UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

37 BESEN PARKWAY, LLC, on behalf of itself and all others similarly situated, Plaintiff, vs. JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), Defendant.	Civil Action No. 15-cv-9924

PLAINTIFF'S BRIEF IN RESPONSE TO COURT'S FEBRUARY 13, 2019 ORDER

This brief addresses the two questions raised in the Court's February 13, 2019 order (Dkt. 156) regarding the proposed plan of allocation.

ANSWERS TO THE COURT'S QUESTIONS

Question No. 1: "[W]hy [policyholders allegedly subject to a prior release in *Duhaime v. John Hancock Mutual Life Insurance Company*, 177 F.R.D. 45 (D. Mass 1997)] should recover any portion of the Settlement Funds."

There are four reasons why the policyholders who are arguably subject to the release in the *Duhaime* case should recover a portion of the Settlement Fund. There are a total of 2,960 Class members (3.7% of the total Class) who are potentially subject to the release. *See* Declaration of Steven G. Sklaver in Support of Plaintiffs Brief in Response to Court's February 13, 2019 Order ("Sklaver Decl.") ¶ 2. Whether that release would bar the claims asserted here is an issue that has not been litigated in this case and, if it were, the validity of the defense would be disputed. Because of the existence of the unresolved affirmative defense of release, the claims of those policyholders are discounted as compared with the claims of Class members not potentially subject to the release.

First, those policyholders who are potentially subject to the *Duhaime* release are part of this Settlement Class and will thus be bound by the same release against John Hancock that the Settlement here provides for every other Class member. The strong presumption in the Second Circuit (and elsewhere) is that all settlement class members, in exchange for the releases they give, should receive something of value from a settlement. *See TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (a class settlement should not rest on "the uncompensated sacrifice of claims of members"). This alone is reason enough to allocate a "portion of the Settlement Funds" to these Class members.

John Hancock demanded a release from these and all other Class members as part of this Settlement. It demanded a release from these policyholders to eliminate the risk that their claims may not be barred by John Hancock's unresolved affirmative defense of release under the *Duhaime* settlement. *See* Dkt. 12 (Answer) at 13 (affirmative defense of release). To give those Class members nothing in exchange for relinquishing the right to challenge that affirmative defense would be inequitable and at odds with the law of this Circuit. John Hancock's unresolved affirmative defense of release—a defense which suffers from the serious weaknesses described below—is the only thing that differentiates these Class members from the others: they were always included in the Class sought to be certified in this case and they are otherwise on equal footing with all other Settlement Class members.

Second, it is reasonable to make a distribution to those policyholders because the merits of the affirmative defense of release were not litigated in this action, and there are very serious questions about whether John Hancock would prevail if that affirmative defense had been litigated. While the ultimate merits of the defense need not be resolved to assess the reasonableness of the plan of allocation, it is sufficient to note that there are competing arguments, creating risks on both sides.

On the one hand, had the defense of release been litigated, Class Counsel would have argued that the release in *Duhaime* does not, and could not, release the claims alleged in this action, which arise out of different conduct occurring *after* the effective date of the *Duhaime* release. The claims here concern John Hancock's alleged breach of a provision in Class members' policies which "obligates John Hancock to review its COI rates at least once every five policy years, and provide[] that the only factor that the carrier can and must consider when reviewing COI rates are 'expectations of future mortality experience.'" Compl., Dkt. 6, ¶ 21.

Those improved "expectations of future mortality experience" did not even exist until years after the *Duhaime* settlement was finalized. Dkt. 122 at 10-11.

Under Second Circuit precedent, a prior class-action settlement cannot bar claims that require "proof of further facts" not litigated in the first case, or that do not involve the "identical factual predicate". *See Nat'l Super Spuds. Inc. v New York Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir. 1981) (Friendly, J.); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 106 (2d Cir. 2005) ("Plaintiffs' authority to release claims is limited by the "identical factual predicate" . . . doctrine[]"). The allegations in this case regarding Applied Month Rates and recently improved mortality expectations were not (and could not have been) litigated in *Duhaime*, which was a "vanishing premium" case that focused on allegedly misleading illustrations provided to prospective policyholders at the point-of-sale.[1] Plaintiffs in other recent cost of insurance ("COI") class actions have successfully defeated this exact same affirmative defense of release from prior vanishing premium class settlements. *See Feller v. Transamerica Life Ins. Co*., 2016 WL 6602561, at *6 (C.D. Cal. Nov. 8, 2016) (rejecting argument on a motion to dismiss that a prior vanishing premium settlement barred a challenge to the insurers current COI rates because

[1] "Vanishing premium" litigation was filed in waves against over 100 insurers in the late 1990s and early 2000s, alleging that the projections policyholders were shown before they purchased their policies made unrealistic interest rate assumptions and thus misrepresented how those policies would actually perform. *See Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 1 (1st Cir. 1999) (describing the case as "challeng[ing] a number of John Hancock's sales and marketing practices from 1979 through the mid–1990s"); *see also Olick v. John Hancock Mut. Life Ins. Co*., 106 F. App'x 736, 737 (1st Cir. 2004) ("The underlying suit, brought on behalf of nearly four million policyholders, charged defendants with a number of deceptive sales and marketing practices.").

two cases did not share the "identical factual predicate" (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d at 107).[2]

On the other hand, in the *Larson* action, which was a follow-on case filed after this action, John Hancock successfully obtained a ruling that the *Duhaime* release barred certain of the *Larson* plaintiff's claims. *See Duhaime v. John Hancock Life Ins. Co.*, 96-cv-10706, Dkt. 366 (D. Mass. June 15, 2017). That order was under appeal to the First Circuit at the time the *Larson* case settled—a settlement that included policies allegedly subject to the *Duhaime* release, and made a 50% distribution to them. *See Larson v. John Hancock Life Ins. Co*., 17-1703 (1st Cir.) (appeal); *Larson v. John Hancock Life Ins. Co. (U.S.A.)*, Case No. RG16813803 (Alameda County Sup. Ct. May 8, 2018) (final approval order). Tellingly, unlike in *Larson*, John Hancock never sought a ruling in this case that the *Duhaime* release barred any of the Class's claims, possibly because it recognized that it could not satisfy the "identical factual predicate" test demanded by the Second Circuit. In fact, John Hancock has not litigated that release at all in this case, other than listing it as an affirmative defense in its answer and producing a copy of the *Duhaime* settlement agreement in discovery.

In short, there are risks to both the Class and to John Hancock, and distributing a "portion of the Settlement Funds" to the policyholders in question reflects those risks—risks which were carefully weighed by the parties when entering into the Settlement.

---

[2] *See also In re Conseco Life Ins. Co. Cost of Ins. Litig*., 2005 WL 5678842 (C.D. Cal. Apr. 26, 2005) ("Plaintiffs' breach of contract claims here are not based on the identical factual predicate as the [vanishing premium] *Dupell* claims and involve actions by Defendants that first occurred years after the *Dupell* settlement and that therefore could not have been asserted in the *Dupell* litigation. In short, the *Dupell* Release, as broad as it is, cannot bar Plaintiffs' (or other policyholders') breach of contract claim for elimination of the R-Factor [in the formula used to calculate COI charges], and is not a bar to class certification.")

Third, courts and commentators have endorsed plans of allocation like the one proposed here, in which absent class members subject to potential defenses unique to them share in settlement funds, albeit discounted to account for those risks. For example, in *In re Facebook, Inc., IPO Sec. & Derivative Litig*., 343 F. Supp. 3d 394, 415 (S.D.N.Y. 2018), the court approved a plan of allocation which "substantially discounted" the recovery of institutional investors "based on the reasonably held position that a 'truth on the market' defense is more likely to limit recovery when asserted against sophisticated institutional investors." Similarly, the plan of allocation in *In re Veeco Instruments Inc. Sec. Litig*., 2007 WL 4115809 (S.D.N.Y. Nov. 7, 2007), recognized that certain claims were stronger than others depending on when the securities in question were bought or sold. The court approved the plan of allocation, explaining that "[a]llocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim. *Id.* at *13 (quoting *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429 (S.D.N.Y. 2001)); *see also In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2005) ("Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims."); 2 McLaughlin on Class Actions § 6:23 (15th ed.) ("Allocation formulas, including certain discounts for certain types of claims within a class, may properly take into consideration the comparative strengths and values of different categories of the settled and released claims.").

Here, the plan of distribution reasonably takes into account the relative risk created by the unresolved issue of the potential scope and application of the *Duhaime* release and the law of res judicata. A distribution plan "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel," and it does not need to be "tailored

to the rights of each plaintiff with mathematical precision." *In re Credit Default Swaps Antitrust Litig*, 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016); *see also Hart v. RCI Hosp. Holdings, Inc.,* 2015 WL 5577713, at *12 (S.D.N.Y. Sept. 22, 2015) (plan of allocation "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 193 (S.D.N.Y. 2012) ("[T]he rationale" for a plan of distribution "need only be reasonable and rational."). That standard is easily met here for all the reasons set forth in motion for final approval. *See* Dkt. 143 at 21-22.

The plan of allocation specifically provides for a discount due to the existence of the affirmative defense of release and thus fairly "take[s] into consideration the comparative strengths and value[]" of the defense. *Veeco*, 2007 WL 4115809 at *13; *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) ("[T]he 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.").

Fourth, no Class member has objected to the plan of allocation. The notice was sent directly to every member of the Class via First Class mail to their last known address, and it specifically disclosed that policyholders subject to the unresolved defense of release would be part of this Settlement Class and would share in the Settlement Funds. Dkt. 133-2 Ex. B § 7. Courts place great weight on the lack of objections when approving a plan of allocation. *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, 2012 WL 3589610, at *8 (D. Conn. Aug. 20, 2012) ("Finally, the favorable reaction of the Class supports approval of the Plan as no member has objected to the Plan of Allocation although notices to 19,500 potential Class Members have been

distributed."); *Chavarria v. New York Airport Serv., LLC*, 875 F. Supp. 2d 164, 175 (E.D.N.Y. 2012) ("Courts also consider the reaction of the class to a plan of allocation.").[3]

Question No. 2. "[W]hether, if such pre-December 31, 1996 policy owners receive a portion of the Settlement Funds, the remaining class members' settlement amount will be reduced."

The answer to this question is "Yes." However, the proposed payments to the *Duhaime* class members will have minimal effect on payments made to other class members because the former are only a small part of the Class. Because Class Counsel negotiated a Settlement under which *no* portion of the Settlement Fund reverts back to John Hancock, and because after one year all uncashed checks are again re-distributed to Class members who previously cashed their checks, the distribution of a portion of the Settlement Fund to *any* Class member necessarily reduces the remaining funds to be distributed ultimately to other Class members. There are over 79,000 policies in this Settlement Class, and only 2,960 of those policyholders (3.7%) were also class members in *Duhaime*. Sklaver Decl. ¶ 2. The proposed total net distribution to these class members is only 2.3% of the total Settlement Fund. As a result, the impact of providing payment to the policyholders in question is minimal. For example, if all policyholders allegedly subject to the affirmative defense of release were to receive *nothing*, then a non-*Duhaime* Class member who is now slated to receive a $1000 distribution would only receive an additional $24. Sklaver Decl. ¶¶ 3-4.

[3] It should be noted that the plan of allocation has no effect on the fairness and reasonableness of the Settlement itself: the total all-cash fund of $91.25 million (before interest) is an outstanding result for the entire class under any measure, even if the plan of allocation were altered.

CONCLUSION

Plaintiff and Class Counsel respectfully request that the Court grant final approval to the Settlement and proposed plan of allocation.

Dated: February 25, 2019

/s/ Steven G. Sklaver
Seth Ard
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Tel.: 212-336-8330
Fax: 212-336-8340
sard@susmangodfrey.com

Steven G. Sklaver (*pro hac vice*)
Glenn C. Bridgman (*pro hac vice*)
Rohit Nath (*pro hac vice*)
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150
ssklaver@susmangodfrey.com
gbridgman@susmangodfrey.com
rnath@susmangodfrey.com

Class Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

37 BESEN PARKWAY, LLC, on behalf of itself and all others similarly situated, Plaintiff, vs. JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), Defendant.	Civil Action No. 15-cv-9924 **DECLARATION OF SERVICE**

I, Glenn C. Bridgman, declare:

1. I am over eighteen years of age, I am not a party to this action, and I am an employee with the law firm of Susman Godfrey L.L.P., in the Los Angeles, California office.

2. My business address is 1900 Avenue of the Stars, Suite 1400, Los Angeles, California 90067.

3. On February 25, 2019, I served a copy of PLAINTIFF'S BRIEF IN RESPONSE TO COURT'S FEBRUARY 13, 2019 ORDER via the court's CM/ECF system upon the following:

Alan Borden Vickery
avickery@bsfllp.com
John Francis La Salle, III
jlasalle@bsfllp.com
Yotam Barkai
ybarkai@bsfllp.com
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022
T: 212 446 2300
F: 212 446 2350

Joseph Fields Kroetsch
jkroetsch@bsfllp.com
Motty Shulman
mshulman@bsfllp.com
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
T: 914 749 8200
F: 914 749 8300

Attorneys for Defendant,
John Hancock Life Insurance Company (U.S.A.)

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 25, 2019, at Los Angeles, California.

/s/ Glenn C. Bridgman
Glenn C. Bridgman