IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DAVID CRUSON AND JOHN DENMAN *Plaintiffs*, v. JACKSON NATIONAL LIFE INSURANCE COMPANY *Defendant*.	§ § § § § § § § § § § § § § § §	Civil Action No. 4:16-CV-912-ALM JURY TRIAL

PLAINTIFFS' UNOPPOSED MOTION AND BRIEF IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs David Cruson and John Denman seek preliminary approval of the Settlement Agreement (the "Settlement") negotiated and signed by Plaintiffs' Counsel and Defendant's Counsel and by the Plaintiffs. The settlement concludes more than four years of litigation and provides a settlement fund of $8,750,000 from which cash compensation will be paid to Class Members. The detailed Settlement was the result of a lengthy process of arms-length negotiations among experienced counsel, aided with the substantial assistance of mediator Hesha Abrams near the conclusion of the settlement process. Because the negotiation process was fair and non-collusive, and the terms are within the range of reasonableness, Plaintiffs move the Court for an order as follows pursuant to Rule 23 of the Federal Rules of Civil Procedure:

1. Preliminary approving the settlement;
2. Approving the form and manner of Notice to Class Members;
3. Certifying the proposed Settlement Class for settlement purposes only;
4. Appointing Heffler Claims Administration, LLC as the third-party Claims Administrator;
5. Appointing Named Plaintiffs David Cruson and John Denman as Settlement Class Representatives;
6. Appointing Lewis LeClair of McKool Smith, P.C. and Gary Corley of the Corley, Law Firm as Settlement Class Counsel; and
7. Scheduling a final approval hearing at which the Court may consider final approval of the Settlement, final approval of the distribution plan, and Plaintiffs Counsels' motion for fees and costs.

If approved, the Settlement will conclude the action entirely.

On preliminary approval, the question is whether these terms fall within the range of

possible approval such that Notice should be sent to the Class and a full fairness hearing held. This Settlement is a fair and appropriate recovery for the Class and satisfies the preliminary approval test:

- Procedurally, the Settlement is the result of a fair process that resulted in agreement only after full discovery and with trial imminent.
- Substantively, the Settlement recovers a meaningful percentage of the alleged overcharges, while eliminating the risk that Defendant would prevail at trial or prevail on appeal.

At the final approval hearing, the Court will have before it more extensive submissions in support of the Settlement and will be asked to make a full determination as to whether the Settlement is fair, reasonable, and adequate in light of all of the relevant factors. A proposed Preliminary Settlement Approval Order accompanies this motion and brief.

II. BACKGROUND & PROCEDURAL HISTORY

On November 29, 2016, certain plaintiffs filed a putative class action on behalf of themselves and others who purchased variable annuity investment products from Defendant Jackson National Life Insurance Company ("Jackson"). ECF No. 1. Plaintiffs claimed that Jackson assessed surrender charges on withdrawals from annuities and again on the surrender charges themselves. *Id.* In doing so, plaintiffs averred that Jackson breached the plain language of its contract and contravened the Securities and Exchange Commission ("SEC") annuity consumer protection guidelines. *Id.* Plaintiffs aimed to stop this practice and compensate current contract holders who paid excess surrender charges. *Id.*

On April 18, 2018, the original plaintiffs filed a motion to dismiss all named plaintiffs except David Cruson. ECF No. 86. On April 24, 2018, Named Plaintiffs filed a Second

Amended Class Action Complaint adding John Denman as a named plaintiff. ECF No. 90. The Second Amended Class Complaint sought injunctive relief against Jackson related to Jackson's method of calculating surrender charges under the terms of variable annuity contracts Jackson sold throughout the United States. *Id.* Jackson denied all material allegations in the lawsuit and asserted numerous affirmative defenses.

On March 31, 2017, Jackson moved to dismiss under Rule 12 and asserted the same Rule 12(b)(6) and 12(b)(1) defenses. ECF No. 18. Jackson again acknowledged "Plaintiffs filed a Putative Class Action Complaint on behalf of a putative nationwide class." On September 29, 2017, the Court denied Jackson's Rule 12(b)(6) defense and granted Jackson's Rule 12(b)(1) defense. ECF. No. 30.

Class certification briefing

On November 14, 2017, Plaintiffs filed for class certification. ECF. No. 52. On January 19, 2018, Jackson responded, challenging all Rule 23 elements except numerosity, and, also asserted that Jackson was not subject to general personal jurisdiction in Texas and non-putative class members cannot establish specific personal jurisdiction over Jackson.

On March 5, 2018, the Court held a hearing on Plaintiffs' Motion for Class Certification and heard significant argument on the issues. Following that hearing, the Court granted the motion for certification and certified the class as requested by Plaintiffs.

Rule 23(f) Appeal

Following the issuance of the Court's class certification order, Jackson filed a petition for permission to appeal this Court's order under Rule 23(f) of the Federal Rules of Civil Procedure. The Fifth Circuit Court of Appeals granted the petition on June 27, 2018. The matter was fully briefed and then argued in the Fifth Circuit on April 30, 2019. The Fifth Circuit issued a

published opinion vacating this court's class certification order on March 25, 2020, remanding the case for further consideration by this Court.

Following the remand of the matter to this Court, counsel for the parties consulted with respect to formal and informal discovery necessary to address issues remaining and to address the appropriate path forward for the case. Named Plaintiffs and their counsel have examined the relevant law and facts to assess Named Plaintiffs' claims and to determine how best to serve the interests of Named Plaintiffs and the Settlement Class. Based on their evaluation of the facts and the law, Named Plaintiffs and their Counsel have agreed to settle the Lawsuit after considering such factors as (1) the benefits to the Settlement Class; (2) the risk, uncertainty and delay of litigation; and (3) the desirability of obtaining relief for plaintiffs and the Settlement Class now rather than later (or not at all).

III. HISTORY OF SETTLEMENT NEGOTIATIONS

Preliminary settlement negotiations with Defendant began in 2018, but they did not progress given the substantial uncertainties associated with the Rule 23(f) appeal. Declaration of Lewis LeClair ("LeClair Decl.") ¶ 7. Following the Fifth Circuit's opinion in March of 2020, settlement negotiations resumed and continued informally through the summer of 2020. The parties engaged in a process of informal discovery designed to aid settlement negotiations, while at the same time scheduling further formal discovery to be conducted in the event that settlement negotiations were unsuccessful. The parties entered into an agreed scheduling order that addressed the further process of discovery, expert analysis and a renewed motion for class certification.

After a productive period of intermittent discussions between counsel for the parties, and an intensive further period of document discovery and review of data from Jackson's records, the parties elected to engage an experienced mediator, Hesha Abrams Esq., to assist them in the

process of closing settlement negotiations. *Id.* at ¶ 11. The mediation process involved a series of phone calls with counsel for both sides individually and all parties collectively. The mediator scheduled a formal virtual mediation to take place on October 30, 2020. After a full day of mediation that extended into the evening, the parties reached a tentative settlement agreement to resolve the litigation on October 30, 2020. *Id.* at ¶ 12. The parties had a second joint discussion with Ms. Abrams on November 4, 2020 to discuss certain non-monetary terms of the settlement agreement. *Id.* at ¶ 13. Following the joint discussion with the mediator, the parties continued to negotiate specific non-monetary settlement terms. *Id.* As a result of these efforts, Plaintiffs and Defendant have reached a final agreement to resolve the disputes, subject to review and approval by this Court. *Id.* at ¶¶ 15-16. The parties' Settlement Agreement appears as Exhibit A to the accompanying Declaration of Lewis LeClair.

IV. MATERIAL TERMS OF THE SETTLEMENT AGREEMENT

A. The proposed Settlement Class

Plaintiffs seek certification of the Settlement Class for settlement purposes only. LeClair Decl. Ex. A at ¶ 2. The "Settlement Class" is defined in the Settlement to mean all persons and entities who are or were U.S. customers of Jackson with contracts that contain the Language at Issue who incurred Withdrawal Charges and/or Recapture Charges on variable annuities between January 2, 2009 and January 31, 2021. The following persons and/or entities are excluded from the Settlement Class: (i) Jackson; (ii) Jackson's subsidiaries and affiliates; (iii) Jackson's past and current executive officers and directors; (iv) Jackson's legal representatives, heirs, successors or assigns; (v) any entity in which any of the foregoing excluded persons have or had a controlling interest; and (vi) the judge presiding over the Action or a member of his immediate family or judicial staff. For purposes of clarification, Jackson's appointed financial professionals are not excluded under (iv) above. Any person and/or entity who or which submits a request for

exclusion that is accepted by the Court also shall be excluded from the Settlement Class.

B. Monetary relief to the Settlement Class

1. Cash Settlement Fund of $8,750,000

Jackson agrees to pay $8,750,000 to create a cash Settlement Fund (the "Settlement Fund") for cash distribution to eligible Class Members, payment of Class Notice and settlement administration expenses, and Class Counsels' attorneys' fees and litigation costs. *Id.* at ¶¶ 3-4. Jackson has agreed to deposit $2,750,000 into the Escrow Account no later than 30 calendar days after the last to occur of both (a) the date of entry by the Court of an order preliminarily approving this Settlement; and (b) Jackson's counsel's receipt from Class Counsel of the information necessary to effectuate a transfer of funds to the Escrow Account, including wiring instructions that include the bank name and ABA routing number, account name and number, a signed W-9 reflecting a valid taxpayer identification number for the qualified settlement fund in which this portion of the Settlement Amount is to be deposited, and contact information for the individual who will receive and confirm payment (including a name, address, and telephone number), _Any additional amounts to be paid in cash to former customers shall be deposited in the Escrow Account within 45 days after the Effective Date. *Id.* at ¶ 5.

2. Method of Payment to the Settlement Class

Payment to class members will be handled differently depending on whether they remain customers of Jackson currently or have terminated their contractual relationship. Approximately seventy-eight percent (78%) of the class members are no longer Jackson customers and have no continuing relationship with Jackson.

For the approximately twenty-two percent (22%) of Class Members with Current Accounts as defined in the Settlement Agreement, Jackson will provide the settlement payment directly to their Current Accounts as provided in the Settlement Agreement. The settlement

payment to such customers will be made by a deposit to the customer account (contract value) of all such customers, other than those who affirmatively opt out of the settlement. *Id.* at ¶ 5.

Jackson shall cause the settlement amount that is not directly credited to the Class Member Accounts to be deposited into the Escrow Account. *Id*. at 6. The Claims Administrator no later than 60 days after the Effective Date will make the required payments to Class Members who do not have Current Accounts from the Settlement Fund by tendering a valid digital form of payment, or in the case of larger settlement payments, by a check sent by certified mail, at the option of such class members. *Id.* If a check is neither returned nor cashed within ninety (90) days of mailing, the monetary value of the check will revert to the Settlement Fund. *Id.* If a check is returned as undeliverable, the Claims Administrator will promptly employ a "skip-trace" procedure and re-mail the check if the skip-trace yields a new address. *Id.* If the skip-trace does not yield a new address, or if the check is re-mailed and returned, or if the check is re-mailed and not cashed within ninety (90) days of re-mailing, the monetary value of the checks will revert to the Settlement Fund for pro rata redistribution among identified Class Members. *Id.*

There will be no reversion of settlement funds to Jackson or Jackson's insurance carriers, or any other person or entity who or which funded the Settlement Amount if the Settlement does not become final. *Id.* If Class Counsel and Jackson agree that pro rata redistribution is not practical because the amount to be re-distributed is sufficiently small, then Jackson shall credit such amount pro rata to the accounts of Class Members with Current Accounts. *Id.* at ¶ 22.

C. Additional Information to be Provided to the Settlement Class

1. Explanation to Clarify withdrawal and recapture charge methodology on future withdrawals of Class Members

To avoid any continuing confusion or misunderstanding of the appropriate methodology

for the calculation of withdrawal or recapture charges for Class Members, those Settlement Class members who remain customers of Jackson and continue to have the language at issue in existing contract that is the subject of this class action will receive an additional explanation of Jackson's methodology such that when Jackson calculates charges in the future, it will be consistent with Jackson's past methodology and further consistent with the explanation provided. *Id.* at ¶ 11.

D. Costs of Notice and Settlement Administration

Class Counsel may pay from the Settlement Funds and the Escrow Account the actual and reasonable costs of Class Notice and settlement administration without further order of the Court. Class Counsel shall provide monthly reports of such expenditures from the Escrow Account. *Id.* at ¶ 12. In the event that the Settlement is not consummated for any reason other than Jackson's right to terminate the Settlement Agreement, 50% of the money paid or costs actually incurred for the costs of notice and settlement administration, shall be returned or repaid to Jackson, their insurance carriers, or any other person or entity who or which funded the Settlement Amount.

E. Attorneys' Fees, Costs, and Incentive Awards

The Settlement Agreement provides that Defendant will not oppose a Fee and Expense Award that is equal to or less than $2,500,000 nor will Jackson oppose the Incentive Award. *Id.* at ¶ 13. Any attorneys' fees and expenses requested by Class Counsel or awarded by the Court are separate from the Settlement, and any issues, problems, or objections to the fee and expense request or award will not affect the validity of the Settlement (including the releases contained therein). *Id.* Each side shall bear its own costs and expenses, other than those fees and expenses to be paid from the Settlement Fund. *Id.* Class Counsel represent that they will divide the Fee and Expense Award between them in a manner to which they have agreed, or as otherwise

approved by the Court. *Id.*

Plaintiffs' counsel will request that an incentive award of $1000 be granted to the two named class members for their service as class representatives, which may be paid from the Escrow Account within 14 days after the Effective Date. This award is justified by the time and effort that the class representatives have devoted to this matter.

F. Class Action Fairness Act ("CAFA")

The Settlement Agreement provides that Defendant will provide the notices required by the Class Action Fairness Act (CAFA), 28 U.S.C. § 1715, and Defendant will pay any and all costs associated with the CAFA notice. *Id.* at ¶ 16.

G. Class Notice

Counsel have given extensive consideration to the appropriate methodology for notice given the size of the class and the amount of the settlement payments to certain class members who incurred smaller amounts of allegedy excess withdrawal or recapture charges. The benefits expected to be paid to the class members range from approximately $40,000 at the highest level down to less than $1 at the lowest level. As discussed in the distribution plan below, the minimal payment will be set at $2 for all class members.

Notice will be sent as follows:

a. Jackson shall send the Long-Form Notice to Class Members with Current Accounts using (i) the mail address and (ii) the e-mail address (if any) that Jackson has on file for each such Class Member with a Current Account.

b. For Class Members who do not have Current Accounts:

    i. The Claims Administrator shall send the Short-Form Notice using the mailing address that Jackson has on file; and

ii. If Jackson has an e-mail address on file, the Claims Administrator shall send the Long-Form Notice by e-mail.

c. Jackson will send a copy of the Long-Form Notice to any broker-dealer who is listed in Jackson's system as having been involved with any Class Member Policies. Because it is not feasible for Jackson to provide the broker-dealers with detailed information about which of the broker-dealer's customers may be Class Members, the Long-Form Notice will be accompanied by a communication from Jackson advising the broker-dealers that certain of the broker-dealer's customers may be Class Members and therefore entitled to relief under the Settlement Agreement.

d. The Long-Form Notice and the Short-Form Notice will instruct Class Members who do not have Current Accounts to provide additional contact information to facilitate distribution of settlement payments. The Long-Form Notice and the Short-Form Notice will specify that Class Members without Current Accounts who do not provide this information will not receive a settlement payment.

e. Upon receipt of any returned Class Notice that includes a forwarding address provided by the Postal Service, the Claims Administrator will re-mail the Short-Form Notice to the forwarding address.

f. For any Class Notice returned without forwarding addresses, the Claims Administrator will use the United States Postal Service's Address Element Correction ("AEC 1") service to attempt to identify the Class Member's current address. The Claims Administrator will be obliged to re-mail the Class Notice only if the Claims Administrator obtains a current address.

g. Class Counsel may take additional steps to attempt to ensure Class Notice to Class Members whose allocation of the Settlement Amount Class Counsel deems sufficiently high that additional efforts at providing Class Notice is warranted.

The Claims Administrator will create and maintain a web site for the settlement until all settlement payments have been made in accordance with the Court's Order of Final Approval. The Long-Form and Short-Form Notice shall direct class members to the web site. Full details about the settlement and options available to such class members will be explained on the web site.

H. Distribution Plan

Class Counsel proposes that the settlement funds be distributed on a pro rata basis to Class Members based on the total amount each Class Member incurred in withdrawal and/or recapture charges under a Class Member Policy during the class period, compared to other class members receiving benefits from the Settlement Fund. *Id.* at ¶7. For Class Members with Current Accounts, no later than 60 days after the Effective Date, Jackson will cause each Class Member's pro rata share of the Settlement Amount credited to Class Members' Current Accounts. Jackson will administer and pay the aforementioned existing customers in a manner to be agreed with Class Counsel, subject to reasonable audit by Class Counsel or a mutually agreed-upon third-party expert hired and paid for by Class Counsel. If a Class Member has more than one Class Member Current Account, the credits will be applied to each Current Account corresponding to the charges incurred on that account. If a Class Member with more than one Current Account receives a distribution for Withdrawal and/or Recapture Charges incurred on a closed account, that distribution will be credited to the Class Member's oldest Current Account.

If there are amounts remaining that cannot practically and reasonably be distributed to class members due to the amount of such funds, they will be credited pro rata to Class Members

who are current Jackson customers (because such credit can be applied without cost of distribution).

Counsel considered various other methodologies of distribution that would consider other factors about the damages incurred by individual class members. However, given the limitations on available data, these additional factors did not significantly improve the allocation methodology and introduced potential errors in the allocation formula. For example, the actual rate of charge applied by Jackson in calculating withdrawal and recapture charges was part of a dynamic computer process and was not specifically retained by Jackson in any readily accessible source of information. Further, the date of the class members' contracts with Jackson is readily available, but not the specific dates of deposit of funds that were subject to withdrawal or recapture charge.

In general, the effort to introduce more granularity as to calculation of class member payments did not lead to substantial adjustments in the payments to individual members, but in fact introduced additional uncertainly. In many cases, the contract year of the class member did not correlate to the percentage of surrender charge due to deposits of additional premium. By way of example, a class member in their 20th contract year and otherwise exempt from surrender or recapture charges, could be subject to a withdrawal or recapture charge - and therefore an alleged overcharge - by the deposit of additional premium. The length of time between the effective date of a class member's contract and the date of the surrender or recapture charge did not effectively determine the correct percentage of surrender or recapture charge to be applied nor the alleged overcharge suffered by a class member.

Based on significant time and analysis of potential allocation methodologies, the preferable method of allocation of payments to class members is by amount of withdrawal or

recapture charge suffered by a class member relative to the withdrawal or recapture charge suffered by the class as a whole.

I. No Admission of Wrongdoing, Waiver of Individual Defenses

The Settlement provides that Jackson denies any wrongdoing. *Id.* at ¶ viii. Jackson is entering into the Settlement to avoid the expense, inconvenience, and inherent risk of litigation, as well as the concomitant disruption of its business operations. *Id.* For the purposes of this settlement, and only for purposes of settlement, Jackson is waiving any individual defenses that it may have as to the Class Members who do not opt out of the settlement, as of the Effective Date.

J. Release

Named Plaintiffs and every Class Member (except those who have opted out) will release certain litigation-related claims against Jackson. *Id.* at ¶14. Specifically, Class Members who reside in California acknowledge that Section 1542 of the California Civil Code and all similar federal or state laws, rules or legal principles of any other jurisdiction are knowingly and voluntarily waived in connection with the claims released in the Settlement Agreement. *Id.* Named Plaintiffs and the Settlement Class acknowledge that they may later discover claims presently unknown or unsuspected, or facts in addition to or different from those which they now believe to be true with respect to the matters released in this Settlement Agreement. If the Settlement becomes final, Class Members who do not opt out will release Jackson from claims relating to the purchase of variable annuity contracts during the Class Period which were alleged or could have been alleged. *Id.*

V. LEGAL STANDARD

Preliminary approval of a class action settlement is appropriate if the court "finds as a threshold matter that the proposed settlement class is sufficiently adequate under Rule 23 so that

preliminary approval may be granted and the proposed class may be sent notice of the fairness hearing. *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 430 (E.D. Tex. 200). Preliminary approval allows notice to be provided to class members and grants them an opportunity to object to the proposed settlement. *Cone v. Vortens, Inc.*, No. 4:17-CV-001-ALM-KPJ, 4:19-CV-248-ALAM-KPJ, 2019 WL 2517835, at *4 (E.D. Tex. Apr. 25, 2019). "After the notice period, the Court will be able to evaluate the settlement with the benefit of the Class Members' input." *Id.* Preliminary approval requires the court to evaluate "whether the [s]ettlement is within the 'range of reasonableness.'" *Duncan v. JPMorgan Chase Bank, N.A.*, No. SA-14-CA-00912-FB, 2015 WL 11623393, at *3 (W.D. Tex. Oct. 21, 2015) (citing 4 Newberg on Class Actions § 13:15 (5th ed. 2015)). Preliminary approval is granted where the court finds that the settlement is "fair, reasonable, and adequate to warrant providing notice of the [s]ettlement to the [s]ettlement [c]lass." *Salim v. JPay, Inc.*, No.: 4:18-cv-00730, 2019 WL 1614624 (E.D. Tex. Apr. 16, 2019)

In conducting a preliminary approval inquiry, a court considers both the negotiating process for the settlement and the settlement's substantive terms (*See Duncan*, 2015 WL 11623393, at *3 (citations omitted). A settlement process is fair when "'the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible judicial approval.'" *Duncan*, 2015 WL 11623393, at *3 (citing *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. 1993). Negotiations "that involve arm's-length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness." *Id.* The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Silvercreek Mgmt., Inc. v. Banc of America Securities, LLC*, 534 F.3d 469, 472 (5th Cir. 2008).

The settlement of complex class action litigation is strongly favored. Courts are "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981); *see also In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (noting that there is a strong public interest in favor of settlements).

VI. ARGUMENT

A. The Settlement should be preliminarily approved

A court's determination to preliminarily approve a proposed class action settlement does not require the court to approve the final settlement. It is a determination that the "settlement is well within the range of reasonableness." *Vuaghn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 747 (E.D. Tex. 2007).

A settlement is considered fair, reasonable, and adequate, though the trial court has grant discretion in granting preliminary approval. *See, e.g., Silvercreek Mgmt., inc. v. Banc of America Securities,* LLC, 534 F.3D 468, 472 (5th Cir. 2008). In determining whether the settlement is fair, courts will consider any: "(1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expanse, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members." *Newby v. Enron Corp.*, 293 F.3d 296, 308 (5th Cir. 2004).

B. The Settlement satisfies the standards for preliminary approval

Throughout this litigation, counsel demonstrated vigorous and independent lawyering in all respects. This is decidedly true as the parties negotiated the terms over two days of remote mediation sessions with Hesha Abrams, a well-regarded mediator in Dallas, Texas. *See* LeClair

Decl. ¶ 11; *Newby*, 394 F.3d at 302, 308 (concluding there was support for the district court's finding that the settlement agreement was formed from serious negotiations without evidence of collusion); *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 (E.D. Pa. 2008).

Second, the parties engaged in substantial discovery. *See Newby*, 394 F.3d at 307 (determining that the record was exceptionally well developed); *see also*, *Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 743 (E.D. Tex. 2007) (finding that the parties had engaged in extensive discovery). Here the parties' discovery efforts were extensive. Jackson produced more than 200,000 pages of documents; the Named Plaintiffs also produced documents, and numerous depositions of the parties and their representatives were taken. *See* LeClair Decl. ¶ 10. And, with the assistance of an expert, plaintiffs' counsel spent hundreds of hours analyzing very large amounts of data provided by Jackson relating to withdrawal and recapture transactions. *Id.*

Third, counsel here are experienced in class action litigation. And plaintiffs' counsel firmly believes that the settlement is fair, reasonable, adequate, and in the best interests of the class members. LeClair Decl. ¶ 6. This further highlights the fairness, reasonableness, and adequacy of the settlement. "The Fifth Circuit has repeatedly stated that the opinion of class counsel should be accorded great weight" when "evaluating a proposed settlement." *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 649 (N.D. Tex. 2010); *Henderson*, No. Civ. A. 01-0138, 2002 WL 31415728, at *4 (E.D. La. Oct. 25, 2002) ("Finally, the Court finds that the opinions of class counsel, class representatives, and absent class members weigh in favor of settlement. Counsel for both plaintiff and defendant concur that the settlement is fair."); *accord Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988) ("If plaintiffs' counsel did not believe these factors all pointed substantially in favor of this settlement as presently structured, this Court is certain that they would not have signed their names to the settlement agreement.").

C. The Settlement Class satisfies Rule 23

The proposed Settlement Class easily satisfies the standards of Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3). Where, as here, the Court has not certified a class, it should "make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Claudet v. Cytec Retirement Plan*, Bi, 17-10027, 2020 WL 3128611, at *3 (E.D. La. June 12, 2020) (Manual for Complex Litigation § 21.632). This preliminary approval "serves the primary goals of Rule 23, namely economies of time, effort, and expense' without sacrificing fairness" to the settlement class. *Telles v. Midland Coll.*, No. MO:17-CV-00083-DC, 2018 WL 7352426 (W.D. Tex., Apr. 30, 2018) (internal citations and quotation marks excluded).

1. The Settlement Class satisfies Rule 23(a)

Rule 23(a) requires the parties moving for class certification to show the following: (1) Numerosity: The class is so numerous that joinder of all members is impracticable yet ascertainable; (2) Commonality: There are questions of law or fact common to the class; (3) Typicality: The claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) Adequacy: The representative parties will fairly and adequately protect the interests of the class. *See Bywaters v. U.S.*, 196 F.R.D. 458, 463 (E.D. Tex. 2000) (citing F.R.C.P. 23(a)).

a. The Settlement Class is sufficiently numerous

Rule 23(a)(1) requires the members of a proposed class to be so numerous that joinder of all the class members would be impracticable. Fed. R. Civ. P. 23(a). "[A] number of facts other than the actual or estimated number of purported class members may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each

plaintiff's claim." *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016). The Fifth Circuit has found that 100 to 150 class members is within the range that satisfies the numerosity requirement. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999); *see Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983) (finding that numerosity requirement would not be met by a class with 20 members, but was met by a class with 317 members).

Plaintiffs currently estimate that there are approximately 190,000 members of the nationwide class who have incurred withdrawal and recapture charges. LeClair Decl. ¶ 19. These overcharged policies are distributed throughout the fifty states of the United States and the District of Columbia. *Id*. Plaintiffs' proposed Settlement Class is sufficiently numerous to satisfy Rule 23(a)(1). Joinder is also impracticable. The numerosity requirement is therefore met. *See Bywaters v. U.S.*, 196 F.R.D. 458, 466 (E.D. Tex. 2000) (noting numerosity can be satisfied with 100-200 members) (internal citations omitted); *See also Henderson v. Eaton*, No. Civ. A. 01-0138, 2002 WL 10464, at *1 (E.D. La. Jan. 2, 2002) numerosity satisfied with estimated class size of at least 200 members).

b. Questions of law and fact are common to the Class

Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Even a single common question of law or fact can suffice to establish commonality, so long as resolution of that question 'will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke.'" *Ibe*, 836 F.3d at 528 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350). The tests for commonality and typicality are not demanding. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999); *see also Walton v. Franklin Collection Agency*, 190 F.R.D. 404, 408 ("The Fifth Circuit has held that the threshold of commonality is not a high one."). Commonality is met "'where there is at least one

issue, the resolution of which will affect all or a significant number of the putative class members.'" *Mullen*, 186 F.3d at 625 (citing *Lightborun v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997);.*see also In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014) ("To satisfy the commonality requirement under Rule 23(a)(2), class members must raise at least one contention that is central to the validity of each class member's claims."). Moreover, the commonality element is generally satisfied when there is a "single question of law or fact common to the members of the class that is not overwhelmed by dissimilarities precluding common answers." *Brown v. Mid-America Apartments, LP*, No. 1:17-CV-307-RP, 2018 WL 3603080, at *3 (W.D. Tex. May 22, 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

Plaintiffs asserted that the class members share common facts and questions as to breach of contract, including the uniform terms of the contract and the uniform conditions of the breach of contract, that are central to their claims. ECF No. 1. Whether class members suffered the same injurious conduct gives rise to another common question. *See, e.g., In re Deepwater Horizon*, 739 F.3d at 810-811 ("[T]he legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse."); *see also Gehrich v. Chase Bank USA, N.A.,* No. 12 C 5510, 2016 WL 806549, at *4 (N.D. Ill. Mar. 2, 2016) ("Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 251 (N.D. Ill. 2014) ("Here there is a common injury, resulting from receipt of the allegedly offending calls . . . The Court likewise determines that there are questions of law or fact common to each class member."). The Court in *In re Deepwater Horizon* explained the "same injury"

issue as follows:

> Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

In re Deepwater Horizon, 739 F.3d at 810 (quoting *Dukes*, 564 U.S. at 350).

The factual and legal questions as to whether Jackson calculated its withdrawal and recapture charges correctly and whether its actions breached its contracts with its annuity holders can be resolved through the presentation of common evidence and generate common answers for all plaintiffs. ECF No. 96 at 18. Neither party asserts that the contract language is ambiguous. *Id.* ("Plaintiffs' lawsuit is founded on an unreasonable reading of unambiguous contract language."). Jackson also stipulated to the following facts regarding variable annuity products issued in states other than New York, which shows there are no material differences in its contract language, how Jackson calculates and applies withdrawal charges, and how it markets its contract:

- There are no material differences in how Jackson calculates [Withdrawal and Recapture] Charges for residents of any one state of the United States as compared to any other;
- There are no material differences in the language in Jackson's variable annuity contracts concerning the calculation of Surrender Charges between a contract

issued in any one state of the United States as compared to any other;

- With respect to each type of Jackson variable annuity contract, there are no material differences in the language in Jackson's variable annuity prospectuses concerning the calculation of Surrender Charges between a contract issued in any one state of the United States as compared to any other state; except that the prospectuses for some of Jackson's variable annuity contracts have an Appendix B that other prospectuses do not. However, Jackson calculates Surrender Charges uniformly, regardless of the presence or absence of Appendix B;
- There are no material differences in the language of Jackson's variable annuity contracts concerning the calculation of Surrender Charges;
- There are no material differences in the language in Jackson's marketing materials concerning Surrender Charges in any one state of the United States as compared to any other state, except as set forth in paragraph 3 above; and
- There are no material differences in the training material or how Jackson trains its support personnel to respond to questions or inquiries from policy holders concerning Surrender Charges in any one state of the United States as compared to any other state.

See ECF No. 96 at 18–19.

Given the uniformity of Jackson's contracts and actions, the contention of breach is a common question. The commonality of Rule 23(a)(2) is met. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012) ("Rule 23(a)(2) requires that all of the class members' claims depend on a common issue of law or fact whose resolution "will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke.") (quoting *Dukes*,

564 U.S. 338 at 350) (emphasis in original).

c. Plaintiffs' claims are typical

To evaluate typicality, the Court must examine "the similarity between the named Plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Bywaters*, 196 F.R.D. at 467.'" "When the claims of both arise from the same event or course of conduct and are based on the same legal theory, the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those other class members." *Id.* Typicality seeks to protect from "conflicts between the named plaintiffs' interests and the class members' interests.'" *Edgar v. Andarko Petroleum Corp.*, No. 17-1372, 2017 WL 11178402, at *3 (S.D. Tex. July 24, 2017) (citing *In re BP Sec. Litigation*, 758 F. Supp. 2d 428, 437 (S.D. Tex. 2010); *see also In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (noting the "typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals."). As noted, "[t]he test of typicality, like that of commonality, is not demanding." *In re Seitel, Inc. Sec. Litig.*, 245 F.R.D. 263, 270 (S.D. Tex. 2007).

Here, "[t]he named Plaintiffs allege on behalf of the Class and themselves the same manner of injury from the same course of conduct and assert on their own behalf the same legal theory that they assert for the Class. Any probable factual differences relate to damages rather than to liability." *Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.*, No. 12-3824, 2014 WL 631031, at *3 (E.D. Pa. Feb. 18, 2014). The Named Plaintiffs and the Class Members all share common contract language and common conditions resulting from their harms. LeClair Decl. ¶ 19. In other words, "[i]n the event the class members in this case were to proceed in a parallel action, they would advance legal and remedial theories similar, if not identical, to those

advanced by the [N]amed [P]laintiffs." *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997). Thus, the named "Plaintiffs' interests are aligned with the interest of the class." *Local 731 I.B. of T. Excavators and Paves Pension Trust Fund v. Diodes, Inc.*, No. 6:13cv247, 2013 WL 12334835 (E.D. Tex. June 14, 2013).

d. Plaintiffs will fairly and adequately represent the Class

Rule 23(a)(4) requires that the Named Plaintiffs fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). This requirement seeks to prevent "conflicts between the class representatives' interests of class members." *Morrow v. Washington*, 277 F.R.D. 172, 195 (E.D. Tex. 2011). *See also Chavez v. Plan Benefit Servs., Inc.*, No. AU-17-CA-00659-SS, 2019 WL 4254627, at *3 (W.D. Tex. Aug. 30, 2019) ("The purpose of this requirement is to uncover conflicts of interest between named parties and the class they seek to represent."). "While the burden in a class certification motion is on the Plaintiffs, the adequacy of the putative representatives and of Plaintiffs' counsel is presumed in the absence of specific proof to the contrary." *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 129-130 (5th Cir. 2005).

Here, the Named Plaintiffs are capable of protecting, have protected, and will continue to protect, the interests of absent class members. LeClair Decl. at ¶ 20. From the outset, the Named Plaintiffs have been, and remain, involved in this matter. *Id.* The Named Plaintiffs have reviewed important documents, including multiple drafts of the complaint; they have discussed the details of the case with their attorneys; they know that they must continue to supervise their attorneys; they understand the fundamental nature of the claims presented; and they comprehend the damage that the alleged breach has caused them to suffer. *Id.* One Named Plaintiff, Mr. Cruson, testified in his deposition that the Named Plaintiffs would represent the class and do what was required of them. *See* ECF No. 52, Exhibit A-5, Cruson Dep. at 107:12-24. The Named Plaintiffs communicate regularly with counsel and are prepared to make all necessary

decisions involving this case with class members' best interests in mind. LeClair Decl. at ¶ 20.

In addition, the Named Plaintiffs retained counsel experienced and competent in class action and other complex litigation. Indeed, courts have appointed plaintiffs' counsel as settlement counsel in many sophisticated class action cases. Adequacy is satisfied.

2. The Class satisfies the requirements of Rule 23(b)

After satisfying all requirements under Rule 23(a), the class must then satisfy elements of Rule 23(b), commonly referred to as predominance and superiority.

a. Questions common to Class Members predominate over any questions affecting only individual members

Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *Mullen*, 186 F.3d at 624.[1] "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). This inquiry turns on "how a trial on the merits would be conducted if a class were certified." *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008). The objective of Rule 23(b)(3) is to promote economy and efficiency in actions that are primarily for money damages. Where common questions "predominate," a class action can achieve economies of time, effort, and expense as compared to separate lawsuits, permit adjudication of disputes that cannot be economically litigated individually, and avoid inconsistent outcomes, because the same issue can be adjudicated the same way for the entire

[1] The Fifth Circuit's opinion on the Rule 23(f) petition does not create any obstacle to certification in this current settlement context. Jackson is waiving any individual defenses, and the methodology for determining damages and settlement payments is both straightforward and uniform. Given the amounts at issue, this settlement and certification are unquestionably in the best interest of the settlement class and common issues predominate here.

class. Fed. R. Civ. P. 23(b)(3), Advisory Committee Note (1966).

The right of every class member in this case to recover damages or not to recover damages may be resolved in "one stroke." Plaintiffs have shown that the amount of each class member's damages, is calculable from Jackson's records; that Jackson still possesses such records; and that such records are maintained sequentially in order of the year and date the annuity contract was signed. LeClair Decl. ¶ 21. Thus, the fact that the amount of damage awardable to each individual class member will vary according to the amount of that class member's contract with Jackson does not defeat predominance. That is, the common question of whether class members are entitled to a refund in surrender charges pursuant to Jackson's annuity contract "predominate[s] over any questions affecting only individual members." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 459 (2013); *see In re Deepwater Horizon*, 739 F.3d 790, 816 (5th Cir. 2014) (upholding a finding of predominance despite diverse damages because "even without a common means of measuring damages, [the] common issues [of fact and law] nonetheless predominated over the issues unique to individual claimants.").

b. A class action is superior to other methods for the fair and efficient adjudication of this matter

Rule 23(b)(3) also requires that a district court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "'The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.'" *Sistrunk v. TitleMax, Inc.*, 2016 WL 9450445 (W.D. Tex. Aug. 26, 2016) (citing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533-34 (3d Cir. 2004); *Basile*, No. 1:15-cv-01518, 2018 WL 2441363, at *5 (M.D. Pa. May 31, 2018). When determining whether class treatment is superior to the available methods of adjudicating the controversy, the Court

examines the following factors: "(A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties encountered in managing a class action." *Amchem Prods., Inc.*, 521 U.S. at 615–16.

In this matter, the other available method of adjudication is individual suits challenging Defendant's conduct through multiple cases, in multiple states – or no cases at all, given that the small purchases of many class members would make such cases economically inefficient. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (considering the amount of the class action resolution is a more desirable outcome than individualized actions). A single class action is therefore not just the superior alternative, but likely the only alternative. As such, the final requirement of 23(b)(3) is satisfied. This Court should preliminarily certify the Settlement Class.

VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE UNDER RULE 23(E)

Rule 23(e) requires that a court preliminarily evaluate the fairness of a class action settlement:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by the parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. . . . The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual For Complex Litigation § 21.632 (4th ed. 2004); *see also* 4 Alba Conte & Herbert B.

Newberg, Newberg On Class Actions, § 11.25 (4th ed. 2002). After the court makes a preliminary fairness evaluation, and notice has been issued, the court must then hold a final fairness hearing to determine whether the proposed settlement is truly fair, reasonable, and adequate. *See* Manual For Complex Litigation § 21.633-34; Newberg, § 11.25.

Considering as much, preliminary approval requires only that a court evaluate whether the proposed settlement was negotiated at arm's-length and is within the range of possible litigation outcomes such that "probable cause" exists to disseminate notice and begin the formal fairness process. *See* Manual For Complex Litigation § 21.632-33.

With the understanding that a full fairness determination is not necessary at this preliminary approval stage, the Fifth Circuit has identified six factors for consideration in analyzing the fairness, reasonableness, and adequacy of a class action settlement under Rule 23(e): (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 n.11 (5th Cir. 2012).

In addition, Rule 23(e) mandates consideration of several additional factors, including that the class representatives and class counsel have adequately represented class members, and that the settlement treats class members equitably relative to each other. Here, each relevant factor supports the conclusion that the settlement is fundamentally fair, reasonable, and adequate.

A. There is no fraud or collusion behind the Settlement

The parties agreed to settle this matter following months of negotiation that succeeded a mediation with Hesha Abrams, Esq. LeClair Decl. ¶ 4. Accordingly, the settlement is not the

product of collusion, but rather the ultimate result of arms-length negotiations facilitated by an experienced mediator. A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion. *See* 2 Mclaughlin On Class Actions § 6:7 (8th ed. 2011); *accord In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 931 (E.D. La. 2012) ("any suggestion of fraud or collusion" regarding settlement was "baseless," as "the Settlement was reached only after many months of hard-fought negotiations").

B. The complexity, expense, and likely duration of litigation favors settlement

There exists "an overriding public interest in favor of settlement" especially "in class action suits." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1997). *See also Assoc. for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) (settlement is favored "particularly in class actions that have the well-deserved reputation as being most complex."). Indeed, "there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003). Here, absent settlement, the parties would have had to continue with discovery, including multiple depositions; brief both class certification and merit-related issues; and, try any issues not resolved on summary judgment. Appeals would almost certainly have followed. The settlement, however, provides immediate relief, and avoids the certainty of additional, expensive, and protracted litigation. *See Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 303 (S.D. Miss. 2014) ("Although this Action was actively litigated for over two years, recovery by any means other than settlement would require additional years of litigation."); *Henderson*, 2002 WL 31415728, at *3 (following discovery, "several fundamental issues in the case remained in dispute: . . . . Resolving these questions through a trial and, ostensibly, an appeal, would likely be

burdensome and costly.”).

C. The stage of the proceedings supports preliminary approval of the Settlement

Plaintiffs filed their putative class action complaint on November 29, 2016. ECF No. 1. Thereafter, the plaintiffs filed two amended complaints, respectively incorporating new information learned through discovery and altering their claims accordingly. ECF No. 10 and 90. Leading up to the mediation with Ms. Abrams, the parties focused their efforts on discovery specifically targeted to foster a resolution.

All of this, taken together, ensured that “‘counsel had an adequate appreciation of the merits of the case before negotiating.’” *Duncan v. JPMorgan Chase Bank, N.A.*, No. SA-14-CA-00912-FB, 2016 WL 4419472, at *8 (W.D. Tex. May 24, 2016) (citing *Jenkins*, 303 F.R.D. at 303-304). The parties then consummated the settlement having a clear view towards the strengths and weaknesses of their respective positions. *See Mashburn v. Nat’l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988) (“That is, Class Counsel developed ample information and performed extensive analyses from which to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation.”).

D. The probability of plaintiffs’ success on the merits, the range of possible recovery, and the uncertainty of damages favor preliminary approval

Courts are to consider the estimated damages and “estimate the likelihood of recovery.” *In re Corrugated Container Antitrust Litig.,* 659 F.2d 1337, 1340 (5th Cir. 1981); *see also* Jenkins, 300 F.R.D. at 304 (“[T]he likelihood and extent of any recovery from the defendants absent settlement.” That is, “[t]he settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case.” *In re Pool Prods. Distribution Market Antitrust Litig.*, MDL No. 2328, 2015 WL 4875464, at *13 (E.D. La. Aug. 13, 2015) (preliminarily approving class action settlement).

A class action constitutes the only realistic way plaintiffs' claims can be adjudicated. Many of the class members' claims will be small relative to the high costs of maintaining individual actions. The size of the Settlement Class should not present management difficulties. The computation of damages is an objective question that does not require subjective consideration for particular class members. Streamlining claims in one class action will avoid inconsistency and simplify the process of resolving the surrender charge claims.

E. The opinion of plaintiffs' counsel further supports preliminary approval of the settlement

"The Fifth Circuit has repeatedly stated that the opinion of class counsel should be accorded great weight" when "evaluating a proposed settlement." *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 649 (N.D. Tex. 2010); *Henderson*, 2002 WL 31415728, at *4 ("Finally, the Court finds that the opinions of class counsel, class representatives, and absent class members weigh in favor of settlement. Counsel for both plaintiffs and defendant concur that the settlement is fair."); *accord Mashburn*, 684 F. Supp. at 669 ("If plaintiffs' counsel did not believe these factors all pointed substantially in favor of this settlement as presently structured, this Court is certain that they would not have signed their names to the settlement agreement.").

Here, plaintiffs' counsel is highly experienced in class action litigation. *See* LeClair Decl. at ¶ 25. And plaintiffs' counsel firmly believes that the settlement is fair, reasonable, adequate, and in the best interests of class members. *Id.* at ¶ 22.

F. Named Plaintiffs and Class Counsel have adequately represented the Class

Named Plaintiffs were committed throughout this matter to acting in the best interests of class members. LeClair Decl. ¶ 6. They stayed updated on the case and spoke with their counsel regularly. *Id.* Named Plaintiffs also remained prepared to, and did, make all necessary decisions required of them in the best interests of the class members. *Id.* Similarly, plaintiffs' counsel—

who is experienced in complex litigation and has served as class counsel on numerous occasions—zealously litigated on behalf of plaintiffs and class members, and against sophisticated and experienced defense counsel. Ultimately, with class counsels' guidance, Named Plaintiffs obtained an excellent recovery for themselves and for class members.

G. The Settlement treats Class Members equitably

Rule 23(e)(2)(D) requires that a court confirm that a class action settlement treats all class members equitably. The Advisory Committee's Note to Fed. R. Civ. P. 23(e)(2)(D) advises that courts should consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."

In this case, all class members have similar claims. The Settlement provides that each participating class member will receive a pro rata portion of the Settlement Fund based on the total amount each Class Member incurred in withdrawal and/or recapture charges under a Class Member Policy in the applicable time period for this Settlement.

VIII. NOTICE TO THE CLASS IS ADEQUATE

There are two requirements for notice under Rule 23. First, to satisfy due process, "[a] class settlement need only properly identify the plaintiff class and generally describe the terms of the settlement so as to alert members 'with adverse viewpoints to investigate and to come forward and be heard.'" *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 298 (W.D. Tex. 2007). *See also Charron v. Pinnacle Group N.Y. LLC*, 874 F. Supp. 2d 179, 191 (S.D.N.Y. 2012) ("[A] Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally and informs the Class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing."); *accord Wal-Mart Stores, Inc.*, 396 F.3d at 113–14 ("There are no rigid rules . . . the settlement notice must fairly apprise

the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." (quotations omitted)). Second, the manner of sending notice to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem*, 521 U.S. at 617.

Both requirements are met here. The form of notice proposed satisfies due process because it uses plain language to inform Class Members of the terms of the settlement and the options open to them. *See* Newberg on Class Actions § 11.53 (the form of notice is "adequate if it may be understood by the average class member"). The Long-Form Notice, which is attached to the Settlement Agreement (LeClair Decl. Ex. A) as Exhibit E communicates in unambiguous language the essential elements of the Settlement and the options available to Class Members, including the various benefits to the Class, the fact that Class Counsel may request up to $2,500,000 of the cash amount of $8,750,000 million to be deposited into an Escrow Account, and the dispute resolution protocol. *Id.* The Notice provides specific information the procedure for objecting and the date, time and place of final approval. *Id.* The Short-Form Notice that will be initially sent to Class Members who are no longer current account holders at Jackson (Exhibit F to the Settlement Agreement, Exhibit A to the LeClair Declaration) communicates both the basic information necessary and gives direction to both a web site and a telephone number for additional information.

The proposed manner of sending notice relies on both direct mailing and e-mailing to individual Class Members using Defendant's address database and is the best notice practicable. *Id.* The proposed approach is also particularly appropriate in this case because there are approximately 190,000 Class Members. LeClair Decl. at ¶ 19. Class Counsel will be permitted

to place neutral notices (subject to Jackson's review and approval) that a settlement has been reached with a hyperlink to the settlement website. *Id.* at ¶ 23. And as necessary, the Claims Administrator will research and attempt re-delivery of any Notices returned as undeliverable. *Id.*

Courts routinely recognize that direct mailings to class members, using known addresses maintained by defendants or other sources, are the best possible form of notice. *Fernandez da Silva v. M2/Royal Const. of La.,* LLC, No. 08-4021, 2009 WL 3565949, at *5 (E.D. La. Oct. 29, 2009); See*, e.g.*, *United States v. New York*, Nos. 13-CV-4165, 13-CV-4166, 2014 WL 1028982, at *5 (E.D.N.Y. Mar. 17, 2014) (where class notice was mailed directly to 3,876 class members "who were identified by Defendants," the "simple and direct notice was 'the best notice practicable under the circumstances'" (quoting *In re Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 133 (S.D.N.Y. 2008)).

IX. THE DISTRIBUTION PLAN IS REASONABLE

"The standard for approving a plan of distribution is the same as the standard for approving the settlement: the plan must be 'fair, adequate, and reasonable' and must not be 'the product of collusion between the parties.'" *Buettgen v. Harless*, 2013 WL 12303143 (N.D. Tex. Nov. 13, 2013) (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1981)). *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (A distribution plan is fair and reasonable so long as it has a "reasonable, rational basis."). The analysis should be "informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *In re Chicken Antirust Litig.*, 669 F.2d at 238. Because mathematical precision is often impossible in calculating claims for a class, courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104,

133 (S.D.N.Y. 1997).

As explained in the Settlement, Class Members will receive settlement funds (net of fees and costs) on a *pro rata* basis proportionate to the dollar amounts each Class Member incurred in withdrawal and/or recapture charges under a Class Member Policy in the applicable time period for this Settlement.

This type of distribution, where funds are distributed on a *pro rata* basis, is frequently determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."); *In re Lloyds' Am. Trust Fund Litig.*, No. 96-Civ. 1262, 2002 WL 31663577, at *19 (S.D.N.Y. Nov. 26, 2002) ("*[P]ro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. at 135 (approving *pro rata* distribution). In addition, plaintiffs counsels' conclusion that the distribution plan is fair, adequate, and reasonable, *see* LeClair Decl. ¶ 6, is entitled to weight. *See In re Am. Bank Note Holographics, Inc.* 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (approving allocation plan and according counsel's opinion "considerable weight"). Therefore, the distribution plan is fair, reasonable, and should be preliminarily approved.

X. APPOINTMENT OF SETTLEMENT CLASS REPRESENTATIVES AND SETTLEMENT CLASS COUNSEL

The Court has already appointed David Cruson and John Denman as Class Representatives and McKool Smith PC and the Corley Law Firm as Co-Lead Class Counsel. ECF No. 96 at 22. Class Representatives David Cruson and John Denman seek to be appointed as representatives of the Settlement Class, and Co-Lead Class Counsel McKool Smith PC and

the Corley Law Firm seek appointment as Settlement Class Counsel. *See* Fed. R. Civ. P. 23(c)(1)(B). Class Representatives David Cruson and John Denman are appropriate Settlement Class Representatives. They have standing to represent absentee Class Members,[2] possess no conflicts, and have actively participated in the litigation for the benefit of the Class. LeClair Decl. ¶ 1. The Court has already found that Co-Lead Class Counsel are well-experienced, qualified, and sufficiently skilled to litigate this case for Class Members. ECF No. 96 at 22. Since their original appointment, Co-Lead Class Counsel have worked diligently to prepare pleadings, undertake and analyze discovery, conduct motion practice, and negotiate settlement terms that provide fair, reasonable and adequate relief to Class Members. Co-Lead Class Counsel request that the Court appoint them as Settlement Class Counsel.

XI. CONCLUSION

Class Counsel respectfully request that the Court (1) preliminarily approve the proposed Settlement as within the range of fairness, reasonableness and adequacy; (2) approve the proposed form and manner of Notice to the Settlement Class; (3) certify the proposed Settlement Class for settlement purposes only; (3) appoint David Cruson and John Denman as Settlement Class Representatives; (4) appoint Class Counsel as Settlement Class Counsel; (5) appoint Heffler Group LLC as Claims Administrator; and (6) schedule a date and time for a hearing to consider final approval of the Settlement and related matters.

Dated: February 5, 2021

[2] *See Sullivan*, 667 F.3d at 311-12 (approving settlement of nationwide indirect purchaser class with class representatives from fewer than all 50 states); *Accord In re Plastic Additives Antitrust Litigation*, No. 08-3358, 2009 WL 405522, at *1 (3d. Cir. 2009) ("There is no requirement, in the context of a class settlement that named class members hail from the same states as absentee class members").

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS DAVID CRUSON AND JOHN DENMAN

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing was served on all parties entitled to notice by electronic notification on this 5th day of February 2021.

/s/ *Lewis T. LeClair*
Lewis T. LeClair