to use 15 for your case in chief and for cross-examination, and you really think you are going to use 12, I may have to put some limits because, you know, the following Monday is a holiday. I really don't want to drag people back in here, if I don't have to, after a three-day weekend.

So if you don't think -- and we don't have to necessarily decide this today, but if you really thought 15 was a really sort of -- you were cutting it close, I'm not sure that's going to work. So if you're not ready quite yet to discuss that --

MR. SKLAVER: It's not going to be an issue for the plaintiff. We're good with that proposal.

MR. JOHNSON: I think our estimates are very conservative.

THE COURT: I assumed so. And so, like I said, if we get through Tuesday or something and you are way behind, then maybe we have to regroup, but I'm not going to put you on the clock then at this point. So thank you. I appreciate that.

I also appreciate that you brought the exhibits. I glanced through that. I know that you marked the ones that are stipulated to. I appreciate that. I will just ask on Monday, or whenever we get to the actual presentation of evidence, I'll just want to make sure that that list of stipulated exhibits is still accurate, and I'll probably

either put it in the record or read it into the record myself so that we can have that settled. So if there are any that you decide later to stipulate to or decide aren't stipulated to, just maybe give me an updated list by the time we start.

I know both sides have planned for technology training with Mr. Keech, so I appreciate that. That will be useful for everybody.

The last thing I wanted to bring up -- I'm sure that you have been doing this -- I just urge people in every case to have one last conversation with their clients and then with each other about the possibility of settlement. Obviously, everybody here is very sophisticated and sophisticated clients, but I still will expect you to have one last conversation. Every trial is a big risk. Somebody always loses. Sometimes both parties find a way to lose at trials. And just have that conversation. Tell your client that the Judge ordered you to make sure they really want to go through this with trial, and then confer with each other one last time. You don't have to tell me anything about it. I will assume by showing up on Monday that you have had those conversations and they -- everybody still wanted to go through, but I think it's worth -- I try to do this in every case -- worth just letting everybody know that the Judge suggests that they have that one last conversation, because obviously there is a lot of risk and uncertainty about what

happens in a trial.

Okay. That's all I had on my list. Are there any other issues that the parties wanted to raise? Mr. Sklaver?

MR. SKLAVER: None for the plaintiff, Your Honor.

THE COURT: For the defense?

MR. JOHNSON: Just a couple of issues, Your Honor. First, I appreciate the Court's ruling on the motion to strike the supplemental report from Mr. Mills, but I think it's -- even if you conceive of his new damages model as something that could be gleaned from existing information, it is undoubtedly the case that this is the first time we have seen a damages calculation that assumes that the premium classes are not four different possibilities but just two different possibilities. So we would appreciate the opportunity to provide a rebuttal to that aspect of his report. The first time we have ever seen a damages model that, contrary to Mr. Zail's opinion that there are four premium classes, there's only two, and we could put a supplemental -- excuse me -- a rebuttal to that supplemental damages report together and have it to the plaintiffs by Saturday relatively easily, I believe. It's essentially the defendants' view of what the damages would be if you assumed two classes instead of four. So that's one point.

The other point, Your Honor, is that we have reflected on your statement at the pretrial conference that

you intended to seat fewer jurors than your normal practice. I think you said you were going to seat seven as opposed to your normal nine, and the rationale was COVID. It strikes me that COVID is a rationale to seat more jurors in case we lose people along the way. So we would ask that you revisit that and agree to seat nine instead of seven.

THE COURT: All right. Well, so taking the -- let's deal with your first point first.

Mr. Sklaver, do you want to respond to that?

MR. SKLAVER: Yes, Your Honor. First of all, the defendant had no rebuttal expert ever in this case, and so -- on the damages issue to Mr. Mills. His opinions were unrebutted. So I don't know who it would be, and we'd have to depose that expert and the like. All this information was, in his report, was applying their updated data. If you remember, at class certification they gave us data I believe through 2019. They refreshed it -- around that time. They refreshed it so it's current as of December 2022. So all he did was update his numbers to account for that. And this smoker/nonsmoker distinction is just a way to -- is just to run through the numbers through a different filter if the jury finds that those are the two classes at issue. There's nothing new, and there's nothing new to rebut in that sense. We'd have to take a deposition on Sunday, for example, if that were the case.

THE COURT: Why don't you respond, Mr. Johnson.

MR. JOHNSON: Yes. Your Honor, the reality is that in his original report there is no damages calculation or model that calculates the damages assuming only two classes. And the number is materially different than the four-class damages number. I think they are trying to hedge the likelihood that the Court concludes that anyone with a preferred designation has no claim for breach here. More than half of the class here have preferred class designations. Every preferred contract holder, and this will be undisputed in the evidence, received an increase. In other words, the uniformity provision was not breached with respect to more than half of this class because there's not a single preferred person who didn't get an increase. And what that means, Your Honor, is that their damages number is substantially less, which is why they've pivoted to this idea that there's only two classes and the preferred designation doesn't matter, even though their own external expert says preferred defines two of the four premium classes.

The notion that this new damages model, which comes up to I think $50 million, is just a refresh of existing data has no basis, and I would defy Mr. Sklaver to show the Court where in Mr. Mills' original report there is a table that shows damages using just the two classes. This is an entirely new calculation, and we should be allowed to rebut it.

THE COURT: Mr. Sklaver, it does seem to me that there is at least something there with the difference between two and four. Is there a reason that we are now at two rather than four? And even if there's a good reason for it, why shouldn't they be able to respond to that?

MR. SKLAVER: Well, this is no different than the other arguments at issue. The original report laid out damages on a policy-by-policy basis and identified their smoking status and if they're preferred or not preferred. All this chart does is, like a demonstrative, pull out all that information. Mr. Mills is not taking a position on two versus four. He is, in essence, a computer that just spits out the number that's based on the data that was in his original report, and that's all he does in this case. He's not taking a position on two versus four.

THE COURT: And he just hasn't broken it down by four in this particular supplement; is that right?

MR. SKLAVER: Yeah, in two, which is all available in the data in the first report.

THE COURT: Okay. I think he wants to say something to you.

MR. KIRKPATRICK: He does break it down by four and two. He is just presenting alternatives summed in different ways.

THE COURT: All right. I might need to look at it a

little bit more carefully. For now, though, Mr. Johnson, I'm willing to -- you may want to go talk to your potential expert, disclose it. I will look at it a little bit more carefully. Disclose whoever this is, and I'll look at it a little bit more carefully. I mean, it does seem like essentially the same information just broken down differently. I'm not sure that warrants a rebuttal expert, but since we're getting so close to trial I don't want to tell you not to do it definitively, but I'll let you decide if it's worth that, given the risk that I may still not allow that evidence.

As to your request to seat more jurors, I appreciate that, and you are right, it was partly due to COVID. I will tell you, I'm not as concerned as you might be about losing enough jurors because, again, due to COVID the jury administration here is pretty liberal with excusing people who tell them that they have an issue that may come up related to COVID. And so I have actually found that since COVID we lose fewer people than we did otherwise.

So at this point I'm going to stick with the plan to go with seven jurors, although I appreciate that.

Is there anything else? Mr. Sklaver, you said no.

Mr. Johnson?

MR. JOHNSON: No. Thank you, Your Honor.

THE COURT: All right. I appreciate everybody. I will see you -- assuming that those conversations don't prove

fruitful with your clients, I will see you on Monday.

(Proceedings concluded 12:57 p.m.,

February 9, 2023.)

REPORTER'S CERTIFICATE

I, JULIE H. THOMAS, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 16th day of March, 2023.

/s/ Julie H. Thomas
Official Court Reporter

EXHIBIT 5

Plan of Allocation[1]

1. Each Final Class Member who is the current owner of a policy according to Security Life's records ("Recipient") shall be issued a check for that policy equal to the minimum settlement relief plus that Recipient's pro-rata share of the remaining Net Settlement Fund.
2. The minimum settlement relief payment for each policy shall be one hundred dollars ($100.00).
3. Each Recipient's pro-rata share of the Net Settlement Fund after deducting all minimum settlement relief payments shall be computed as follows:
    a. First, identify each Recipient's total COI overcharges as reflected in Schedule 4 of the Mills Supplemental Report.
    b. Second, divide that number by the combined total COI overcharges for all Final Class Members as reflected in Schedule 4 of the Mills Supplemental Report.
    c. Third, multiply the resultant percentage for each Recipient by the Net Settlement Fund that remains after deducting all minimum settlement relief payments.
4. If a Recipient would receive multiple checks pursuant to paragraphs 1-3 above, such checks may be consolidated into a single check.
5. Within one year plus 30 days after the date the Settlement Administrator mails the first checks, any funds remaining in the Net Settlement Fund shall be redistributed on a pro rata basis to Recipients who previously cashed the checks they received, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair. All costs associated with the disposition of residual funds – whether through additional distributions to Final Class Members and/or through an alternative plan approved by the Court – shall be borne solely by the Final Settlement Fund.
6. The plan of allocation may be modified upon further order of the Court. Any updates to the plan of allocation will be published on the Class Website.

[1] All capitalized terms herein are used as defined in the Joint Stipulation and Settlement Agreement.