

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

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**DECLARATION OF LEWIS T. LECLAIR IN SUPPORT OF
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Lewis T. LeClair, declares and states as follows:

1. I submit this declaration in support of preliminary approval of the class action settlement reached on behalf of the Named Plaintiffs, David Cruson and John Denman, and other members of the Settlement Class (collectively, "Plaintiffs"). Class Representatives David Cruson and John Denman are appropriate Settlement Class Representatives. They have standing to represent absentee Class Members, possess no conflicts, and have actively participated in the litigation for the benefit of the Class.

2. I am a shareholder and principal in the law firm of McKool Smith, PC, which is Co-Lead Counsel for the Plaintiffs. I am a member in good standing of the Texas and California bars and am admitted to practice in the United States District Courts for the Northern, Southern,

Western, and Eastern District of Texas. In addition, I am admitted to practice in the United States District Courts for the Northern, Central and Southern District of California, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court. I have personal knowledge of the matters set forth in this declaration. I became involved in this case in 2016 and am closely familiar with all aspects of this case.

3. On May 9, 2018, by Order of this Court I was appointed Co-Lead Class Counsel for the Named Plaintiffs. ECF No. 96.

4. Co-Lead Class Counsel Gary Corley I were the principal negotiators of the settlement reached with Defendant Jackson National Life Insurance Company (“Defendant”). The settlement was achieved after extensive negotiations extending over months, and only after the conclusion of a full day virtual mediation session and follow-up negotiations before the very able and effective mediator Heshia Abrams, Esq., in which the Plaintiffs and Defendant, through counsel, participated. The parties’ settlement has been documented in a proposed Settlement Agreement, a true and correct copy of which is attached to this declaration as Exhibit A (the “Settlement”).

5. Plaintiffs now seek to have the Court preliminarily approve the Settlement and order that notice be given to a class of persons entitled to recover under the Settlement. Attached to the Settlement are true and correct copy of the Long Form and Short Form Notice of Proposed Settlement for distribution to Class Member (Exhibits E and F to the Settlement). Also attached to the Settlement is a true and correct copy of an Explanation Letter that will be sent to Class Members who have current accounts (Exhibit B to the Settlement).

6. I believe the Settlement Agreement provides for a settlement with Defendants that is fair, reasonable, adequate, and in the best interests of all class members. All Class Plaintiffs

support this settlement.

7. Preliminary settlement negotiations with Defendant began in 2018, but the negotiations did not progress given the substantial uncertainties associated with the Rule 23(f) appeal.

8. Following the Fifth Circuit's opinion in March 2020 vacating the class certification order issued by the Court here, settlement negotiations began again and continued informally through the summer of 2020.

9. The parties have engaged in extensive discovery, both formal and informal. Prior to the original hearing on class certification, the parties exchanged substantial document production and took depositions of the class members and their broker representatives, and Plaintiffs took the deposition of Jackson and its representative. More recently, the parties have engaged in informal discovery designed to aid in those settlement negotiations, while at the same time scheduling further formal discovery to be conducted in the event that settlement negotiations were not successful. The parties entered into an agreed scheduling order on October 21, 2020 that addressed the further process of discovery, expert analysis, and a renewed motion for class certification. *See* Sixth Amended Scheduling Order (Dkt. 132).

10. The Defendant has produced over 200,000 pages of documents; the Named Plaintiffs also produced documents, and numerous depositions of the parties and their representatives were taken. In addition, plaintiffs' counsel, with the assistance of an expert, spent hundreds of hours analyzing very large amounts of data provided by the Defendant relating to withdrawal and recapture transactions.

11. 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 then engaged experienced mediator, Heshia Abrams, Esq. to assist them in the process of continuing and, hopefully, finalizing the settlement negotiations. Ms. Abrams is a highly regarded mediator in Dallas, Texas.

12. Given the ongoing pandemic, the mediation process involved a series of phone calls with counsel for both sides individually and all parties collectively, followed by lengthy Zoom virtual mediation sessions. The formal virtual mediation took 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 that day.

13. On November 4, 2020, the parties had a second joint discussion with Ms. Abrams to discuss certain non-monetary terms of the settlement. Following this joint discussion with the mediator, the parties continued over the ensuing months to negotiate the non-monetary terms of the settlement agreement.

14. The Settlement is the result of several rounds of vigorous negotiation conducted at arm's-length with Defendant's settlement counsel, David Levy and Scott Schutte, who are both partners at Morgan, Lewis & Brokius LLP, and who are experienced in the litigation of complex cases, including class actions.

15. From October 2020 through the end of January 2021, Mr. Corley and I negotiated the detailed terms of the Settlement with Mr. Levy and Mr. Schutte. The final Settlement Agreement was executed on February 5, 2021.

16. The negotiations were entirely professional, but also entirely adverse and non-collusive. I was closely familiar with all the contested legal and factual issues and thoroughly evaluated Defendant's contentions. Mr. Corley and I advocated in the negotiation process for the best possible settlement that could be achieved on behalf of the class.

17. The detailed terms and conditions of the Settlement are set forth in the Settlement Agreement. The principal terms of Settlement are:

- Certification of the Settlement Class for settlement purposes only.
- A \$8,750,000 million cash payment (net of fees and costs).
- Class Members' (except those who have opted out) will release certain litigation-related claims against the Defendant.

18. In my opinion, the \$8,750,000 million in cash payments to Class Members, net of fees and costs, is an excellent recovery for Class Members in light of the Class's damage calculations, the uncertainties of the action, and the risks of trial and appeal.

19. The Named Plaintiffs and Class Members all share common contract language and common conditions resulting from the withdrawal of funds from their variable annuities with Jackson and the calculation of withdrawal and recapture charges. There are more than 190,000 members of the nationwide class who have incurred withdrawal and recapture charges during the class period. These policies are distributed throughout the fifty states of the United States and the District of Columbia.

20. The Named Plaintiffs are capable of protecting, have protected, and will continue to protect, the interests of absent class members. The Named Plaintiffs have been committed throughout this matter to acting in the best interests of class members. 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. 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.

21. The right of every class member in this case to recover damages for the claims addressed in this case are best resolved through a class recovery. Plaintiffs have shown that the amount of each class member's damages is calculable from Defendant's records; that Defendant still possesses such records; that such records are maintained sequentially in order of the year and date the annuity contract was signed; and that although there are certain calculations made by Jackson in a dynamic process pursuant to computer programs that do not retain every piece of information used in the calculation, there are sufficient records to enable Class Counsel, with expert assistance, to determine the appropriate level of damage as to each class member.

22. Class Counsel recommends the proposed distribution plan described in Paragraphs 15 and 16 of the Settlement (Exhibit A). Class Members will receive Settlement funds (net of fees, costs, and any incentive awards) 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 the this Settlement. If there are significant unclaimed funds or returned checks from the first round of distributions, a second round distribution will made pro rata to those Class Members who received benefits in the first round distribution. No settlement funds will be returned to the Defendant. If the amount of unclaimed funds is not large enough to justify a full distribution to all Class Members, then Jackson has agreed to credit any remaining amount, pro rata, to the contract value of the Class Members who are still current customers of Jackson. It is my opinion that the distribution plan is fair, adequate, and reasonable.

23. Subject to Defendant's review and approval, Class Counsel will place key documents and copies of the court approved notices that a settlement has been reached with a hyperlink to a settlement website to be created and maintained by the Heffler Claims Group (the

“Claims Administrator”). And as necessary, the Claims Administrator will research and attempt re-delivery of any Notices returned as undeliverable.

24. The Settlement also provides that Class Counsel may request up to \$2,500,000 of the cash amount of \$8,750,000 in attorneys’ fees and expenses, and requests an incentive award for the two named Class Members in the amount of \$1,000.

25. I am a member of the Texas and California bars. I received a Bachelor of Business Administration with honors, and a Juris Doctor degree with high honors from the University of Texas. After graduation from law school, I clerked for Judge Walter Ely on the Ninth Circuit Court of Appeals. I have practiced commercial litigation for my entire legal career spanning 45 years. I have had substantial experience in all kinds of commercial matters, including serving as co- lead counsel in major class actions, including one that was tried to verdict, and one that settled during trial in the Southern District of New York.

26. The practice of McKool Smith is limited to complex commercial and intellectual property litigation. The firm has offices around the United States, including an office in the Eastern District of Texas. The firm has tried many cases in the Eastern District and is familiar with practice in this Court. The firm has served as lead counsel or co-lead counsel in a number of class action or derivative lawsuits in both state and federal courts across the country, including:

- *Dial Corporation, et. al., v. News Corporation, et. al., Case No. 13 Civ. 06802 (WHP) (United States District Court for the Southern District of New York)*(antitrust class action, LeClair and McKool served as co-lead counsel for the class, case settled during trial for \$244 million).
- *Bernard Parrish, et. al. v. NFLPA, Case No. C07 0943 WHA (United States District Court for the Northern District of California)*(LeClair and McKool Smith served as co-lead counsel for the class, case tried to verdict, actual and punitive damages awarded)
- *Garcia et. al. v DirecTV and Hughes Electronics, LASC Case No. BC259174 (Los Angeles County Superior Court, State of California)* (LeClair and McKool Smith served as co-lead counsel for the plaintiff class)

- *Capitol Entertainment of Northern Virginia, Ltd. and Video Capitol Rental, Inc. v. Daniel Gilbert, Wayne L. Bledsoe, Shirley A. Bledsoe, Bob Gerber, David A. Golden, M.D., Max Meyer, Trustee, Max Meyer Recv. Living Trust, Stephen J. Obermeier, M.D., Cletus C. Schenk and W. Thomas Veal, Jr., D.D.S., Inc., Money Purchase Pension Plan and Profit Sharing Plan, W.T. Veal, Trustee*, No. 95-06471 (District Court, Dallas, County, Texas, 44th Judicial District) (LeClair and McKool Smith served as co-lead counsel for the plaintiffs)
- *In re Affiliated Computer Services Derivative Litigation*, Cause No. 06-03403 in the 193rd District Court of Dallas County, Texas (consolidating *Huntsinger v. Deason*, et al., Cause No. 06-03403 in the 193rd District Court of Dallas County, Texas; *Oury v. Deason*, et al., Cause No. 06-03872 in the 162nd District Court of Dallas County, Texas; and *Anchorage Police & Fire Retirement System v. Deason*, et al., Cause No. 06-0526S in the 14th District Court of Dallas County, Texas) (LeClair and McKool Smith served as lead counsel for certain defendants)
- *In re Affiliated Computer Services Derivative Litigation*, Master File No. 3:06-CV-1110-M (consolidating *Alaska Electrical Fund v. Deason*, et al., Cause No 3-06-CV-1110-M in the United States District Court, Northern District of Texas, Dallas Division and *Lunceford v. Rich*, et al., Cause No. 3-06-CV-1212-M in the United States District Court, Northern District of Texas, Dallas Division) (LeClair and McKool Smith served as lead counsel for certain defendants)
- *Brandin v. Deason*, et al., Civil Action No. 2123N in the Court of Chancery of the State of Delaware in and for New Castle County (LeClair and McKool Smith served as lead counsel for certain defendants)
- *In re: Search Financial Services Acceptance Corp., MS Financial, Inc., Search Funding Corp., Search Financial Services Inc.*, No. 398-32129-RCM-11 (United States Bankruptcy Court for the Northern District of Texas, Dallas Division) (LeClair and McKool Smith served as lead counsel for a defendant)
- *Warmack-Muskogee Limited Partnership, individually and on behalf of all others similarly situated v. PricewaterhouseCoopers, LLP, a/k/a PricewaterhouseCooper Global, Ernst & Young, LLP, Ernst & Young International, Inc., Cap Gemini Ernst & Young U.S., LLC, KPMG, LLP, and KPMG Consulting, Inc., and Does 1 through 3*, No. DR-2001-504-3 (Circuit Court of Miller County, Arkansas) (LeClair and McKool Smith served as lead counsel for a defendant)
- *R&D Business Systems, et al. v. Xerox Corporation*, No. 2:92-CV-042 (United States District Court, Eastern District of Texas) (McKool Smith served as co-lead counsel for the plaintiff)
- *Dichter, et al. v. BP America Production Company f/k/a Amoco Production Company, et al.*, No. D-0101-CV-200001620 (First Judicial District County of Santa Fe, New Mexico) (McKool Smith served as co-lead counsel for the plaintiff)

- *Kopies, Inc. et al. v. Eastman Kodak Company*, No. C94-0524-AWT (United States District Court, Northern District of California) (McKool Smith served as co-lead counsel for the plaintiff)
- *Doris Ferrer, et al. v. Amoco Production Company, et al.*, No. CIV-95-0012-JB (United States District Court, District of New Mexico) (McKool Smith served as co-lead counsel for the plaintiff)
- *Debra Walker, et al. v. United States Dept. of Housing and Urban Development, et al.*, No. 3:85-CV-1210-R (United States District Court, Northern District of Texas) (McKool Smith served as lead counsel for a defendant)I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 5th day of February, 2021.

/s/ Lewis T. LeClair

LEWIS T. LECLAIR