UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WILLIAM JEFFREY BURNETT and JOE H. CAMP, individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	**CLASS ACTION**
v.	)	CAUSE NO.: 1:18-cv-00200-JPH-DML
CONSECO LIFE INSURANCE COMPANY, INC.; CNO FINANCIAL GROUP, INC.; and CNO SERVICES, LLC,	)	
Defendants.	)	

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

TABLE OF CONTENTS

Plaintiffs William Jeffrey Burnett and Joe H. Camp (together, "Plaintiffs") respectfully move this Court pursuant to Fed. R. Civ. P. 23 for an Order: (1) granting preliminary approval of a proposed settlement agreement (the "Settlement Agreement") with Defendant Conseco Life Insurance Company only ("Conseco Life"); (2) preliminarily designating Plaintiffs as class representatives; (3) preliminarily appointing attorneys from Weisbrod Matteis & Copley PLLC ("WMC") and DeLaney & DeLaney LLC (the "DeLaney Firm") as Class Counsel; (4) preliminarily appointing Donlin Recano & Company, Inc. ("Donlin Recano") as Settlement Administrator; and (5) directing notice to all class members who would be bound by the Settlement Agreement.

INTRODUCTION

Plaintiffs are former holders of "LifeTrend" life insurance policies (the "LifeTrend Policies" or "Policies"). They have sued Conseco Life, CNO Financial Group, Inc. ("CNO Financial"), and CNO Services, LLC ("CNO Services") (collectively, "Conseco") for breach of contract, contending that Conseco Life breached the Policies by announcing and implementing changes in the calculation of Policy premiums and expense charges that caused thousands of policyholders to surrender their Policies. Inducing thousands of policyholders to give up their valuable Policies—a consequence that the company referred to internally as "shock lapse"—was no accident. Rather, it was one of the primary purposes of the changes. Conseco carefully calculated the effects of the shock-lapse strategy in advance of the changes. The strategy proved to be even more effective than Conseco expected, and transferred many tens of millions of dollars in value from LifeTrend policyholders to Conseco Life and its ultimate parent, CNO Financial.

After over seven years of hard-fought litigation in multiple federal district courts and the

U.S. Court of Appeals for the Ninth Circuit, and after three mediations before three different mediators, Plaintiffs and Conseco Life have reached a $27 million settlement. Under the terms of the Settlement Agreement,[1] no Class Member will receive less than $500 and many Class Members will receive thousands of dollars more than that. In addition, the Settlement Agreement preserves Class Members' ability to continue to litigate their claims against CNO Financial and CNO Services (together, the "CNO Defendants"), which are not parties to the Settlement Agreement.

Under the circumstances, the Court likely will be able to conclude that the Settlement Agreement is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and that the Class should be certified. Accordingly, the Court should grant the preliminary approvals requested and approve the proposed notice.

BACKGROUND

I. Plaintiffs' Claims

In October 2008, Conseco announced in a letter to individual LifeTrend policyholders that they no longer could maintain their Policies without paying substantial new premiums and charges. Plaintiffs allege that Conseco announced and then implemented these changes as part of a shock-lapse strategy to induce policyholders to give up their valuable Policies.

Plaintiffs allege that Conseco's actions breached the Policies in numerous ways, including by improperly applying the Policies' rules for optional premium payment ("OPP") eligibility (also known as "vanishing premium" eligibility), using prohibited factors in increasing cost-of-insurance ("COI") rates, diluting guaranteed interest rates, violating the Policies' prohibition against using COI charges to recoup prior losses, and failing to comply with the

[1] Capitalized terms not defined in this brief have the meaning ascribed to them in the Settlement Agreement.

Policies' mandatory disclosure and reporting requirements. Plaintiffs seek to recover damages for the loss of the Policies that Conseco's breaches induced.

Conseco's shock-lapse strategy worked. Conseco's records show that, during the nine months[2] prior to the October 2008 letter—when Conseco was calculating OPP provision eligibility properly and was not making COI deductions—no more than 27 LifeTrend Policies were surrendered or allowed to lapse, out of more than 12,000 Policies. *See* Browne Decl. ¶¶ 14, 16 [Dkt. 200-4 at 4]. In the three years following the October 2008 notice letter, by contrast, approximately 34 percent of LifeTrend policyholders surrendered their Policies or let them lapse. *See id.* ¶ 18 [Dkt. 200-4 at 6]. Approximately 3,666 policyholders surrendered 4,508 Policies after receiving the October 2008 notice letter. *See id.* ¶¶ 13, 15 [Dkt. 200-4 at 4-5].

Plaintiffs sued Conseco Life (the company that issued the Policies), CNO Financial (Conseco Life's indirect parent), and CNO Services (a subsidiary of CNO Financial that carried out most of Conseco Life's day-to-day operations under CNO Financial's direction). Plaintiffs sued the latter two entities for breach of contract under an alter ego theory.

At this point, Plaintiffs have settled only with Conseco Life. The proposed Settlement Agreement explicitly excludes from its release Plaintiffs' claims against the CNO Defendants. Plaintiffs are continuing actively to litigate those claims. Weisbrod Decl. ¶ 18 [Dkt. 200-2 at 5]. The CNO Defendants have moved to dismiss on the ground that Plaintiffs' complaint supposedly fails to state an alter ego claim.[3]

---

[2] Conseco agreed to provide data going back only nine months.

[3] Conseco Life's separate motion to dismiss (Dkt. 107) has been withdrawn in light of the settlement. *See* Dkt. 197. The CNO Defendants, in a footnote in their own motion to dismiss, stated that they joined in Conseco Life's motion. *See* Dkt. 111 at 3 n.2. The Court ruled on March 20, 2020 that it would consider the arguments made in Conseco Life's motion to the extent necessary in deciding the CNO Defendants' motion. Dkt 197.

II. The *Brady* Action

Plaintiffs filed this case in October 2012 in the U.S. District Court for the Central District of California. About a month later, the case was transferred to a then-pending multidistrict litigation proceeding (No. 10-md-02124; the "LifeTrend MDL") in the U.S. District Court for the Northern District of California (the "MDL Court").

The LifeTrend MDL encompassed several lawsuits brought by several different plaintiffs. As a practical matter, the plaintiffs playing the most active role in the LifeTrend MDL were the plaintiffs who had filed what was known as the *Brady* case, *Brady v. Conseco Life Insurance Co.*, No. 08-cv-5746 (N.D. Cal.). The *Brady* case had been filed on December 24, 2008 on behalf of a putative class of almost all LifeTrend policyholders—including policyholders who had retained their Policies as well as policyholders who had surrendered their Policies, like Plaintiffs here. Initially, *Brady* included claims against Conseco Life and CNO Financial, but CNO Financial was dismissed and the *Brady* plaintiffs decided not to pursue alter ego claims against CNO Financial. Some of the attorneys at WMC who currently represent Mr. Burnett and Dr. Camp previously represented the *Brady* plaintiffs when those attorneys were at another law firm, Gilbert LLP.

Mr. Burnett, Dr. Camp, and other members of the proposed Class here were included for a brief period in a certified class in *Brady*. However, on December 20, 2011, the MDL Court held in light of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), that former policyholders no longer could be included in the *Brady* Rule 23(b)(2) class, because former policyholders had no standing to seek declaratory or injunctive relief, and the damages they sought were not incidental to injunctive relief. *See In re Conseco*, No. C 10-02124 SI, 2011 WL 6372412, at *5-6 (N.D. Cal. Dec. 20, 2011). That partial decertification of the *Brady* class spurred Plaintiffs here to file this action.

After former policyholders were removed from the *Brady* class, the MDL Court partially granted the *Brady* plaintiffs' summary judgment motion, finding that Conseco Life breached the Policies by using Policy duration (how long the policyholder held the Policy) in setting new COI rates. *See In re Conseco*, 920 F. Supp. 2d 1050, 1058-59 (N.D. Cal. 2013). The court also found that the *Brady* plaintiffs' other breach-of-contract allegations raised triable issues of fact. *Id.* at 1059-64.

The *Brady* plaintiffs and Conseco eventually reached a settlement in which the class members received a mix of injunctive relief and cash.[4] The *Brady* settlement agreement also required the MDL Court to vacate its order granting summary judgment in favor of LifeTrend policyholders.

In November 2013, the MDL Court approved the *Brady* settlement and certified two settlement classes—a Rule 23(b)(1) and (2) class of "In Force Policyholders" and a Rule 23(b)(3) class of "Lapsed Policyholders." *See In re Conseco*, No. 3:10-MD-02124-SI, 2013 WL 10349975, at *1 (N.D. Cal. Nov. 8, 2013). The *Brady* Lapsed Policyholders class included approximately 190 former policyholders whose Policies had "lapsed." A policy "surrender" occurs when a policyholder surrenders a policy by submitting a surrender form, whereas a policy "lapse" occurs when the policyholder fails to pay required premiums. Plaintiffs in this case allege that Conseco's shock-lapse strategy was intended to induce both surrenders and lapses.

The similarities between the Lapsed Policyholders class certified in *Brady* and the Class for which Plaintiffs seek certification here are striking. Like the Class Members here, members of the *Brady* Lapsed Policyholder class were former policyholders, not current ones. They also

[4] The WMC attorneys who served as class counsel for the *Brady* plaintiffs had left the Gilbert firm prior to the settlement. Although WMC played a significant role in arguing on behalf of absent class members in favor of class certification in the *Brady* case, neither WMC nor its attorneys received any compensation from the *Brady* settlement.

had breach-of-contract claims. They also made decisions about whether to maintain coverage. And as here, the *Brady* Lapsed Policyholder class sought damages, not injunctive relief, to compensate for the loss of Policies.

Because the *Brady* settlement did not resolve claims involving surrendered Policies, the holders of approximately 35-40 percent of LifeTrend Policies still have not been compensated for Conseco's alleged breaches. *See* Browne Decl. ¶ 14 [Dkt. 200-4 at 4].

III. *Burnett* Litigation History

The proposed Settlement Agreement is the culmination of more than seven years of intensely adversarial litigation between Plaintiffs and Conseco Life, during which Plaintiffs' counsel have incurred hundreds of thousands of dollars in costs and have spent thousands of hours prosecuting Plaintiffs' claims.

A. Defendants' First Set of Motions to Dismiss and the Ninth Circuit's Reversal

On December 15, 2014, Conseco Life and the CNO Defendants moved to dismiss the First Amended Complaint ("FAC") under Rule 12(b)(6), arguing that Plaintiffs and the putative class members relinquished any breach-of-contract claims by surrendering their Policies, except for claims seeking payment of the Policies' stated surrender values. *See* Dkt. 639 & 642, LifeTrend MDL. The CNO Defendants also moved to dismiss pursuant to Rule 12(b)(2), arguing that Plaintiffs' alter ego allegations in the FAC were insufficient to establish personal jurisdiction in California. *See* Dkt. 642, LifeTrend MDL. On April 9, 2015, the MDL Court granted the motion to dismiss the FAC for failure to state a claim pursuant to Rule 12(b)(6). *See* Dkt. 717, LifeTrend MDL. The MDL Court also dismissed the *Burnett* Plaintiffs' claims against the CNO Defendants because those claims derived from the *Burnett* Plaintiffs' claims against Conseco Life. *Id.*

On May 4, 2017, the U.S. Court of Appeals for the Ninth Circuit unanimously reversed

the MDL Court's dismissal of the FAC. *See* Dkt. 728, LifeTrend MDL. The Ninth Circuit ruled that the fact that surrendering policyholders may have received a payment when they surrendered their Policies did not extinguish their right to sue for consequential damages arising from pre-termination breaches of their Policies. *Id*. at 3. The Ninth Circuit also held that the forms policyholders submitted to surrender their Policies did not release their rights to sue for breach of contract because the release language in the forms applied only if Conseco Life waived surrender charges, which it did not do. *Id.* at 4. The case was remanded to the MDL Court.

B. Venue Motions

On August 22, 2017, at the request of Conseco Life, the MDL Court entered an order suggesting remand of the *Burnett* action to the transferor court, the Central District of California. *See* Dkt. 753, LifeTrend MDL. (Conseco Life had requested the same relief in 2015, shortly before the MDL Court dismissed the FAC.) Plaintiffs opposed remand. On September 20, 2017, the U.S. Judicial Panel on Multidistrict Litigation entered a Conditional Remand Order remanding the *Burnett* action to the Central District of California. *See* Dkt. 29, 30, No. 5:12-cv-01715-VAP-SP (C.D. Cal.) ("C.D. Cal. Action"). On December 22, 2017, Conseco Life filed a motion to transfer venue from the Central District of California to this Court. Dkt. 50, C.D. Cal. Action. Plaintiffs opposed the transfer. That motion was granted on January 24, 2018 (Dkt. 69, C.D. Cal. Action), and the case was transferred to the U.S. District Court for the Southern District of Indiana the next day. *See* Dkt. 70, C.D. Cal. Action.

C. Defendants' Second Set of Motions to Dismiss

After Conseco Life and the CNO Defendants sought another opportunity to file motions to dismiss, this Court permitted them to refile only motions to dismiss that were "not moot or ha[ve] not already been resolved." Dkt. 106. Conseco Life filed a motion to dismiss on April 6, 2018, primarily to raise arguments—which the MDL Court already had considered and rejected

one or more times—relating to the Regulatory Settlement Agreement ("RSA") that some LifeTrend policyholders participated in and signed. The CNO Defendants likewise filed a motion to dismiss on April 6, 2018, primarily to challenge the sufficiency of Plaintiffs' alter ego allegations. The Court granted Conseco Life's request to withdraw its motion to dismiss on March 20, 2020. *See* Dkt. 197.

D. Plaintiffs' Motion for Class Certification

On September 19, 2019, Plaintiffs moved for class certification. Plaintiffs have withdrawn that motion, without prejudice, pending the settlement of their claims against Conseco Life.

E. Discovery

The *Burnett* Plaintiffs conducted extensive jurisdictional and merits discovery, including requesting and reviewing tens of thousands of documents and taking numerous corporate representative and other depositions. Plaintiffs are continuing to seek discovery in support of their claims against the CNO Defendants.

Plaintiffs have engaged in substantial motions practice regarding discovery. Plaintiffs filed six motions to compel discovery from Conseco Life in March 2014, after which the MDL Court entered an Order regarding the motions and directing parties to proceed with discovery in accordance with the guidance set forth in the Order. In March 2015, after meeting and conferring extensively with Defendants, Plaintiffs filed three additional motions to compel, along with an associated motion for attorneys' fees. Two of those motions were refiled in this Court after transfer. *See* Dkt. 118; Dkt. 123. Both motions were granted in part and denied in part.

IV. Settlement History

The proposed Settlement Agreement was reached after negotiations with the assistance of three different mediators. During their negotiations, the parties discussed various forms of relief

for Class Members, including the issuance of new insurance policies, cash payments, and combinations of the two, before finally agreeing on an all-cash settlement. The parties participated in mediation sessions before Retired Northern District of California Chief Magistrate Judge Edward A. Infante in San Francisco on February 18, 2015; before Retired Indiana Supreme Court Justice Theodore R. Boehm in Indianapolis on June 18, 2019; and before Jed D. Melnick in New York City on September 20, 2019. After the third mediation session, the parties continued discussing the possibility of settlement with each other and Mr. Melnick, and reached an agreement in principle on the terms of the settlement, including $27 million in cash relief, on October 1, 2019.

Even after the principal terms of the settlement were agreed upon, the settling parties continued negotiations over other terms, including the precise language of the release of claims and the settlement procedure. As negotiations continued over a protracted period of time, the parties brought Mr. Melnick back into discussions to help facilitate a negotiation schedule that would promptly lead to a final agreement. Plaintiffs and Conseco Life confirmed to this Court on March 19, 2020 that they had reached an agreement, and they executed the Settlement Agreement on April 9, 2020.

SUMMARY OF SETTLEMENT

I. Class Definition

The proposed Settlement Agreement encompasses the claims of all LifeTrend III and IV policyholders who surrendered their Policies on or after October 1, 2008 and before June 30, 2013. This amounts to 4,508 insurance Policies held by approximately 3,666 policyholders. *See* Browne Decl. ¶¶ 13, 15 [Dkt. 200-4 at 4]. The Settlement Agreement does not apply to claims regarding policies that were covered by the *Brady* settlement. The definition of the Class whose certification is sought is:

> All Persons who owned a Class Policy, where Class Policy means each LifeTrend 3 Policy and LifeTrend 4 Policy that was surrendered or lapsed on or after October 1, 2008 and before June 30, 2013, and which LifeTrend 3 Policy or LifeTrend 4 Policy was not included within the class in the Brady Class Settlement and its release.
>
> Notwithstanding the foregoing, the following Persons shall be excluded from the Class and shall not constitute Class Members: (1) all Persons who make a timely election to be excluded from the proposed Class as approved by the Court in the Final Approval Order; (2) governmental entities; (3) the judge(s) to whom this case is assigned and any immediate family members thereof; and (4) Conseco Life, Wilton Re, the Wilco Life Affiliates, the Wilco Life Agents, the CNO Defendants, the CNO Affiliates, and the CNO Agents.

II. Settlement Fund, Notice, and Allocation Plan

Under the proposed Settlement Agreement, Conseco Life will pay $27 million in cash to settle the claims of the Class (the "Settlement Fund"). Settlement Agreement ¶ 1.59 [Dkt. 200-1 at 13]. No portion of the Settlement Fund will revert to Conseco Life. *Id.* Ex. 1 ¶ 1 [Dkt. 200-1 at 54]. However, the amount distributed to the class will be reduced by the proportional pro rata share of the Settlement Fund attributable to any Opt-Outs. *Id.* ¶ 4.5 [Dkt. 200-1 at 19]. Conseco Life also reserves the right to withdraw from the Settlement Agreement if the number of Class Policies requested to be excluded from the Class by opt-out is equal to or more than 150.[5] *Id.* ¶ 12.5.3 [Dkt. 200-1 at 45].

Class Members will receive notices that explain in plain language the claims asserted in this case, the amount the Class Member will receive, and the procedure for opting out of or objecting to the settlement. *Id.* Ex. 4 [Dkt. 200-1 at 166]. Notices will be mailed to each Class

[5] The portion of the Settlement Fund proportionately attributable to Opt-Outs (if any) will be transferred to an Opt-Out Reserve Account, and may be used by Conseco Life only to satisfy settlements with or judgments obtained by Opt-Outs. *Id.* ¶¶ 1.41, 4.5 [Dkt. 200-1 at 10, 19]. As described in the Plan for Opt-Out Reserve Account Payments, any unused funds in the Opt-Out Reserve Account after three years will be transferred to the *cy pres* recipient approved by the Court. *Id.* Ex. 2 [Dkt. 200-1 at 57].

Member within 30 days after the Court grants this motion. *Id.* ¶ 6.6 [Dkt. 200-1 at 21-22]. Class Members will be given until 28 days before the Fairness Hearing to exclude themselves from the Class. *Id.* ¶ 7.1 [Dkt. 200-1 at 24]. The number of Opt-Outs will not affect the portion of the Settlement Fund allocated to attorneys' fees, nor will it affect the applicable cap on reimbursable expenses.

Under the proposed Plan of Allocation, the Settlement Administrator will distribute the Net Settlement Fund (i.e., $27 million minus Court-approved fees and expenses and any proportionate carve-out for Opt Outs), in two distributions. *Id.* Ex. 1 [Dkt. 200-1 at 54]. For deceased Class Members, funds will be distributed to their estate, their policy's primary beneficiary, or their policy's contingent beneficiary ("Class Member Successors"), in that order of priority. *Id.* ¶ 1.14 [Dkt. 200-1 at 5].

The proposed Plan of Allocation represents a principled, fair, and reasonable way to compensate Class Members. The Settlement Fund will be allocated pro rata, with pro rata shares calculated using the same damages model that Plaintiffs have asserted in this case, based on Professor Mark Browne's calculation of the "Alleged Policy NPV Damages" for each Class Policy. *Id.* Ex. 1 ¶ 3 [Dkt. 200-1 at 54]. That calculation models the net present value (as of the date of policy surrender) of policy benefits based on expected mortality rates and lapse rates, and then subtracts the net present value (as of the date of policy surrender) of any payments required to keep the Policy in force. Browne Decl. ¶¶ 19-20 [Dkt. 200-4 at 6-7]. The payment values used by Professor Browne for the Alleged Policy NPV Damages are based on LifeTrend policy data and actuarial assumptions used by Conseco in 2008, except that Professor Browne used a discount rate of 5.75% to estimate damages in present value terms, which is the rate assumed by Conseco Life's actuarial consultants in connection with the RSA in 2010. *Id.* [Dkt. 200-4 at 6-

7]. Damages are the difference between the amount Conseco paid to policyholders upon surrender and the net present value of the Policies. *Id.* [Dkt. 200-4 at 6-7].

In the Initial Distribution, the Settlement Administrator will send to each Class Member, or the Class Member's successor or beneficiary, either the Class Member's pro rata share of the Net Settlement Fund (minus a one percent holdback for unforeseen or unexpected errors in payment, to be distributed in a Second Distribution to the extent it is not used) based on these calculations, or a $500 minimum payment, whichever is higher. Settlement Agreement Ex. 1 ¶ 3 [Dkt. 200-1 at 54]. The Settlement Administrator will conduct a reasonable search for Class Members and their successors whose settlement checks are returned or uncashed. *Id.* Ex. 1 ¶¶ 3-4 [Dkt. 200-1 at 54-55]. After the Initial Distribution is complete, the Settlement Administrator will distribute to Class Members who deposited or cashed their initial distribution checks ("Successful Initial Distribution Recipients") any remaining funds, according to each Successful Initial Distribution Recipient's pro rata share of the initial distribution.[6] *Id.* Ex. 1 ¶ 5 [Dkt. 200-1 at 55-56].

Finally, any portion of the Net Settlement Fund that remains unclaimed after the Second Distribution, as well as any funds that are not distributed to Opt-Outs in satisfaction of individual settlements or judgments, will be used to fund a *cy pres* award to the National Consumer Law Center, or alternatively to another recipient designated by the Court. *Id.* Ex. 1 ¶ 7 [Dkt. 200-1 at 56], Ex. 2 ¶¶ 4, 6 [Dkt. 200-1 at 57].

The proposed settlement here will provide at least $16,700,00 (the minimum amount of the Net Settlement Fund) to a Class of 3,666 policyholders. Accordingly, each Class Member

[6] Initial distribution recipients whose pro rata share of the Second Distribution is less than $10 will not receive checks in the Second Distribution. Instead, those funds will be distributed pro rata to other Class Members.

will receive (at minimum) an average of approximately $4,555 in cash. By way of comparison, the *Brady* settlement purportedly provided $27,000,000 (exclusive of fees and expenses) to a class of 7,190 policyholders, meaning that each *Brady* class member received an average of no more than $3,755. *See* Dkt. 505 at 18, *In re Conseco*, 3:10-md-02124-SI (N.D. Cal.).

III. Release

Once the settlement becomes final and Conseco Life funds the Settlement Fund, Plaintiffs and Class Members will release, in essence, any and all claims against Conseco Life (and certain related individuals and entities) based on the LifeTrend Policies. The details of the release are contained in Article 8 of the Settlement Agreement. *See id.* Art. 8 [Dkt. 200-1 at 26-33]. The release does not encompass claims based on any other life insurance policies, nor any of Plaintiffs' claims against the CNO Defendants.

IV. Fees and Expenses

No attorneys' fees, expenses, or class representative awards will be distributed out of the Settlement Fund without the Court's approval. Per the Court's March 19, 2020 Order, Dkt. 196, Plaintiffs are filing concurrently with this motion a motion seeking such amounts, contingent on final approval of the Settlement Agreement. Class Members will have the opportunity to object to these costs, fees, and awards. The proposed Settlement Agreement provides that Plaintiffs may seek a reasonable portion of the settlement fund to be set aside for litigation costs, attorneys' fees, and class representative incentive awards. *See* Settlement Agreement Art. 9 [Dkt. 200-1 at 33-35]. Plaintiffs are seeking $553,012.94 of the Settlement Fund to cover litigation costs, plus additional expenses and settlement administration expenses to be submitted with the motion for final approval of the settlement. Total expenses to be withdrawn from the Settlement Fund will not exceed $1.25 million. Settlement Agreement ¶ 9.1.2 [Dkt. 200-1 at 33]. Plaintiffs are also seeking an attorneys' fee for Class Counsel of $9 million, or one-third of the

Settlement Fund. *See id.* ¶ 9.1.1 [Dkt. 200-1 at 33]. The named Plaintiffs are also seeking incentive rewards of $25,000 each for their representation of the Class. *See id.* ¶ 9.1.3 [Dkt. 200-1 at 33].

ARGUMENT

I. The Proposed Settlement Is Fair, Adequate, and Reasonable.

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also Uhl v. Thoroughbred Tech. & Telecommunications, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002). Preliminary approval of a proposed class action settlement "is the first step in a two-step process to determine whether a proposed Rule 23 settlement is fair, adequate, reasonable, and not a product of collusion." *Butler v. Am. Cable & Tel., LLC*, No. 09-5336, 2011 WL 4729789, at *9 (N.D. Ill. Oct. 6, 2011).

The result of granting preliminary approval is an order directing notice of the proposed settlement class, not the finalization of the settlement. *See* Fed. R. Civ. P. 23(e)(1)(B); *McCue v. MB Fin., Inc.*, No. 1:15-CV-00988, 2015 WL 1020348, at *1 (N.D. Ill. Mar. 6, 2015) (preliminary approval "simply allows notice to issue to the class and for class members to object to or opt out of the settlement"). Thus, at this stage Plaintiffs need only show that final approval is *likely*, not that it is certain. *See* Fed. R. Civ. P. 23(e)(1)(B). At the preliminary approval stage, the parties must show only that the proposed settlement is "within the range of possible approval." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979); *see also In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 588 (N.D. Ill. 2016) (same). "This bar is low." *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 416 (S.D. Ind. 2001). "After the notice period, the Court will be able to evaluate the settlement with the benefit of the class members' input." *McCue*, 2015 WL 1020348, at *1.

Preliminary (and final) settlement approval is governed by Federal Rules that came into effect in December 2018, but that "essentially codified [the] prior practice" of courts. William B. Rubenstein, et al., *Newberg on Class Actions* § 13:13 (5th ed.) ("Newberg"). Case law applying the pre-2018 version of Rule 23 therefore remains relevant to the determination of preliminary approval of a proposed settlement. *See Snyder v. Ocwen Loan Servicing, LLC*, No. 14 C 8461, 2019 WL 2103379, at *5 (N.D. Ill. May 14, 2019) ("The six factors identified by the Seventh Circuit in *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863-64 (2014), and numerous other cases subsume most of the factors listed in Rule 23(e)(2)."); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660, 2018 WL 6606079 at *2 (S.D. Ill. Dec. 16, 2018) (the amended Rule 23 "considerations overlap with the factors previously articulated by the Seventh Circuit").

Rule 23(e)(1)(A) requires parties seeking preliminary approval of a proposed class action settlement to provide information sufficient to enable the court "to determine whether to give notice of the proposal to the class." The parties must demonstrate that notice is "justified by the parties' showing that the court will *likely* be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal."[7] Fed. R. Civ. P. 23(e)(1)(B) (emphasis added). Rule 23(e)(2) sets forth a list of factors that courts must consider in order to determine that the proposed settlement is "fair, reasonable, and adequate." Courts must consider whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the proposal treats class members equitably relative to each other; and

(D) the relief provided by the settlement is adequate, taking into consideration:

[7] This section addresses only the first requirement of the preliminary approval analysis—a finding that final approval under Rule 23(e)(2) is likely. The second requirement for preliminary approval—a finding that class certification is likely—is addressed below. *See infra* at22-28.

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of the proposed method of distributing relief;

(iii) the terms of any proposed award of attorneys' fees;

(iv) any agreements made in connection with the proposed settlement.

Fed. R. Civ. P. 23(e)(2).

A. Class Representatives and Class Counsel Have Adequately Represented the Class.

Dr. Camp and Mr. Burnett have participated in this litigation and been available to counsel since the case's inception. Weisbrod Decl. ¶ 14 [Dkt. 200-2 at 3]. Class Counsel[8] have vigorously prosecuted this case for more than seven years. Class Counsel have represented the Class's interests through two rounds of motions to dismiss, an appeal to the Ninth Circuit, two heavily contested changes of venue, and through extensive discovery and discovery-related motions. Together, WMC and the DeLaney Firm have invested hundreds of thousands of dollars in litigation expenses and thousands of hours of attorney and paraprofessional time. *Id.* ¶ 11 [Dkt. 200-2 at 2-3]; DeLaney Decl. ¶¶ 12-21 [Dkt. 200-3 at 4].

B. The Settlement Agreement Was Negotiated at Arm's Length.

In evaluating a class action settlement, courts must consider whether it was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B). This case could not be further from the "product of collusion" that gives rise to this concern. *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

First, the Settlement Agreement is the product of *years* of litigation, not the type of quick settlement that sometimes raises concerns about collusion. *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) ("By the time the settlement was reached, the

[8] The term "Class Counsel" is used in this brief only for convenience. Plaintiffs' counsel have not yet been appointed as class counsel.

litigation had proceeded to a point in which both plaintiffs and defendants had a clear view of the strengths and weaknesses of their cases.").

Second, the participation of experienced mediators in the settlement negotiations "reinforces that the Settlement Agreement is non-collusive." *Johnson v. Brennan*, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011). Here, the Settling Parties participated in day-long mediation sessions three times with three different highly qualified neutral mediators, including the former Chief Magistrate Judge of the Northern District of California and a retired Justice of the Indiana Supreme Court, before reaching an agreement in principle, and the Settling Parties then continued to negotiate for months over the fine print of the settlement. "A strong presumption of fairness attaches to a settlement agreement when it is the result of this type of negotiation." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (discussing settlement negotiations with "an experienced mediator" and over "several telephone conferences"); *see also Wong*, 773 F.3d at 864 ("Finally, and importantly, the settlement was proposed by an experienced third-party mediator after an arm's-length negotiation where the parties' positions on liability and damages were extensively briefed and debated"); *Snyder*, 2019 WL 2103379, at *4 (finding the proposed settlement was reached through arm's length negotiations when the negotiations were conducted "via three separate and independent mediators").

Third, the terms of the Settlement Agreement itself reinforce its non-collusive nature. The consideration to be paid by Conseco Life is all cash and substantial, as described below. No unclaimed funds will revert to Conseco Life. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("reversion of unclaimed refunds to the putative wrongdoer" is indicative of collusion). Class Counsel's proposed fees are well within the reasonable range. *See Ormond v.*

Anthem, Inc., No. 1:05-CV-01908-TWP, 2012 WL 5878031, at *5 (S.D. Ind. Nov. 20, 2012) (collecting cases in which courts have approved "a percentage market rate of 33.3%").

C. The Relief Provided for the Class Is Substantial and Appropriate.

The $27 million cash settlement payment is an excellent result for the class. It affords Class Members immediate relief in the form of a payment of not less than $500 per Class Policy. *See Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) ("immediate payment of substantial amounts to Class Members," supports final approval "even if it means sacrificing speculative payment of a hypothetically larger amount years down the road") (quotation marks omitted). Depending on the value of the Policies they surrendered, many Class Members will receive much more—average per-Policy relief exceeds $3,700, and the highest per-Policy payment amount is more than $150,000. *See* Settlement Agreement Ex. 3 [Dkt. 200-1 at 58]. The proposed settlement is undoubtedly within the "range of possible approval." *General Motors*, 594 F.2d at 1124 (7th Cir. 1979).

Furthermore, the *cy pres* relief will be used only for the small portion of the Settlement Fund, if any, that remains unclaimed after multiple distributions to Class Members and/or to Opt-Outs. The use of a *cy pres* award is appropriate in these circumstances. *See* American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07 (2010) (endorsing this approach); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 818854, at *5 (N.D. Ill. Mar. 2, 2017), *aff'd*, 896 F.3d 792 (7th Cir. 2018) (rejecting objections to *cy pres* award for unclaimed funds after multiple distributions). The National Consumer Law Center is an appropriate proposed *cy pres* recipient because it is a "nonprofit organization dedicated to consumer protection and the promotion of fairness and justice in the marketplace," and it has been designated as a *cy pres* award recipient in numerous class actions, including cases involving breaches of insurance policies. *See* Dubois Decl. ¶¶ 3, 12-15 [Dkt. 200-6 at 2-3, 5-6]. The

Court may choose a different *cy pres* recipient if it so chooses.

1. Trial and Appeal Would Present Significant Costs, Risk, and Delay.

Rule 23(e)(2) may require courts "to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. "[T]he essence of a settlement is compromise an[d] abandonment of the usual total-win versus total-loss philosophy of litigation in favor of a solution somewhere between the two extremes." *Armstrong v. Board of School Dir. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (abrogated on other grounds) (citations omitted).

While Plaintiffs are confident in their claims against Conseco Life and their ability ultimately to prevail at trial, there is inherent risk in continuing to litigate this action. The claims already have been dismissed once, although that dismissal was reversed by the Ninth Circuit. When the parties reached agreement on the settlement, Conseco Life had yet another motion to dismiss pending in this Court. If that motion to dismiss were granted, Plaintiffs would appeal once again, which would cause additional delay and incur additional costs. Even though significant discovery had been completed, much work remained to be done, including additional depositions expert discovery. Weisbrod Decl. ¶ 25 [Dkt. 200-2 at 6]. Given the passage of time (eleven years since the October 2008 notice letter), it is possible that Plaintiffs could face evidentiary obstacles at trial if, for example, witnesses have forgotten relevant information. Plaintiffs anticipate that, absent settling this dispute, both sides would submit motions for summary judgment, and that either side could try to appeal any adverse summary judgment rulings. Such proceedings would add significant costs and delays to the litigation. *Id.* ¶ 26 [Dkt. 200-2 at 6].

Given the potential costs, risks, and delay of trial and appeal, the proposed $27 million cash settlement presents a favorable result for the class.

2. The Proposed Method for Distributing Relief Is Simple and Effective.

This Rule 23(e)(2) factor requires courts to look at "the method of processing class-member claims." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 40 (E.D.N.Y. 2019) (*citing* Fed. R. Civ. P. 23(e)(2)(C)(ii). "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Id.* at 40 (citing Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment). Here, there is no demand at all on Class Members and their successors—the Settlement Fund will be distributed without the need for anyone to submit a claim form.

The plan for distributing relief is straightforward. There appears to be no real dispute about who is a member of the Class or the calculation of each Class Member's recovery. Both are determined using objective facts about the value of Class Members' Policies based on data found in Conseco's own records. Plaintiffs have engaged Donlin Recano, a company that specializes in claims administration, to conduct the notice and distribution processes. *See* Voorhies Decl. [Dkt. 200-5]. Over 30 years, Donlin Recano has provided notice to millions of class members and has administered billions of dollars in claims. *Id.* ¶ 3 [Dkt. 200-5 at 2].

3. The Proposed Attorneys' Fee Award Is Reasonable and Fair.

"The Seventh Circuit Court of Appeals uses a percentage basis rather than a lodestar or other basis when determining a reasonable fee." *Will*, 2010 WL 4818174, at *2 (citing *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir.1998); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994)); *see also Cooper v. IBM Pers. Pension Plan*, No. 99-829-GPM, 2005 WL 1981501, at *3 (S.D. Ill. Aug. 16, 2005), *reversed and remanded on other grounds*, 457 F.3d 636 (7th Cir. 2006) ("The approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class."). Class Counsel is seeking $9 million in fees, or

one-third of the Settlement Fund. As detailed in Plaintiffs' Motion for Attorneys' Fees, Expenses, and Representative Plaintiffs' Incentive Awards, one-third of a common fund is a standard rate in complex class actions that reflects the risk that counsel takes on by accepting a case that may yield no fee at all. *See Ormond*, 2012 WL 5878031, at *5 (collecting cases in which courts have supported "a percentage market rate of 33.3%" when granting attorneys' fees). Class Counsel are seeking reimbursement of $553,012.94 in litigation and administration expenses, plus additional expenses and settlement administration expenses to be submitted with the motion for final approval of the settlement. Any expenses above $1.25 million will be borne by Class Counsel. Given the complexity of the case and the positive results for the class, such an award is reasonable and fair.

4. There Are No Other Agreements to Be Identified under Rule 23(e)(3) Aside from the Settlement Agreement.

Rule 23(e)(3) requires the parties seeking preliminary approval of a class action settlement to "file a statement identifying any agreement made in connection with the proposal." Plaintiffs have attached to the Voorhies Declaration the agreement between Class Counsel and Donlin Recano regarding administration of the settlement. Plaintiffs are not parties to, and are not aware of, any other agreement to be identified under Rule 23(e)(3).

D. The Proposed Settlement Agreement Apportions Settlement Funds Equitably Among Class Members.

Each Class Member or the Class Member's successor will receive a pro rata share of the Class Member's alleged damages based on the net present value damages model of Professor Mark Browne that Plaintiffs have maintained is the appropriate method for apportioning damages throughout this litigation, *see supra* at 11-12, with each recipient receiving a minimum of $500.

The Settlement Agreement's distribution plan ensures that the Settlement Administrator

will make reasonable efforts to locate Class Members and their successors and/or beneficiaries in order to distribute their portions of the Settlement Fund in an Initial Distribution. Furthermore, after the Settlement Administrator has done so, the Settlement Administrator will disburse remaining Net Settlement Funds to the Class Members and successors who deposited their initial distributions. Only the small amount remaining in the custody of the Settlement Administrator after that second distribution, if any, will be distributed by the Settlement Administrator to a *cy pres* recipient approved by this Court. *See supra* at 12.

II. The Proposed Class Will Likely Be Certified.

Before notice is directed to the Class, the moving party must "show[] that the court will *likely* be able to … certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii) (emphasis added). This standard recognizes the preliminary nature of this inquiry, which leaves class certification to a later stage in which settlement class members will have the opportunity to object. *See* Newberg § 13:18. The standard also acknowledges the distinction between certification "for purposes of judgment on the [settlement] proposal" and certification for trial. Fed. R. Civ. P. 23(e)(1)(B)(ii).

A. Cases Alleging Breaches of Form Contracts Are Ideal for Class Certification.

As Plaintiffs explained in their now-withdrawn motion for class certification, whether an insurer breached substantively identical provisions in a standard-form insurance policy is a classic common question. "With . . . a form contract, almost universally signed without negotiation or modification, there is no reason to think that the interpretation of the provision will vary from one signatory to another, and therefore the issue is one that is capable of a common answer and for which that common question predominates over questions affecting individual class members." *Red Barn Motors, Inc. v. NextGear Capital, Inc.*, 915 F.3d 1098, 1102 (7th Cir. 2019).

Courts have certified classes as a matter of course in a recent wave of lawsuits alleging class-wide breaches of life insurance policies.[9] The MDL Court was one such court and, as noted above, certified classes under Rule 23(b)(2) (current LifeTrend policyholders seeking injunctive relief) and Rule 23(b)(3) (former LifeTrend policyholders whose policies lapsed) in connection with the *Brady* settlement. *In re Conseco*, 2013 WL 10349975, at *1.

This contract dispute between Conseco Life and former LifeTrend policyholders who surrendered their Policies also should be resolved on a class-wide basis. Plaintiffs assert that Conseco breached the Policies in the same ways as to each putative class member. Conseco argues that its actions did not breach the Policies. Regardless of whose interpretation is correct, these questions apply to the Class as a whole. The meaning of the Policies is a common question with a common answer, and it predominates over any potential individual issues. Indeed, the MDL Court already has certified classes of Conseco policyholders alleging many of the same breaches of the same Policies. *In re Conseco*, 270 F.R.D. 521, 535 (N.D. Cal. 2010); *In re Conseco*, 2011 WL 6372412, at *10; *In re Conseco*, 2013 WL 10349975, at *1.

Furthermore, nationwide classes are appropriate in breach-of-contract actions because the elements of breach are uniform throughout the country. *See Feller*, 2017 WL 6496803, at *6.[10] As the MDL Court noted, "contrary to Conseco's representations, several courts have recognized

[9] *See, e.g., 37 Besen Parkway LLC v. John Hancock Life Insurance Co.*, No. 1:15-cv-09924 (S.D.N.Y. Mar. 29, 2019), Dkt. No. 161; *Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2018 WL 4937069, at *3 (W.D. Mo. Oct. 11, 2018); *Feller v. Transamerica Life Ins. Co.*, No. 16-cv1378, 2017 WL 6496803, at *15 (C.D. Cal. Dec. 11, 2017), *Larson v John Hancock Life Insurance Company*, No. RG16 813803, 2017 WL 4284163, at *10 (Cal. Super. Mar. 23, 2017); *Lincoln Nat'l Life Ins. Co. v. Bezich*, 33 N.E.3d 1160 (Ind. Ct. App. 2015), *transfer granted, opinion vacated*, 37 N.E.3d 493 (Ind. 2015); *Fleisher v. Phoenix Life Ins. Co.*, No. 11 CIV. 8405 (CM), 2013 WL 12224042, at *12 (S.D.N.Y. July 12, 2013); *Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 480 (C.D. Cal. 2012).

[10] *See also Larson*, 2017 WL 4284163, at *6; *Transamerica*, 2017 WL 6496803, at *12; *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004) ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey.").

that the law relating to the element of breach does not vary greatly from state to state." *In re Conseco*, 270 F.R.D. at 529. If a class was appropriate in those contested cases, then it is certainly appropriate here. Indeed, the Court need not consider the manageability of a class action when certification is sought pursuant to a settlement. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

B. The Class Satisfies All Four Elements of Rule 23(a).

A proposed class must satisfy the four "gate-keeping" requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. *See Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015). All are easily met here, as they were in *Brady*.

Numerosity: The size of the class easily satisfies Rule 23(a)'s numerosity requirement. There are roughly 3,666 Class Members.[11] Even "a forty-member class is often regarded as sufficient." *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017).

Commonality: As long as the class members' claims share "a single common question," the commonality standard is met. *Wal-Mart*, 564 U.S. at 359 (alterations omitted). A question is "common to the class" if it is one for which a class-wide proceeding may "generate common answers apt to drive the resolution of the litigation." *Id.* at 350. As discussed in further detail below, the central questions in this case—such as whether Conseco breached the Policies by changing the way it determined policyholders' eligibility for OPP status—can be answered using common evidence.

Common questions include:

- Did Conseco breach the Policies' optional premium payment provisions?
- Did Conseco breach the Policies' COI provisions?
- Did Conseco breach the Policies' reporting and disclosure provisions?

[11] There are 4,508 Class Policies. Some Class Members, like Mr. Burnett, owned more than one Policy.

- Did Conseco breach the Policies' guaranteed interest rate provisions?
- Did Conseco breach the Policies' non-participating provisions?

Common evidence includes:

- The terms of the Policies;
- The October 2008 form letters that Conseco sent to all LifeTrend policyholders;
- The form letters that Conseco sent a month later telling policyholders to disregard "all" prior notices;
- Evidence that almost no LifeTrend policyholders surrendered their Policies before October 2008;
- Evidence that approximately 34 percent of all LifeTrend policyholders surrendered their Policies after Conseco announced and implemented the changes first described in October 2008; and
- Evidence that Conseco intended to induce lapses and surrenders of Policies and hired an actuarial consultant to estimate the number and value of the lapsed and surrendered Policies.

Typicality: The two class representatives' claims are "typical of the claims . . . of the class" because, like all putative class members, they surrendered their substantially identical Policies after Conseco's class-wide breaches. Fed. R. Civ. P. 23(a)(3).

Adequacy: The two proposed class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Both have individual claims and have pursued this case vigorously from the start. Their interests are aligned with those of the Class—they seek to maximize the Class's recovery from Conseco for the alleged breaches. Both have actively participated in this litigation, including by testifying at depositions.

The adequacy of Class Counsel is shown by the terms of the proposed settlement agreement that the class representatives have achieved. Stephen Weisbrod of WMC and Kathleen DeLaney of the DeLaney Firm have vigorously represented the class. WMC has a national litigation practice and specializes in representing insurance policyholders, including in

the mass litigation context. Weisbrod Decl. ¶ 6 [Dkt. 200-2 at 1-2]. The firm has been named on the National Law Journal's Litigation Boutiques Hot List and has prevailed in cases against insurance companies (and others) in trial courts and arbitral forums, on appeal, and in the U.S. Supreme Court. *Id.* ¶ 7 [Dkt. 200-2 at 2]. While at another law firm, Mr. Weisbrod previously served as class counsel in the *Brady* action. *Id.* ¶ 9 [Dkt. 200-2 at 2]. He has extensive experience representing policyholders (including life insurance policyholders) and has tried more than 30 cases in seven states and the District of Columbia. *Id.* ¶¶ 6, 8 [Dkt. 200-2 at 1-2]. WMC has devoted thousands of hours of attorney time and spent hundreds of thousands of dollars in expert and other costs to investigate and prosecute this case since its inception in 2012, including obtaining appellate reversal of a judgment of dismissal. *Id.* ¶ 11 [Dkt. 200-2 at 2-3]. Ms. DeLaney has been appointed class counsel in a number of matters in this District, and has extensive experience litigating complex matters, including cases involving insurance and financial transactions. DeLaney Decl. ¶¶ 3-10 [Dkt. 200-3 at 1-3].

C. The Class Satisfies the Requirements of Rule 23(b)(3).

1. Common Questions Predominate.

Under Rule 23(b)(3), a plaintiff need only demonstrate that the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The predominance test is relaxed when certification is sought in the context of a settlement, because unlike in contested motions for class certification, the Court need not consider "the likely difficulties in managing a class action." *See* Fed. R. Civ. P. 23(b)(3)(D); *Amchem*, 521 U.S. at 615. Thus, while the predominance test is met in contested cases even when non-common "matters will have to be tried separately," *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016), it is not necessary to consider the efficiency of such a plan when the settlement agreement means that no further proceedings against Conseco Life will be necessary.

Common questions predominate if "adjudication of questions of liability common to the class achieve economies of time and expense." *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 444 (7th Cir. 2015). As discussed above, predominance is generally satisfied, even in contested matters, when the claims allege breaches of standard form contracts. *See supra* at 22-23.

All of the core issues in this case are tailor-made for class treatment. Those issues—the proper interpretation of the Policies, whether Conseco breached them, the degree to which the policyholders were harmed, and whether Conseco Life was the alter ego of the CNO Defendants—are either identical for all class members or (in the case of damages) can be determined by applying a simple formula to common evidence.

The MDL Court's certification of a Rule 23(b)(3) class of Lapsed Policyholders pursuant to the settlement in the *Brady* case is strong precedent in support of certification here. Conseco's alleged shock-lapse strategy encompassed surrenders as well as lapses, which are similar in many ways. Like the Class Members here, members of the *Brady* Lapsed Policyholder class were former policyholders, not current ones. And like the Class members here, members of the *Brady* Lapsed Policyholder class made decisions that resulted in the loss of life insurance. (In the *Brady* case, the decision was a decision not to pay any more premiums.) Plaintiffs seek almost precisely the same result here: the certification of a settlement class of LifeTrend policyholders who gave up their Policyholders in the wake of Conseco's alleged shock-lapse strategy.

2. A Class Action Is Far Superior to Other Methods for Adjudication.

In this case, a class action is vastly "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Rule 23(b)(3) superiority requirement is met where, as here, it is highly unlikely that it would be rational or

economically feasible for class members to pursue their claims individually. *See Amchem*, 521 U.S. at 617. Individual claim values here are dwarfed by the massive expense of litigating these claims, including the cost of lawyers, experts, depositions, and document discovery. Using the damages methodology Plaintiffs have asserted throughout this litigation, approximately 1,120 of the Class Policies at issue give rise to damages (excluding prejudgment interest) of less than $1,000, and more than 2,600 give rise to damages of less than $10,000. *See* Browne Decl. ¶¶ 22-23 [Dkt. 200-4 at 8]; *see also, e.g.*, *Red Barn Motors, Inc. v. NextGear Capital, Inc.*, No. 14-cv-01589, 2017 WL 5178250, at *22 (S.D. Ind. June 29, 2017) ("'tens of thousands of dollars'. . . likely would be dwarfed by the cost of litigation"). If the "damages of *at least some* individual class members are likely to be too small to justify litigation," a class action is superior. *See Meijer, Inc. v. Abbott Labs.*, No. C 07-5985 CW, 2008 WL 4065839, at *10 (N.D. Cal. Aug. 27, 2008) (emphasis added). The opt-out process will protect the interests of any policyholders who are eligible to participate as Class Members but wish to pursue individual litigation.

III. The Court Should Approve the Proposed Notice Plan Because It Provides the Best Notice Practicable and Is Easily Understood.

If the Court agrees that "giving notice is justified" per Rule 23(e)(1)(B), then Rule 23(c)(2)(B) requires the Court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Notice may be sent by "United States mail, electronic means, or other appropriate means" and "must clearly and concisely state in plain, easily understood language" the following:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The Settlement Agreement's proposed notice plan satisfies this standard.

The plan is calculated to reach as many class members as possible. Notice will be sent to all Class Members by first-class mail. The Settlement Administrator will use Conseco's internal records of policyholders' last known addresses, and will use other databases to confirm addresses. For deceased policyholders, a family member of the Class Member may identify an open estate to the Settlement Administrator; if the estate is closed, or there is no estate, the notice will be directed to the Policy's primary or contingent beneficiary.

Direct mailing using known addresses has typically been approved by courts as the best notice practicable under the circumstances. *See, e.g., United States v. New York*, No. 13-cv-4165, 2014 WL 1028982, at *5 (E.D.N.Y. Mar. 17, 2014). The notice is in plain English, discloses the nature of the claims in this case, explains the Settlement Agreement in detail (including attorneys' fees), and clearly explains the implications of a class judgment and how Class Members can request exclusion from the class. Furthermore, the Settlement Administrator will provide toll-free phone numbers at which Class Members can seek any additional information that they require. Furthermore, permitting opt-outs until 28 days before the Fairness Hearing is sufficient to protect the interests of any individuals who wish to be excluded from the Class.

IV. Proposed Schedule of Events

Plaintiffs propose the following schedule for Class notice, Opt-Outs, and final approval

of the proposed Settlement Agreement:

Event	**Deadline**
Send notice to Class Members	30 days after preliminary approval
File motion for final approval	60 days after preliminary approval
Deadline for Opt-Outs or objections	28 days before Fairness Hearing
Reply in support of motion for final approval	7 days before Fairness Hearing
Fairness Hearing	110 days after preliminary approval or as soon as practicable for the Court

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order (1) granting preliminary approval of the Settlement Agreement; (2) preliminarily designating Plaintiffs William Burnett and Joe H. Camp as class representatives; (3) preliminarily appointing the undersigned attorneys from WMC and the DeLaney Firm as Class Counsel; (4) preliminarily appointing Donlin Recano as Settlement Administrator; and (5) directing notice to all Class Members who would be bound by the Settlement Agreement.

Dated: April 10, 2020

Respectfully submitted,

/s/ *Stephen A. Weisbrod*

Stephen A. Weisbrod (*pro hac vice*)
Shelli L. Calland (*pro hac vice*)
Derek Sugimura (*pro hac vice*)
Tamra B. Ferguson (*pro hac vice*)
Saul Cohen (*pro hac vice*)
WEISBROD MATTEIS & COPLEY PLLC
1200 New Hampshire Avenue NW Suite 600
Washington, DC 20036
sweisbrod@wmclaw.com
scalland@wmclaw.com
dsugimura@wmclaw.com
tferguson@wmclaw.com
scohen@wmclaw.com

and

Kathleen A. DeLaney (#18604-49)
DELANEY & DELANEY LLC
3646 N. Washington Blvd.
Indianapolis, IN 46205
kathleen@delaneylaw.net

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, a copy of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system, and parties may access this filing through the court's system.

/s/ Kathleen A. DeLaney

Kathleen A. DeLaney
DeLaney & DeLaney LLC
3646 N. Washington Blvd.
Indianapolis, IN 46205
Tel: (317) 920-0400
Fax: (317) 920-0404