UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN HANKS, on behalf of herself and all others similarly situated, Plaintiff, vs. VOYA RETIREMENT INSURANCE AND ANNUITY COMPANY, formerly known as Aetna Life Insurance and Annuity Company, Defendant.	Civil Action No. 16-cv-6399 **DECLARATION OF SETH ARD IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

I, Seth Ard, hereby declare as follows:

1. I submit this Declaration in support of preliminary approval of the proposed class action settlement between Plaintiff Helen Hanks ("Plaintiff"), individually and on behalf of the Class, Defendant Voya Retirement Insurance and Annuity Company ("Voya"), and its administrator and reinsurer the Lincoln Life & Annuity Company of New York ("Lincoln").

2. I am a member in good standing of the bar of this Court, an active member of the State Bar of New York, a partner in the law firm of Susman Godfrey, and counsel of record for Plaintiff Helen Hanks and Class Counsel in the above-captioned action. I have personal knowledge of the facts set forth herein and, if called to testify as a witness, could and would testify competently thereto. Susman Godfrey has significant experience with insurance litigation and class actions, including cost of insurance class actions and settlements thereof. A copy of the firm's class action profile and my profile is attached hereto as **Exhibit 1**.

3. I was among the principal negotiators of the proposed class action settlement. Following extensive negotiations, the parties entered into a memorandum of understanding on

October 21, 2021, and the final Settlement Agreement was executed on January 5, 2022. Attached hereto as **Exhibit 2** is a true and correct copy of the Settlement Agreement. It is the opinion of Class Counsel that this settlement is fair, adequate, and reasonable.

THE LITIGATION

4. Plaintiff Helen Hanks filed this case on August 11, 2016. Dkt. 1. The complaint included a claim for breach of contract against Voya and a claim for unjust enrichment against Lincoln in relation to a June 2016 increase in cost-of-insurance ("COI") rates for over 46,000 universal life insurance policies ("Class Policies"), comprising 18 product lines, issued by Aetna Life Insurance and Annuity Company ("Aetna"), now Voya, between 1983 and 2000. *Id.* Attached as **Exhibit 3** hereto is a true and correct copy of Plaintiff Helen Hank's life insurance policy (Dkt. 5-1).

5. Fact discovery lasted until December 29, 2017, with supplemental discovery obligations under Federal Rule of Civil Procedure 26(e) continuing thereafter. Dkt. 52. During this time, Voya and Lincoln produced—and Plaintiff reviewed—nearly 350,000 pages of documents and spreadsheets. Plaintiff took 4 corporate representative depositions and 14 depositions of individual witnesses from Voya and Lincoln, and Voya and Lincoln deposed Plaintiff Helen Hanks.

6. Plaintiff has also made Freedom of Information requests to state insurance departments throughout the United States relating to Voya's 2016 COI Increase. Plaintiff's efforts uncovered important emails between the New York Department of Financial Services ("NYDFS") and Voya that had not previously been produced during discovery.

7. Expert discovery lasted until August 1, 2018, with additional expert discovery continuing thereafter. Dkt. 84. On March 1, 2018, Plaintiff produced reports from four experts:

actuarial expert Christopher Hause, reinsurance expert Neil Pearson, regulatory custom and practice expert Bruce Foudree, and damages expert Robert Mills. On May 1, 2018, Voya and Lincoln produced reports from three experts: actuarial expert Timothy Pfeifer, regulatory custom and practice expert Neil Rector, and damages expert Dr. David Babbel. On June 1, 2018, Plaintiff produced rebuttal expert reports from all four experts. All seven experts were subsequently deposed. In January 2021, Voya informed Plaintiff that Professor Craig Merrill was being substituted for Dr. Babbel as the damages expert. Plaintiff deposed Professor Merrill on February 12, 2021.

8. The parties next briefed class certification. Plaintiff's opening motion was filed on August 15, 2018; Voya's and Lincoln's opposition was filed on September 20, 2018; and Plaintiff's reply was filed on October 4, 2018. Dkts. 85–91, 94–97. Collectively, Plaintiff filed 35 pages of briefing supported by 50 exhibits.

9. On March 13, 2019, the Court granted-in-part Plaintiff's motion, certifying a breach-of-contract class for the claim against Voya. Dkt. 110. In so doing, the Court found that Hanks was an adequate class representative. *Id.* at 8–9 ("Hanks states that she understands her duties as a class representative and has dedicated a significant amount of time to working with her attorneys on this litigation. She owns one of the insurance policies that was subject to the 2016 COI rate increase and understands the facts underlying the dispute. She states that she does not have any conflicts of interest with putative class members." (citations omitted)). The Court also appoint Susman Godfrey as Class Counsel pursuant to Rule 23(g):

> Hanks requests the appointment of Susman Godfrey L.L.P. as class counsel. Susman Godfrey was appointed as interim class counsel on February 9, 2017. The firm has provided competent representation for Hanks since this action's commencement. It has successfully conducted discovery and its submissions reflect knowledge of the law governing Hanks' claims and familiarity with class

> action procedures. Its performance in the present case demonstrates competence to protect the interests of the class.
>
> Hanks' counsel has significant experience litigating class actions. Plaintiff's counsel has demonstrated that it has adequate resources to litigate this action and is experienced in litigating class actions generally. The Court appoints Susman Godfrey as class counsel.

Id. at 20–21 (citations omitted). The Court denied the motion for class certification for the unjust enrichment claim against Lincoln. *Id.* at 16–20. The parties stipulated to a voluntary dismissal of Lincoln without prejudice. Dkts. 131–32.

10. The Court approved Plaintiff's proposed notice plan on April 23, 2019, finding the form and manner of notice proposed by Plaintiff met "the requirements of Rule 23 and due process, constitute[d] the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto." Dkt. 122. The Court also approved the retention of JND Legal Administration LLC ("JND") as the Notice Administrator. *Id.*

11. Pursuant to the Court's order (Dkt. 122), Voya provided Class Counsel with a list of Class Members and their last known addresses on May 23, 2019 (30 days from the Court's order approving notice), JND mailed the short-form notices on June 13, 2019 (21 days after receiving the list of addresses), and JND established a Notice website and case-specific toll-free number on June 13, 2019. *See* Dkt. 130. Also pursuant to the Court's order, the notice period ended on July 29, 2019 (45 days after mailing). The following policies validly and timely opted out of the class: F1526536, G1060228, G1066983, G1126564, G1194083, G1242387, G1366304, G1426106, U1003277, U1065745, U1151278, U1259092.

12. The parties next briefed summary judgment. Voya's motion for summary judgment was filed on September 12, 2019; Plaintiff's cross-motion for partial summary judgment and opposition was filed on November 6, 2019; Voya's opposition and reply was

filed on December 18, 2019; and Plaintiff's reply was filed on January 17, 2020. Dkts. 133–45, 148–152. Collectively, Plaintiff filed 100 pages of briefing supported by 83 exhibits.

13. On September 30, 2020, the Court denied Plaintiff's cross-motion for partial summary judgment and granted-in-part and denied-in-part Voya's motion for summary judgment. Dkt. 174. The Court granted summary judgment on some of Plaintiff's theories of breach, but held:

> Here, an issue of material fact remains as to whether the 2016 COI Adjustment was based on analysis of cost factors related to the in-force polices as mandated by the terms of the Policy or was based on Lincoln Life's profitability goals. Hanks puts forth evidence and expert opinions supporting its position that the 2016 COI Adjustment was based not on an evaluation of future cost factors, but was implemented on the basis of improper considerations with the aim of "increas[ing] anticipated future profitability." Voya disputes this evidence and has come forward with evidence and expert opinions tending to show that contractually proper future cost factors were the basis of the 2016 COI Adjustment. But at bottom these are disputed issues of material fact and the Court will deny Voya's motion for summary judgment.

Id. at 24–25 (citations omitted).

14. The parties next briefed pretrial motions *in limine*. The parties filed non-damages motions *in limine* on January 28, 2021; non-damages oppositions on February 25, 2021; damages motions *in limine* on March 5, 2021; non-damages replies on March 11, 2021; damages oppositions on April 5, 2021; and damages replies on April 19, 2021. Dkts. 189–212, 230–35, 241–43. The parties also filed supplemental briefing related to one of Voya's motions *in limine* on June 11, 2021. Dkts. 254–57. Collectively, Plaintiff filed nine motions *in limine* and opposed four motions *in limine*, supported by 112 pages of briefing and 49 exhibits. Plaintiff also filed a proposed verdict form, proposed voir dire questions, and proposed jury instructions on March 16, 2021. Dkts. 213–15, 217.

15. On April 27, 2021, the parties filed their Proposed Final Pretrial Order. Dkt. 244. It included witness lists, deposition designations, and exhibit lists. *Id.* The Final Pretrial

Conference was held on May 12, 2021. Dkts. 250–51. On August 31, 2021, the Court informed the parties that the matter was set as the backup trial for the week of December 6, 2021. Dkt. 263.

MEDIATION AND SETTLEMENT

16. As stated above, I was one of the principal negotiators of the proposed class action settlement. Following extensive, arms-length, adversarial negotiations over multiple months between experienced and knowledgeable counsel on all sides, the parties entered into the Settlement Agreement (Exhibit 2) on January 5, 2022. It is the opinion of Class Counsel that this settlement is fair, adequate, and reasonable. The parties have mediated and exchanged numerous offers and counter-offers throughout the life of the case. The parties first mediated at the encouragement of the Court near the outset of the case on June 7, 2017 in New York with David Geronemus, Esq. This mediation did not result in any settlement. The parties again discussed settlement in 2019 after discovery was completed and certification was granted, and mediated with Nancy Lesser, Esq., which included in-person mediations in New York on November 13, 2019 and March 6, 2020. These mediation efforts also did not result in any settlement. The parties continued discussing settlement throughout 2020, and exchanged offers and counteroffers, but remained too far apart to enter into a settlement agreement. Before the Final Pretrial Conference, the parties met and conferred and agreed to mediate again before trial.

17. The final mediation occurred in person on August 11, 2021 with mediator Robert Meyer, Esq. at the JAMS Century City office in Los Angeles, California. Voya supplemented the damages data production, which allowed Plaintiff to determine overcharges through May 31, 2021 in advance of the mediation. *See* January 19, 2022 Declaration of Robert Mills ¶ 4. I

attended this mediation in person along with other members of my team, and Voya's and Lincoln's counsel appeared in person as well. The mediation lasted until late in the day. The parties were unable to reach an agreement but agreed to continue discussing settlement. The parties repeatedly met and conferred in September and October through and with the assistance of the mediator and exchanged offers and counteroffers. This ultimately resulted in the parties executing a Settlement Term Sheet on October 21, 2021 and the final Settlement Agreement (Exhibit 2) on January 5, 2022. By the time the settlement was reached, Class Counsel were well informed of material facts, and the negotiations were hard-fought and non-collusive.

18. The specific terms and conditions of the settlement are set forth in the Settlement Agreement. The Settlement Agreement includes significant cash and non-cash relief. Pursuant to the Settlement Agreement, the Class will receive the benefit of a Settlement Fund of up to $92.5 million. Settlement Agreement § 42. Voya and Lincoln will also agree that "[f]or a period of five (5) years following the Final Approval Date," "COI rates on the Class Policies will not be increased above the current rate schedules implemented on June 1, 2016, unless Voya is ordered to do so by a state regulatory body" and they will "not take any legal action (including asserting as an affirmative defense or counter-claim), or cause to take any legal action, that seeks to void, rescind, cancel, have declared void, or seeks to deny coverage under or deny a death claim for any Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in applying for the policy." *Id.* §§ 49–50. In *Fleisher v. Phoenix Life Insurance Co.*, at final approval, Judge McMahon valued similar non-monetary benefits at $94.3 million ($61 million for a 5-year COI rate freeze and $33.3 million for the policy validity guarantee). 2015 WL 10847814, at *10 (S.D.N.Y. Sept. 9, 2015). The

Settlement Agreement provides that Class counsel may move for an award of attorneys' fees in an amount not to exceed 33% of the gross benefits provided to the Settlement Class—*i.e.*, monetary and non-monetary relief—plus reimbursement for all expenses incurred or to be incurred and any incentive awards. Class counsel, however, will file a motion for attorneys' fees in an amount not to exceed 33% of the gross monetary benefits only, viewed in isolation from the non-monetary benefits, plus reimbursement for all expenses incurred or to be incurred and any incentive awards. If approved, this amount will be deducted from the $92.5 million in the Settlement Fund after any reduction for Class members who opt out. If there are opt-outs and the $92.5 million payment is reduced (say, for example, to $81 million), Class counsel will still only seek attorneys' fees in an amount not to exceed 33% of the recalculated gross monetary benefits (in this example, 33% of $81 million which is $26.73 million). In addition, Class Counsel will seek reimbursement for expenses incurred or to be incurred, as well as an incentive award up to $25,000 for Helen Hanks for her service as the representative on behalf of the Settlement Class, to be paid from the Final Settlement Fund.

19. In exchange, the Settlement Class and certain related parties will release Voya, Lincoln, and certain related entities from "all Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Action arising out of the facts alleged in the Action." *Id.* § 28.

20. The Settlement Class, however, will not release "new claims that could not have been asserted in the Action because they are based upon a future rate schedule increase in Voya's COI charges that occurs after October 20, 2021" or claims arising from Voya or

Lincoln's failure to pay any death benefits owed under the terms of the policies. *Id.* §§ 13, 62, 67.

21. The Settlement Agreement also gives Class Members a second chance to opt-out pursuant to Federal Rule of Civil Procedure 23(e)(4). The $92.5 million Settlement Fund will be reduced, on a *pro-rata* basis measured by the incremental COI charges collected by Voya and Lincoln from June 1, 2016 through May 31, 2021, for each policy that timely and validly opts out during the Rule 23(e)(4) opt-out period. *See* Settlement Agreement §§ 44–45. No portion of the Final Settlement Fund (*i.e.* the post-reduction amount) will revert back to Voya or Lincoln. *See id.* § 16.

22. Class Counsel has actively litigated this case for years—through fact and expert discovery, class certification, summary judgment, and pre-trial motions—and is well versed in all of the factual and legal issues posed by this litigation. Before mediation, Class Counsel took steps to ensure that we had all the necessary information to advocate for a fair, adequate, and reasonable settlement that serves the best interests of the Settlement Class. During mediation and in the settlement discussions that followed, Plaintiff aggressively advocated for the class, while taking into account the strengths and weaknesses of the claims asserted, the risks of continued litigation and trial, and the likelihood of recovery.

23. It is the opinion of Class Counsel that the $92.5 million Settlement Fund represents an excellent monetary recovery for the class. The non-monetary relief adds additional substantial value for the Class. This Settlement represents an especially great result because no part of the Final Settlement Fund (the amount after the *pro-rata* reductions for any opt-outs during the Federal Rule of Civil Procedure 23(e)(4) opt-out period) will be returned to Voya or Lincoln.

PROPOSED NOTICE PLAN

24. Pursuant to the Settlement Agreement, Voya and Lincoln pre-approved JND as the Settlement Administrator and will not oppose Plaintiff's proposed form and manner of notice. *See* Settlement Agreement §§ 33, 51.

25. Plaintiff proposes substantially the same notice plan that was previously approved by the Court after class certification, including the appointment of JND as Settlement Administrator. *See* Dkt. 122. The technical details of the notice plan is described in the January 19, 2022 Declaration of Jennifer Keough, but the overall framework is described in the following paragraphs.

26. Voya and Lincoln will provide JND with address information for all potential members of the Settlement Class within 7 days of the Court's order preliminarily approving the settlement.

27. Within 30 days of the Court's order preliminarily approving the Settlement, JND will mail the short-form notice attached as Exhibit B to the Keough Declaration to Class Members.

28. Also within 30 days of the Court's order preliminarily approving the Settlement, JND will update the website used during class certification notice—https://www.voyacoilitigation.com—with the information contained in the Long-Form Notice attached as Exhibit C to the Keough Declaration. JND will also establish a toll-free automated telephone number.

29. The opt-out period is proposed to close 45 days after the mailing of the short-form notice.

OTHER ISSUES

30. The proposed Plan of Allocation is attached as **Exhibit 4**.

31. Attached as **Exhibit 5** is a true and correct copy of the transcript from the May 12, 2021 final pretrial conference.

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

Executed this 19th day of January, 2022 in New York, NY.

/s/ Seth Ard

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on the following counsel, this January 19, 2022.

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EXHIBIT 1

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THE SUSMAN GODFREY DIFFERENCE

For forty years, Susman Godfrey has focused its nationally recognized practice on just one thing: big - stakes commercial litigation. We are one of the nation's leading litigation boutique law firms with locations in Houston, Los Angeles, Seattle, and New York. Each of the firm's 102 trial attorneys specializes in complex commercial litigation.

How successfully does Susman Godfrey represent its clients?

When *The American Lawyer* held the first-ever "Litigation Boutique of the Year" competition, the firm was named one of the two top litigation boutiques in the nation.

"These firms manage to combine cutting-edge technologies, palpable tastes for risk, and an old-fashioned sense of partnership," said *The American Lawyer*. "The rewards are obvious: Their clients are stellar, and so are their profits."

In other words, Susman Godfrey represents its clients *very* well.

A record of winning

One of Susman Godfrey's early cases, the *Corrugated Container* antitrust trial, led to one of the highest antitrust jury verdicts ever obtained. Since that extraordinary start, the firm has remained devoted to helping businesses and individuals achieve similarly extraordinary results. Recent high-profile victories (click on the links below to see the particular facts and circumstances of these representations):

- Representation of the plaintiffs in a number of successful private antitrust actions against Microsoft Corporation, including litigation or private negotiations on behalf of Gateway, Novell, Caldera, Be, Inc., Paltalk Holdings, and others.

- Representation of MicroUnity Systems in a variety of patent infringement litigation, which has led to confidential settlements with a variety of defendants, including Intel and Sony.

- Defeated claims for $550 million in damages brought by Alcoa against our client, Luminant and convinced the jury to award Luminant $10 million in counterclaim damages.

- Secured a $225 million jury award for Dillard's, Inc. against I2 Technologies for fraud and breach of warranty.

- Obtained a jury award of more than $178 million in a breach of fiduciary duty case brought on behalf of minority shareholders of an NL Industries, Inc. subsidiary.

- Representation of Sky Technologies in patent infringement cases against i2 Technologies, IBM, Ariba, Oracle, and SAP that each have led to confidential settlements.

- Representation of the bankruptcy estate of Enron Corp. against ten banks and investment banks for aiding and abetting breach of fiduciary duty and fraud. Settlements to date have brought more than one billion dollars in value to the Enron estate.

- Successfully concluded the pro bono representation of Texas Clean Air Cities Coalition which included Dallas, Houston, Fort Worth, Waco, El Paso, Plano, Arlington, Irving, and 28 other local governments across Texas. The cities were concerned about the environmental threats resulting from the large amounts of nitrogen oxides, sulfur dioxide, particulate matter, mercury, and carbon dioxide to be emitted from the proposed plants. The coalition of Texas cities challenged permit applications by TXU Corporation to build eight coal-fired power units across Texas. Following the announcement of the proposed buyout of TXU by two private equity firms and citing a new environmental direction for the company, TXU announced that it would withdraw applications for all eight of the coal units that the coalition opposed.

These are only a few of our recent cases. Our practice area inserts provide a more complete description of Susman Godfrey's successes in a number of areas of commercial litigation, including intellectual property, antitrust, accounting malpractice, energy and natural resources, securities litigation, and climate change litigation.

The will to win

At Susman Godfrey, we want to win because we are stand-up trial attorneys, not discovery litigators. We approach each case as if it is headed for trial. Everything that we do is designed to prepare our attorneys to persuade a jury. When you are represented by Susman Godfrey, the opposing party will know that you are willing to take the case all the way to a verdict if necessary; this fact alone can make a good settlement possible.

The American Lawyer award confirmed Susman Godfrey's longstanding reputation as one of the premier firms of trial lawyers in the United States. We are often brought in on the eve of trial to "rescue" troubled cases or to take the reins when the case requires trial lawyers with a proven record of courtroom success.

We also want to win because we share the risk with our clients. We prefer to work on a contingency-fee basis so that our time and efforts pay off only when we win. Our interests are aligned with our clients—we want to achieve the best-possible outcome at the lowest possible cost.

Finally, we want to win because each of our attorneys shares a commitment to your success. Each attorney at the firm – associate as well as partner – examines every proposed contingent fee case and has an equal vote on whether or not to accept it. The resulting profit or loss affects the compensation of every attorney at the firm. This model has been a tremendous success for both our attorneys and our clients. In recent years, we have achieved the highest profit-per-partner results in the nation. Our associates have enjoyed performance bonuses equal to their annual salaries. When you win, our attorneys win.

Unique perspective

Susman Godfrey represents an equal number of plaintiffs and defendants. Ours is not a cookie-cutter practice turning out the same case from the same side of the bar time after time. We thrive on variety, flexibility, and creativity. Clients appreciate the insights that our broad experience brings. "I think that's how they keep their tools sharp," says one.

Many companies who have had to defend cases brought by Susman Godfrey on behalf of plaintiffs are so impressed with our work in the courtroom that they hire us themselves next time around – companies like El Paso Corporation, Georgia-Pacific Corporation, Mead Paper, and Nokia Corporation.

We know from experience what motivates both plaintiffs and defendants. This dual perspective informs not just our trial tactics, but also our approach to settlement negotiations and mediation presentations. We are successful in court because we understand our opponent's case as well as our own.

A lean and mean structure

At Susman Godfrey, our clients hire us to achieve the best possible result in the courtroom at the least possible cost. Because we learned to run our practice on a contingency-fee model where preparation of a case is at our expense, we have developed a very efficient approach to commercial litigation. We proved that big cases do not require big hours. And, because we staff and run all cases using the same model, clients who prefer to hire us by the hour also benefit from our approach.

There is no costly pyramid structure at Susman Godfrey. As a business, we are lean, mean and un-leveraged – with a one-to-one ratio between partners and associates. To counter the structural bloat of our opponents, who often have three associates for each partner, we rely on creativity and efficiency.

Susman Godfrey's experience has taught what is important at trial and what can be safely ignored. We limit document discovery and depositions to the essential. For most depositions and other case related events we send one attorney and one attorney alone to handle the matter. After three decades of trials, we know what we need – and what is just a waste of time and money.

Unparalleled talent

Susman Godfrey prides itself on a talent pool as deep as any firm in the country. Clerking for a judge in the federal court system is considered to be the best training for a young trial attorney, and 91% of our lawyers served in these highly sought-after clerkships after law school. Seven of our attorneys have clerked at the highest level – for Justices of the United States Supreme Court.

Our associates are not document-churning drones. Each associate at Susman Godfrey is expected to second-chair cases in the courtroom from the start. Because we are so confident in their abilities, we consider associates for partnership after seven years with the firm, unless they joined us following a federal judicial clerkship. In that case, we give credit for the clerkship, and the partnership track is generally six years. We pay them top salaries and bonuses, make them privy to the firm's financials, and let them vote – on an equal standing with partners – on virtually all firm decisions.

Each trial attorney at Susman Godfrey is invested in our unique model and stands ready to handle your big-stakes commercial litigation.

No Matter What the Case

Our firm is made up of the best and the brightest trial lawyers in the country. Quite simply, we can try any case, no matter what the subject matter. And our record proves it.

Patent law. Our lawyers are not "patent " lawyers . Yet Susman Godfrey is one of the nation's go-to firms for patent litigation. Indeed, as the amount in controversy soared in patent cases in the early 2000s, so has the number of patent cases tried and won by Susman Godfrey. Clients know that they need real trial lawyers to translate the patent talk into language that can be understood by a jury. And juries listen when Susman Godfrey lawyers talk. Our firm has won some of the largest jury verdicts in patent cases in the country.

Family law. Our lawyers are not "family " lawyers . Yet when the richest couples get in the nastiest divorce battles, they call the real trial lawyers for the ultimate show down. When the owner of the Dodgers risked losing his team to his wife in a bitter divorce battle, Frank McCourt called Susman Godfrey. When David Saperstein found himself in divorce proceedings with his wife in over their multi-million dollar estate, including their $125 million "Fleur de Lys" mansion, he hired Susman Godfrey.

Tax law. Our lawyers are not "tax" lawyers. Yet, when an individual had a $ 800 million tax dispute and needed a trial lawyer, he hired Terry Oxford of Susman Godfrey. Terry, with the assistance of tax counsel, tried the case for 5 weeks in federal court. The result: a decision that would return the taxpayer more than half the disputed amount.

Criminal law. Our lawyers are not " criminal " lawyers . Yet when evidence suggested a death row inmate was wrongly convicted, those trying to right the wrong called Susman Godfrey. When Barry Scheck and his Innocence Project wanted help reversing the wrongful conviction of George Rodriguez, they teamed up with Susman Godfrey. The conviction was reversed and Mr. Rodriguez freed, and Susman Godfrey continues the battle to obtain fair compensation for the 17 years he spent behind bars .

It does not matter what area of law your case is. If we haven't already been involved in path-breaking litigation there, we will master it. And you will have the best possible trial team on your side.

Disclaimer: The information contained herein is revised frequently and is only accurate and current as of the date printed below. Please call us for the most recent edition.

SUSMAN GODFREY L.L.P.


Seth Ard
Partner

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Overview

Seth Ard, a partner in Susman Godfrey's New York office, has secured substantial litigation victories for both plaintiffs and defendants. For plaintiffs, Ard was co-lead counsel for a certified class of insurance policy owners, helping them achieve what the Court in the Southern District of New York described as "the best settlement pound for pound for the class that I've ever seen." For defendants, Ard has obtained take-nothing judgments for NASDAQ and Dorfman Pacific in contract and intellectual property actions seeking tens of millions of dollars.

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

Education

Harvard Law School, *magna cum laude* (J.D. 2007)

École Normale Supérieure, Visiting Scholar, 2003

Northwestern University (M.A., A.B.D., Philosophy, 2003)

Michigan State University, first in class, highest honors (B.A., Philosophy & French Literature, 1997)

Judicial Clerkship

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

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

Honors and Distinctions

2013-2015 listings of Super Lawyers "Rising Stars" in New York (Law & Politics Magazine, Thomson Reuters)

Teaching and Research Assistant for Professor Arthur Miller (Harvard Law School)

Teaching Assistant for Professor Jon Hanson (Harvard Law School)

Editorial Board, Harvard Civil Rights/Civil Liberties Law Review

Notable Representations

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

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

Fleisher et al. v. Phoenix Life Insurance Company (SDNY)
September 2015. Along with Steven Sklaver and Frances Lewis, Ard served as class counsel in a seminal action challenging 2 cost of insurance increases by Pheonix. After winning class certification and defeating two motions for class decertification and a motion for summary judgment, the case settled the day of the final Pretrial Conference in a settlement valued by the Court at over $140 million. Judge Colleen McMahon praised Susman Godfrey's settlement of the case as "an excellent, excellent result for the class," which "may be the best settlement pound for pound for the class that I've ever seen."

Globus Medical v. Bonutti Skeletal (EDPA)
March 2015. Along with Jacob Buchdahl and Arun Subramanian, Ard represents defendant Bonutti Skeletal in patent litigation brought by Globus Medical. Ard successfully argued a partial motion to dismiss the patent complaint, defeating claims of indirect infringement, vicarious liability and punitive damages.

Sentius v. Microsoft (NDCA)
February 2015. Along with Max Tribble and Vineet Bhatia, Ard represented plaintiff Sentius in a patent infringement suit against Microsoft. A few weeks before trial, Ard successfully argued a Daubert motion that sought to exclude

plaintiff's survey expert. The case settled on highly favorable terms within 24 hours of that motion being denied. Previously, Ard had successfully argued an early summary judgment motion and supplemental claim construction, both of which would have gutted plaintiff's claims.

Jefferies v. NASDAQ Arbitration (New York)

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

GMA v. Dorfman Pacific (SDNY)

November 2012. Along with Bill Carmody and Jacob Buchdahl, Ard obtained a complete defense victory on summary judgment in a trademark infringement dispute before Judge Forrest in SDNY. We were hired after the close of discovery and after our client had suffered significant discovery sanctions that threatened to undermine its defense. We were able to overturn those sanctions, reopen discovery and obtain key admissions during a deposition of Plaintiff's CEO, and win on summary judgment (without argument and based on briefing done by Ard).

Washington Mutual Bankruptcy (Bkrtcy. Del.)

February 2012. Along with Parker Folse, Edgar Sargent, and Justin Nelson, Ard represented the Official Committee of Equity Holders in Washington Mutual, Inc. at two trials contesting $7 billion reorganization plans that would have wiped out shareholders stemming from the largest bank failure in American financial history. Both plans were supported by the debtor and all major creditors. After the first trial, at which Ard put on the Equity Committee's expert and crossed the debtor's expert, the Judge denied the plan of reorganization. The debtors and creditors negotiated a new reorganization plan that again would have wiped out shareholders. After the second trial, at which Ard put on the Equity Committee's expert, crossed the debtor's expert, and conducted a full-day cross examination of hedge fund Appaloosa Management that held over $1 billion in creditor claims and that was accused of insider trading, the Court again denied the plan of reorganization, finding that the Equity Committee stated a viable claim of insider trading against the hedge funds. The Equity Committee then negotiated with the debtor and certain key creditors a resolution that provided shareholders with 95 percent of the post-bankruptcy WaMu plus other assets in a package worth hundreds of millions of dollars – an outstanding result especially given that when we were appointed counsel, the debtor tried to disband the equity committee on the ground that equity was "hopelessly out of the money" without any chance of recovery.

Lincoln Life v. LPC Holdings (Supreme Court Onandaga, New York)
2011. Along with Steven Sklaver and Arun Subramanian, Ard represented an insurance trust in STOLI litigation against an insurance company seeking to rescind a life insurance policy with a face value of $20 million. After Ard argued and won a hotly contested motion to compel in which the Court threatened to revoke the pro hoc license of opposing counsel, Lincoln settled the case on very favorable terms.

EXHIBIT 2

Execution Version

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN HANKS, on behalf of herself and all others similarly situated, Plaintiff, vs. VOYA RETIREMENT INSURANCE AND ANNUITY COMPANY, formerly known as Aetna Life Insurance and Annuity Company, Defendant.	Case No. 16-cv-6399 Judge P. Kevin Castel

JOINT STIPULATION AND SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED, subject to approval of the Court and pursuant to Rule 23 of the Federal Rules of Civil Procedure, by and between: (i) Plaintiff Helen Hanks, individually and on behalf of the Class; (ii) Defendant Voya Retirement Insurance and Annuity Company; and (iii) Lincoln Life & Annuity Company of New York, that the causes of action and matters raised by and related to this lawsuit, as captioned above, are hereby settled and compromised on the terms and conditions set forth in this Joint Stipulation and Settlement Agreement.

This Agreement is made and entered into by and between Plaintiff, Voya and Lincoln and is intended to fully, finally, and forever resolve, discharge, and settle the Action and Released Claims upon and subject to the terms and conditions hereof.

I. DEFINITIONS AND CONSTRUCTION

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

1. "Action" means the lawsuit, captioned *Helen Hanks v. Voya Retirement Insurance and Annuity Company of New York*, Case No. 16-cv-6399 (PKC), currently pending in the United States District Court for the Southern District of New York.

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

3. "Claims" means all suits, claims, cross-claims, counter-claims, controversies, liabilities, demands, obligations, debts, indemnities, costs, fees, expenses, losses, liens, actions, or causes of action (however denominated), including Unknown Claims, of any nature, character, or description, whether in law, contract, statute, or equity, direct or indirect, whether known or unknown, foreseen or not foreseen, accrued or not yet accrued, present or contingent, for any injury, damage, obligation, or loss whatsoever, including but not limited to compensatory damages, statutory damages, liquidated damages, exemplary damages, punitive damages, losses, costs, expenses, or attorneys' fees.

4. "Class" means the class certified by the Class Certification Order, more specifically "[a]ll owners of universal life (including variable universal life) insurance policies issued by Aetna Life Insurance and Annuity Company ('Aetna') that were subjected to the cost of insurance rate increase announced in 2016." *See* Class Certification Order at 1. Specifically excluded from the Class are the Class Certifications Opt-Outs; Class Counsel and their employees; Voya and Lincoln; officers and directors of Voya and Lincoln, and members of their immediate families; the heirs, successors or assigns of any of the foregoing; the Court, the Court's staff, and their immediate families.

5. "Class Certification Opt-Outs" means the policies that timely and validly opted-out during the notice period following the Class Certification Order, specifically: Policy Nos.

F1526536, G1060228, G1066983, G1126564, G1194083, G1242387, G1366304, G1426106, U1003277, U1065745, U1151278 and U1259092.

6. "Class Certification Order" means the Court's March 13, 2019 Opinion and Order (Dkt. 110).

7. "Class Counsel" means Susman Godfrey L.L.P., the attorneys appointed as class counsel by the Court pursuant to Federal Rule of Civil Procedure 23(g) in the Class Certification Order.

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

9. "Class Notice" means the notice of the Settlement approved by the Court to be sent by the Settlement Administrator to the Class.

10. "COI" means cost of insurance.

11. "Confidential Information" means material designated as "Confidential" in accordance with the terms of the Stipulated Confidentiality Agreement and Protective Order and Addendum entered in the Action on January 19, 2017 (Dkt. 39).

12. "Court" means The United States District Court for the Southern District of New York, Hon. P. Kevin Castel.

13. "Excluded Claims" means new claims that could not have been asserted in the Action because they are based upon a future rate schedule increase in Voya's COI charges that occurs after October 20, 2021. Excluded Claims are limited to claims that are excluded as a matter of law and to incremental claims and damages that could not have been included in the Action

because a future rate scale increase in Voya's COI charge has not yet taken place and do not include any claims or damages for COI charges using the rate schedule in place as of October 20, 2021.

14. "Final Approval Date" means the date on which the Court enters its Order and Judgment approving the Settlement.

15. "Final Settlement Date" means the date on which the Order and Judgment becomes final, which shall be the latest of: (i) the date of final affirmance on any appeal of the Order and Judgment; (ii) the date of final dismissal with prejudice of the last pending appeal from the Order and Judgment; or (iii) if no appeal is filed, the expiration of the time for filing or noticing any form of valid appeal from the Order and Judgment.

16. "Final Settlement Fund" means the cash fund after any reductions in the amount of the Settlement Fund pursuant to Section 44. The Final Settlement Fund will be a single qualified settlement fund pursuant to 26 U.S.C. § 468B that will be used to pay: (i) Settlement Administration Expenses; (ii) any Incentive Award; (iii) any Class Counsel's Fees and Expenses awarded by the Court; (iv) all payments to the Settlement Class; and (v) any other payments provided for under this Settlement or the Order and Judgment. There will be no reversion of any portion of the Final Settlement Fund to Voya or Lincoln. All funds held in the Final Settlement Fund and all earnings thereon, shall be deemed to be *in custodia legis* of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds shall have been disbursed pursuant to the terms of this Agreement or further order of the Court.

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

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

19. "Lincoln" means Lincoln Life & Annuity Company of New York and its predecessor and successor entities.

20. "Mediator" means Robert Meyer, Esq., with JAMS.

21. "Net Settlement Fund" means the Final Settlement Fund less (i) Settlement Administration Expenses; (ii) any Incentive Award; (iii) any Class Counsel's Fees and Expenses awarded by the Court; and (iv) any other payments provided for under this Settlement or the Order and Judgment.

22. "Order and Judgment" means the Court's order approving the Settlement and entering final judgment. The judgment will include a provision for the retention of the Court's jurisdiction over the Parties to enforce the terms of the judgment and for a bar order (consistent with the provisions of Sections 62–65) prohibiting claims by the Releasing Parties against Released Parties for the Released Claims.

23. "Owner" or "Owners" means each current and former Policy's owner or owners, whether a person or entity and whether in an individual or representative capacity.

24. "Parties" means, collectively, Plaintiff, Voya, and Lincoln. The singular term "Party" means either of Plaintiff, Voya, or Lincoln, as appropriate.

25. "Plaintiff" means Helen Hanks, individually and as representative of the Class, and her assigns, successors-in-interest, and representatives.

26. "Policy" or "Policies" means any universal life (including variable universal life) insurance issued by Aetna Life Insurance and Annuity Company that was subjected to the cost of insurance rate increase announced in 2016 by Voya and Lincoln.

27. "Post-Settlement Opt-Outs" means the Policies that timely elect to opt-out of the Settlement during the additional opt-out period provided in Section 44.

28. "Released Claims" means all Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Action arising out of the facts alleged in the Action. Released Claims does not include Excluded Claims.

29. "Released Parties" means Voya and Lincoln and their respective past, present, and future parent companies, direct and indirect subsidiaries, affiliates, predecessors, Voya's or Lincoln's joint ventures, successors and assigns, together with each of the their respective past, present, and future officers, directors, shareholders, employees, representatives, insurers, attorneys, and agents (including but not limited to, those acting on behalf of Voya or Lincoln and within the scope of their agency), including but not limited to, all of Voya's or Lincoln's heirs, administrators, executors, insurers, predecessors, successors and assigns, or any of them, and including any person or entity acting on behalf or at the direction of any of them.

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

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

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

33. "Settlement Administrator" means the third-party settlement administrator of the Settlement who is consented to by the Parties. Plaintiff shall be responsible for selecting the

Settlement Administrator and consent from Voya or Lincoln will not be unreasonably withheld. Voya and Lincoln pre-approve JND Legal Administration, previously approved by the Court in its April 23, 2019 Order Approving Form and Manner of Notice (Dkt. 122) to administer Class Notice, as the Settlement Administrator. The Settlement Administrator's fees shall be paid from the Final Settlement Fund.

34. "Settlement Class" means the Class without the "Post-Settlement Opt-Outs."

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

36. "Settlement Fund" means a cash fund consisting of the consideration paid for the benefit of the Settlement Class.

37. "Settlement Fund Account" means the escrow account from which all payments out of the Settlement Fund will be made. The Settlement Fund Account shall be established under terms acceptable to the Parties at a depository institution and such funds shall be invested in instruments backed by the full faith and credit of the United States Government (or a mutual fund or funds invested solely in such instruments), shall be deposited in non-interest-bearing transaction accounts that are fully insured by the Federal Deposit Insurance Corporation in the amounts that are up to the limit of FDIC insurance. The Parties and their respective counsel shall have no responsibility for or liability whatsoever with respect to investment decisions made for the Settlement Fund Account. All risks related to the investment of the Settlement Fund shall be borne solely by the Settlement Class.

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

to the Released Claims that the Releasing Parties do not know or suspect to exist in his or her favor at the Final Approval Date, and which if known by him or her might have affected his or her decision to opt-out of or object to the Settlement.

39. "Voya" means Defendant Voya Retirement Insurance and Annuity Company and its predecessor and successor entities.

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

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

II. SETTLEMENT RELIEF

1. Cash Consideration to the Settlement Class

42. Voya shall cause Lincoln to fund and Lincoln agrees to fund, the Settlement Fund, in the amount of $92,500,000, by the Funding Date. If an appeal of the Court's Order and Judgment providing Final Approval of the Settlement is filed, Lincoln shall have the option to either:

(i) fund the Final Settlement Fund on the Funding Date into an escrow account under the control of the Settlement Administrator or other mutually agreeable escrow agent; or

(ii) fund the Final Settlement Fund only upon entry of a final non-appealable order approving the Settlement but pay interest on the Final Settlement Fund for the time period between the Funding Date and the actual payment date at a rate of 1% per annum, simple interest.

43. Apart from causing Lincoln to fund the Settlement Fund, Voya shall have no obligations as it relates to payment of the cash considerations for the Settlement Fund, but if Lincoln does not fund the Settlement Fund, as provided herein, then the releases provided for below are not effective as against Voya or Lincoln.

44. Approval of the Settlement shall provide for opt-outs pursuant to Federal Rule of Civil Procedure 23(e)(4). The Settlement Fund shall be reduced, on a pro-rata basis measured by the incremental COI charges collected by Voya and Lincoln from June 1, 2016 through May 31, 2021, for each Post-Settlement Opt-Out. By way of example, if 1% of the total incremental COI charges collected by Voya and Lincoln from June 1, 2016 through May 31, 2021 are attributable to Post-Settlement Opt-Outs, the Settlement Fund will be reduced by 1% (*i.e.*, to $91.575 million). No reduction shall be made on account of the Class Certification Opt-Outs.

45. Any disputes regarding the reduction of the Settlement Fund shall first be presented to the Mediator for potential resolution, and, absent resolution, to the Court for a determination. The Settlement Fund, after any reduction for Post-Settlement Opt-Outs is referred to herein as the Final Settlement Fund, and the Class Policies that do not timely and validly opt-out during the additional opt-out period provided in Section 44 constitute the Settlement Class. For the avoidance of doubt, if an Owner (such as a securities intermediary or trustee) owns multiple policies on behalf of different principals, that Owner may stay in the Settlement Class as to some Policies and opt-out of the Settlement Class for other Policies. The Parties agree that the opt-out reduction methodology set forth in Section 44 is proposed solely for settlement purposes and may not be used as an admission or evidence of the validity of any damages model regarding any alleged wrongdoing by Voya or Lincoln.

46. Notwithstanding anything in this Agreement, if the total percentage of the Settlement Class (as measured by the face amount of the Policy) submit timely and valid requests for exclusion from the Settlement Class, or on whose behalf timely and valid requests for such exclusion are submitted, exceeds the percentage set forth in Section 5 of the Confidential Exhibit A (which will be provided to the Court upon request), Voya or Lincoln shall have the option, but not the obligation, to terminate this Agreement no later than 7 business days after the opt-out period contemplated by Section 44 expires.

47. The Net Settlement Fund shall be distributed to the Settlement Class pursuant to a distribution formula or other process to be developed by Class Counsel and approved by the Court. Voya and Lincoln will not oppose any such proposed plan of allocation.

48. Neither Voya nor Lincoln shall be required make any payments in connection with this Action other than the Final Settlement Fund amount.

2. Non-Cash Consideration to the Settlement Class

49. For a period of five (5) years following the Final Approval Date, Voya and Lincoln agree that COI rates on the Class Policies will not be increased above the current rate schedules implemented on June 1, 2016, unless Voya is ordered to do so by a state regulatory body. Subject to and without waiving the provision provided for in the preceding sentence, nothing in this Agreement shall otherwise restrict Voya or Lincoln from making adjustments or recommending adjustments to the COl rates that comply with the terms of any Class Policy.

50. Voya and Lincoln agree to not take any legal action (including asserting as an affirmative defense or counter-claim), or cause to take any legal action, that seeks to void, rescind, cancel, have declared void, or seeks to deny coverage under or deny a death claim for any Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or

equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in applying for the policy. The covenant set forth in this paragraph is solely prospective, and does not apply to any actions taken by Voya or Lincoln in the past. With the exception of the foregoing, nothing contained in this Agreement shall otherwise restrict Voya or Lincoln from: (i) following its normal procedures and any applicable legal requirements regarding claims processing, including but not limited to confirming the death of the insured; determining the proper beneficiary to whom payment should be made in accordance with applicable laws, the terms of the policy and policy specific documents filed with Voya or Lincoln; and investigating and responding to competing claims for death benefits; (ii) enforcing contract terms and applicable laws with respect to misstatements regarding the age or gender of the insured; (iii) complying with any court order, law or regulatory requirements or requests, including but not limited to, compliance with regulations relating to the Office of Foreign Asset Control, Financial Industry Regulatory Authority and Financial Crimes Enforcement Network; (iv) taking action with respect to any alleged misrepresentations made in connection with an application to reinstate a Class Policy that was made after September 1, 2021; or (v) refusing to pay a death claim on a policy that is determined to be invalid or void through actions of a party other than Voya or Lincoln.

III. PRELIMINARY APPROVAL AND CLASS NOTICE

51. The Parties agree that Plaintiff shall move for an order seeking preliminary approval of the Settlement, which shall include a request to notify the Class of the settlement and provide a period during which Class members can request exclusion from the settlement, by January 6, 2022. Plaintiff will share a draft of the motion seeking approval of the Settlement (and all other settlement related filings (excluding Class Counsel's motion for Plaintiff's Incentive Award and Class Counsel's Fees and Expenses)) with Voya and Lincoln no less than 5 business

days before it is filed, and Voya and Lincoln will not oppose the motion or any proposed Class Notice plan. To the extent the Court finds that the Settlement does not meet the standard for preliminary approval, the Parties will negotiate in good faith to modify the Settlement directly or with the assistance of the Mediator and endeavor to resolve the issue(s) to the satisfaction of the Court.

52. Plaintiff's form of Class Notice will be direct mailing to Owner address information that is available from Voya's and/or Lincoln's files as well as publication notice through a website such as the one used after certification of the class (*e.g.*, https://www.voyacoilitigation.com/).

53. Settlement Class Members may object to this Settlement by filing a written objection with the Court and serving any such written objection on counsel for the respective Parties (as identified in the Class Notice) no later than 45 calendar days after the Notice Date, or as otherwise determined by the Court. Unless otherwise ordered by the Court, the objection must contain: (1) the full name, address, telephone number, and email address, if any, of the Settlement Class Member; (2) Policy number; (3) a written statement of all grounds for the objection accompanied by any legal support for the objection (if any); (4) copies of any papers, briefs, or other documents upon which the objection is based; (5) a list of all persons who will be called to testify in support of the objection (if any); (6) a statement of whether the Settlement Class Member intends to appear at the Fairness Hearing; and (7) the signature of the Settlement Class Member or his/her counsel and identification by case name and number of all previous class action objections filed by the Settlement Class Member or his/her counsel in any proceeding in the previous five years. If an objecting Settlement Class Member intends to appear at the Fairness Hearing through counsel, the written objection must also state the identity of all attorneys representing the objecting Settlement Class Member who will appear at the Settlement Hearing. Unless otherwise ordered

by the Court, Settlement Class Members who do not timely make their objections as provided in this Paragraph will be deemed to have waived all objections and shall not be heard or have the right to appeal approval of the Settlement. The Class Notice shall advise Settlement Class Members of their right to object and the manner required to do so.

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

IV. INCENTIVE AWARD AND FEES AND EXPENSES

55. Plaintiff will move for an Incentive Award from the Final Settlement Fund in an amount up to but not more than $25,000. Voya and Lincoln will not oppose Plaintiff's motion. The purposes of such an award shall be to compensate the Plaintiff Helen Hanks for efforts undertaken by her on behalf of the Class. The Incentive Award shall be made to Plaintiff in addition to, and shall not diminish or prejudice in any way, any settlement relief which she may be eligible to receive.

56. Plaintiff will move for attorneys' fees not to exceed 33% of the gross benefits provided to the Settlement Class (as described in §§ 42-50 above), and reimbursement for all expenses incurred or to be incurred, payable only from the Final Settlement Fund. Class Counsel's Fees and Expenses, as awarded by the Court, may be paid from the Final Settlement Fund, at Plaintiff's option, immediately upon entry of an order approving such fees and expenses, or at a later date if required by the Court. Voya and Lincoln agree not to oppose Plaintiff's motion for Class Counsel's Fees and Expenses to the extent Plaintiff's request does not exceed the amounts set forth above.

57. Neither Plaintiff, Voya, nor Lincoln shall be liable or obligated to pay any fees, expenses, costs, or disbursements to any person, either directly or indirectly, in connection with the Action, this Agreement, or the Settlement, other than those expressly provided in this Agreement.

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

V. TAX REPORTING AND NO PREVAILING PARTY

59. Any person or entity receiving any payment or consideration pursuant to this Agreement shall alone be responsible for the reporting and payment of any federal, state and/or local income or other form of tax on any payment or consideration made pursuant to this Agreement, and neither Voya nor Lincoln shall have obligations to report or pay any federal, state and/or local income or other form of tax on any payment or consideration made pursuant to this Agreement.

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

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

VI. RELEASES AND WAIVERS

62. Upon the Final Settlement Date, the Releasing Parties shall be deemed to have, and by operation of the Order and Judgment shall have, fully, finally, and forever released, relinquished and discharged the Released Parties of and from all Released Claims. The Released Claims do not include any Excluded Claims.

63. The Releasing Parties hereby expressly further agree that they shall not now or hereafter institute, maintain, assert, join, or participate in, either directly or indirectly, on their own

behalf, on behalf of a class, or on behalf of any other person or entity, any action or proceeding of any kind against the Released Parties asserting Released Claims.

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

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

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

of any duty, law, or rule without regard to subsequent discovery or existence of such different or additional facts.

65. Nothing in this Release shall preclude any action to enforce the terms of this Agreement.

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

67. Notwithstanding the foregoing, for purposes of clarification only, this Agreement shall not release Voya or Lincoln from paying any future death benefits that may be owed.

VII. OTHER PROVISIONS

68. The Parties: (i) acknowledge that it is their intent to consummate this Agreement, (ii) agree to cooperate in good faith to the extent reasonably necessary to effect and implement all terms and conditions of the Agreement and to exercise their best efforts to fulfill the foregoing terms and conditions of the Agreement, and (iii) agree to cooperate in good faith to obtain preliminary and final approval of the Settlement and to finalize the Settlement. The Parties agree that the amounts paid in the Settlement and the other terms of the Settlement were negotiated in good faith, and at arm's length by the Parties, with the assistance of the Mediator, following numerous mediations including before the Mediator on August 11, 2021, and additional follow-on communications, and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

69. No person or entity shall have any claim against Class Counsel, the Settlement Administrator, Voya's counsel, Lincoln's counsel, or any of the Released Parties based on actions

taken substantially in accordance with the Agreement and the Settlement contained therein or further orders of the Court.

70. Voya and Lincoln specifically and generally deny any and all liability or wrongdoing of any sort with regard to any of the Claims in the Action and make no concessions or admissions of liability of any sort. Neither this Agreement, nor the Settlement, nor any drafts or communications related thereto, nor any act performed or document executed pursuant to, or in furtherance of, the Agreement or the Settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Claims, or of any wrongdoing or liability of the Released Parties, or any of them; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of the Released Parties, or any of them, in any civil, criminal or administrative proceeding in any court, administrative agency, or other tribunal. Nothing in this paragraph shall prevent Voya, Lincoln, and/or any of the Released Parties from using this Agreement and Settlement or the Order and Judgement in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

71. Voya and Lincoln agree to provide, or cause to be provided, all data reasonably necessary for Class Counsel to effectuate the distribution of Class Notice, allocation, and payments to the Settlement Class.

72. The Parties agree that if this Agreement or the Settlement fails to be approved, fails to become effective, otherwise fails to be consummated, is declared void, or if there is no Final Settlement Date, then the Parties will be returned to *status quo ante*, as if this Agreement had never been negotiated or executed, except that all Settlement Administration Expenses shall not be

recouped. Each Party will be restored to the place it was in as of the date this Agreement was signed with the right to assert in the Action any argument or defense that was available to it at that time.

73. Except as expressly provided herein, nothing in this Agreement shall change the terms of any Policy. Nothing in this Agreement shall preclude any action to enforce the terms of this Agreement.

74. The Parties agree, to the extent permitted by law, that all agreements made and orders entered during the course of the Action relating to confidentiality of information shall survive this Agreement. To the extent Class Counsel or the Settlement Administrator requires Confidential Information to effectuate the terms of this Agreement, the terms of the Stipulated Confidentiality Agreement and Protective Order and Addendum entered in the Action on January 19, 2017 (Dkt. 39) shall apply to any information necessary to effectuate the terms of this Agreement.

75. The Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest. No waiver of any provision of this Agreement or consent to any departure by either Party therefrom shall be effective unless the same shall be in writing, signed by the Parties or their counsel, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No amendment or modification made to this Agreement pursuant to this paragraph shall require any additional notice to the Settlement Class Members, including written or publication notice, unless ordered by the Court. Plaintiff and Class Counsel agree not to seek such additional notice. The Parties may provide updates on any amendments or modifications made to this Agreement on the website as described in Section 52.

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

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

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

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

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

81. The Parties and their counsel further agree that their discussions and the information exchanged in the course of negotiating this Settlement are confidential under the terms

of the mediation agreement signed by the Parties in connection with the mediation session with the Mediator and any follow-up negotiations between the Parties' counsel. Such exchanged information was made available on the condition that neither the Parties nor their counsel may disclose it to third parties (other than experts or consultants retained by the Parties in connection with the Action and subject to confidentiality restrictions), that it not be the subject of public comment, and that it not be publicly disclosed or used by the Parties or their counsel in any way in the Action should it not settle, or in any other proceeding; provided however, that nothing contained herein shall prohibit the Parties from seeking such information through formal discovery if not previously requested through formal discovery or from referring to the existence of such information in connection with the Settlement of the Action.

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

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

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

(a) If to Voya or Lincoln, then to:

Motty Shulman
Robin A. Henry
Glenn L. Radecki
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza

Alan B. Vickery
John F. LaSalle
Boies Schiller Flexner LLP
333 Main Street
Armonk, New York 10504
Tel: (914) 749-8200

New York, New York 10004-1980
(212) 859-8000 (telephone)
(212) 859-4000 (facsimile)
motty.shulman@friedfrank.com
robin.henry@friedfrank.com
glenn.radecki@friedfrank.com

Fax: (914) 749-8300
avickery@bsfllp.com
jlasalle@bsfllp.com

(b) If to Plaintiff or the Class, then to:

Seth Ard
Ryan C. Kirkpatrick
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
rkirkpatrick@susmangodfrey.com

Steven G. Sklaver
Michael Gervais
Nicholas N. Spear
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
mgervais@susmangodfrey.com
nspear@susmangodfrey.com

85. The Parties reserve the right to agree between themselves on any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

86. All time periods set forth herein shall be computed in calendar days unless otherwise expressly provided. In computing any period of time prescribed or allowed by this Agreement or by order of any court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Each other day of the period to be computed shall be included, including the last day thereof, unless such last day is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court on a day in which the court is closed during regular business hours. In any event, the period runs until the end of the next day that is not a Saturday, a Sunday, a legal holiday, or a day on which the court is closed. When a time period is less than seven business days, intermediate Saturdays, Sundays, legal holidays, and days on which the court is closed shall be excluded from the computation. As used

in this Paragraph, legal holidays include New Year's Day, Dr. Martin Luther King Jr. Day, Lincoln's Birthday, Washington's Birthday, Presidents' Day, Memorial Day, Juneteenth, Independence Day, Labor Day, Columbus Day, Election Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by Federal law or New York Law.

AGREED TO BY:

Helen Hanks

Helen Hanks

Date: January 5, 2022

Voya Retirement Insurance and Annuity Company

By: _____

Title: _____

Date: _____

Lincoln Life and Annuity Company of New York

By: _____

Title: _____

Date: _____

AGREED TO BY:

Helen Hanks

Dated: January __, 2022

Voya Retirement Insurance and Annuity Company

By: _____

Title: Secretary

Dated: January 5, 2022

Lincoln Life and Annuity Company of New York

By: _____

Title: _____

Dated: January __, 2022

AGREED TO BY:

Helen Hanks

Dated: January __, 2022

Voya Retirement Insurance and Annuity Company

By: _____

Title: _____

Dated: January __, 2022

Lincoln Life and Annuity Company of New York

By: Dennis R Glass

Title: President

Dated: January 4, 2022

APPROVED ONLY AS TO FORM:

Motty Shulman Digitally signed by: Motty Shulman DN: CN = Motty Shulman email = motty.shulman@friedfrank.com C = AD Date: 2022.01.05 11:48:22 -05'00'

Motty Shulman
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Counsel for Defendant Voya Retirement Insurance and Annuity Company and Lincoln Life & Annuity Company of New York

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Susman Godfrey L.L.P.
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Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150
ssklaver@susmangodfrey.com

Class Counsel and Attorneys for Plaintiff Helen Hanks

EXHIBIT 3

ÆTNA LIFE INSURANCE AND ANNUITY COMPANY

Hartford, Connecticut 06156

WILL PAY the Proceeds Payable Upon Death to the Beneficiary upon receipt of due proof of the death of the Insured while this policy is in force and before the Maturity Date; or

WILL PAY the Proceeds Payable Upon Maturity to the Owner on the Maturity Date if the Insured is living on that date.

The provisions of this and the following pages are part of the policy.

RIGHT OF POLICY EXAMINATION

All premiums will be refunded if this policy is returned to Ætna or its representative for cancellation within 10 days after it is delivered. The policy will then be deemed void from its beginning.

Signed for Ætna on its Date of Issue.

Louise L. McCarroll — Secretary

William O. Bailey — President

S. Bajek — Registrar

FLEXIBLE PREMIUM ADJUSTABLE ENDOWMENT POLICY
ADJUSTABLE DEATH PROCEEDS PAYABLE UPON DEATH PRIOR TO MATURITY DATE
FLEXIBLE PREMIUMS PAYABLE UNTIL MATURITY DATE OR PRIOR DEATH
NET CASH VALUE PROCEEDS PAYABLE IF INSURED IS LIVING ON MATURITY DATE
NON-PARTICIPATING

38640 T

Policy Summary

It is important that you understand your insurance policy. Ætna has used simple words in this brief summary and in the policy. This summary is not a substitute for the detailed policy provisions.

This is a flexible premium adjustable endowment policy. An adjustable death benefit is payable upon the death of the Insured before the Maturity Date. An adjustable cash value is payable if the Insured is alive on the Maturity Date.

Premiums are payable until the Maturity Date. Sufficient premiums must be paid to continue the policy in force until then. Premium reminder notices will be sent for planned premiums and for premiums required to continue the policy in force. There is a right to reinstate the policy.

Some of the other rights available while the Insured is living are:

- the right to change the owner and beneficiary
- the right to change the amount of insurance
- the right to change the death benefit option
- the right to change premiums
- the right to make loans
- the right to surrender the policy
- the right to choose alternate methods for payment of benefits

THIS POLICY IS A LEGAL CONTRACT BETWEEN THE OWNER AND ÆTNA

READ YOUR POLICY CAREFULLY

Where To Find It

Any riders and a copy of the application follow Page 12

POLICY SPECIFICATIONS

NAME OF INSURED ▶ HELEN R HANKS

POLICY NUMBER ▶ U 1 070 058 JANUARY 10, 1984 ◀ DATE OF ISSUE

PREMIUM CLASS NONSMOKER SEX FEMALE AGE [redacted]

BENEFICIARY - AS PROVIDED IN THE APPLICATION UNLESS CHANGED AS PROVIDED HEREIN.

POLICY OWNER- AS PROVIDED IN THE APPLICATION UNLESS CHANGED AS PROVIDED HEREIN.

PLAN - FLEXIBLE PREMIUM ADJUSTABLE ENDOWMENT POLICY

INITIAL SPECIFIED AMOUNT: $50,000

DEATH BENEFIT OPTION: 1 - CASH VALUE IS INCLUDED IN THE SPECIFIED AMOUNT

PLANNED PREMIUM: $76.50 PAYABLE QUARTERLY

MATURITY DATE: JANUARY 10, 2045

BASIC MONTHLY PREMIUM
BASIC POLICY ONLY: $25.50

MONTHLY DEDUCTION DAY: THE 10TH DAY OF EACH MONTH

MONTHLY EXPENSE CHARGE: $3.00*

* INCLUDED IN BASIC MONTHLY PREMIUM

THIS POLICY MAY TERMINATE PRIOR TO THE MATURITY DATE IF PREMIUMS PAID AND INTEREST CREDITED ARE INSUFFICIENT TO CONTINUE COVERAGE TO THAT DATE

POLICY LOAN INTEREST: 7.40% PER YEAR IN ADVANCE

GUARANTEED INTEREST RATE FOR CASH VALUE: 4.50% PER YEAR

TABLE OF SURRENDER CHARGES

POLICY MONTH STARTING	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
	$$	$$	$$	$$	$$	$$	$$	$$	$$	$$
JAN	383	345	307	268	230	192	153	115	77	38
FEB	380	342	304	265	227	189	150	112	73	35
MAR	377	339	300	262	224	185	147	109	70	32
APR	374	335	297	259	220	182	144	105	67	29
MAY	371	332	294	256	217	179	141	102	64	26
JUN	367	329	291	252	214	176	137	99	61	22
JUL	364	326	288	249	211	173	134	96	58	19
AUG	361	323	284	246	208	169	131	93	54	16
SEP	358	319	281	243	204	166	128	89	51	13
OCT	355	316	278	240	201	163	125	86	48	10
NOV	351	313	275	236	198	160	121	83	45	6
DEC	348	310	272	233	195	157	118	80	42	3

THIS TABLE APPLIES TO THE INITIAL SPECIFIED AMOUNT FOR THE FIRST 10 POLICY YEARS.

AN ADDITIONAL TABLE WILL APPLY UPON EACH INCREASE IN THE SPECIFIED AMOUNT. THE 10 YEAR PERIOD FOR THE ADDITIONAL TABLE WILL INCLUDE THE POLICY YEAR IN WHICH THE INCREASE OCCURS.

A CHANGE IN THE DEATH BENEFIT OPTION WILL RESULT IN A CHANGE IN THE AMOUNT OF THE TABLE. AETNA WILL PROVIDE A NEW TABLE WHEN A CHANGE OCCURS.

FOR ANY POLICY ISSUED UNDER THE EXCHANGE PROVISION OF PAGE 9, THE OWNER MAY CHOOSE AS THE DATE OF ISSUE EITHER THE DATE OF THIS POLICY OR THE DATE OF THE EXCHANGE. PREMIUMS WILL BE BASED ON THE ATTAINED AGE OF THE INSURED ON THE DATE CHOSEN.

TABLE OF
GUARANTEED MAXIMUM INSURANCE RATES

ATTAINED AGE*	MONTHLY RATE	ATTAINED AGE*	MONTHLY RATE	ATTAINED AGE*	MONTHLY RATE
34	0.18250	55	0.83070	76	5.29960
35	0.18750	56	0.90830	77	5.70910
36	0.19340	57	0.99270	78	6.15180
37	0.20000	58	1.08450	79	6.64220
38	0.20920	59	1.18560	80	7.19300
39	0.22000	60	1.29670	81	7.81560
40	0.23340	61	1.41870	82	8.50420
41	0.25090	62	1.55160	83	9.24980
42	0.27090	63	1.69790	84	10.04570
43	0.29430	64	1.85680	85	10.88130
44	0.32010	65	2.02990	86	11.75150
45	0.34760	66	2.21910	87	12.65910
46	0.37760	67	2.42590	88	13.61110
47	0.41020	68	2.65290	89	14.61210
48	0.44600	69	2.90340	90	15.66920
49	0.48610	70	3.18010	91	16.79830
50	0.53030	71	3.48540	92	18.02410
51	0.57950	72	3.81530	93	19.38010
52	0.63370	73	4.16640	94	20.90910
53	0.69380	74	4.53290		
54	0.75970	75	4.91150		

* ATTAINED AGE MEANS AGE ON THE BIRTHDAY NEAREST THE FIRST DAY OF THE POLICY YEAR IN WHICH THE MONTHLY DEDUCTION DAY OCCURS.

Owner and Beneficiary

Owner

During the lifetime of the Insured all rights granted by the policy or allowed by Ætna belong to the Owner.

Beneficiary

Unless this policy states otherwise, the rights of any beneficiary who dies before the Insured belong to the Owner.

Changes in Owner and Beneficiary

Unless this policy states otherwise, the Owner and the Beneficiary, or either of them, may be changed. This may be done as often as desired during the lifetime of the Insured and before the Maturity Date. A signed request must be sent to Ætna. When Ætna gives its written acceptance, the change will take effect as of the date the request was signed. The change will be subject to any action which Ætna takes before the written acceptance.

Assignment

No assignment will bind Ætna until it or a copy is received at the Home Office. When it is received, the rights of the Owner and of the Beneficiary will from then on be subject to the assignment. Ætna is not obliged to see that the assignment is valid.

Proceeds Payable by Ætna

Proceeds Defined

Proceeds means the amount payable on the death of the Insured, on the Maturity Date, or upon surrender of this policy.

Death — The Proceeds Payable Upon Death means the Death Benefit minus any loan balance outstanding on the date of death.

or

Maturity — The Proceeds Payable Upon Maturity means the net cash value on the Maturity Date. The net cash value will be the cash value on the Maturity Date minus any loan balance outstanding on that date.

or

Surrender — The proceeds payable upon surrender of this policy will be the Surrender Value.

Adjustments To Proceeds

All proceeds are subject to adjustment under the Age and Sex, Incontestability, Suicide and Grace Period provisions.

Death Benefit Options

Options

The Death Benefit used in determining the Proceeds Payable Upon Death will be as provided under one of the Death Benefit options. The option for this policy as of the Date of Issue is shown on page 2.

Option 1 — The Specified Amount includes the cash value. Under this option, the Death Benefit will be the greater of (a) the Specified Amount on the date of death, and (b) a percentage, as determined below, of the cash value on the date of death. Unless (b) applies, payment of a premium under this option will not increase the Death Benefit.

Option 2 — The Specified Amount is in addition to the cash value. Under this option, the Death Benefit will be the greater of (a) the Specified Amount plus the cash value on the date of death, and (b) a percentage, as determined below, of the cash value on the date of death.

Under either Death Benefit Option, the Death Benefit shall be not less than a percentage, as determined below, of the cash value on the date of death. Age on the birthday nearest the first day of the policy year in which death occurs is used.

ATTAINED AGE	CASH VALUE %	ATTAINED AGE	CASH VALUE %	ATTAINED AGE	CASH VALUE %	ATTAINED AGE	CASH VALUE %
40 And Younger	140%						
41	139	51	129%	61	119%	71	109%
42	138	52	128	62	118	72	108
43	137	53	127	63	117	73	107
44	136	54	126	64	116	74	106
45	135	55	125	65	115	75	
46	134	56	124	66	114	And Older	105
47	133	57	123	67	113		
48	132	58	122	68	112		
49	131	59	121	69	111		
50	130	60	120	70	110		

Premiums and Reinstatement

Premiums

Premium due dates, policy anniversaries, policy years and policy months are measured from the Date of Issue. The first premium is due on the Date of Issue. No benefit will be provided on the basis of a premium until that premium is paid. Premiums are payable until the Maturity Date.

Premiums may be paid to Ætna or its authorized representative. A receipt signed by an officer of Ætna will be given upon request.

Planned Premiums

Premium reminder notices for planned premiums will be sent at frequencies of 1, 3, 6 or 12 months. Planned premiums as of the Date of Issue are shown on page 2.

Additional Premiums

Additional premiums may be paid at any time while the policy is in force and before the Maturity Date. The amount and frequency of planned premiums may also be changed. However, Ætna will have the right to limit the amount and number of additional premiums, as well as the right to limit any increase in planned premiums, subject to these rules:

1. Additional premiums may be paid only when there is no outstanding loan balance.
2. During each policy year, not more than $25,000 in total additional premiums may be paid and not more than $25,000 in total increases in planned premiums may be made. Further limits may be applied to the extent necessary to preserve the favorable income tax status of this policy. A statement of any such further limits will be sent each year to the Owner.
3. Evidence of insurability satisfactory to Ætna may be required. This will happen only if payment of the additional premium or the new planned premium would, during the current policy year, increase the difference between the Death Benefit and the cash value.

Premium Limit Due to Loans

While there is an outstanding loan balance, the sum of all payments to Ætna during each policy year in excess of the premium limit due to loans will be considered as loan balance repayments and not as premiums. The premium limit due to loans during each policy year will be the sum of the Basic Monthly Premiums for each of the 12 months of that year.

All payments to Ætna during a policy year will be counted in determining when the limit is reached, whether or not there is an outstanding loan balance at the time of payment. The Basic Monthly Premium on the Date of Issue is shown on page 2.

Effective Dates

The Date of Issue will be the effective date for the coverage provided in the original application.

For any increase, addition to coverage, or reinstatement, the effective date will be the monthly deduction day on or next following the date of Ætna's approval.

Grace Period

If the Surrender Value is insufficient to allow a monthly deduction on the monthly deduction day, Ætna will allow 61 days of grace to pay a premium that will cover the deduction.

During the days of grace the policy will stay in force. If the Insured dies during the days of grace, Ætna will deduct the overdue monthly deduction(s) from the proceeds. If the premium is not paid within 61 days after the monthly deduction day, the policy will terminate without value at the end of the grace period. Written notice will be sent to the Owner not less than 31 days before termination. However, termination will not occur if the policy is being continued under the Basic Monthly Premium provision.

Basic Monthly Premium

This policy will not terminate within the 2 year period after its effective date if on each monthly deduction day within that period the sum of premiums paid within that period equals or exceeds the sum of (a) and (b) where:

(a) is the sum of the Basic Monthly Premiums for each policy month from the start of that period, including the current month;

and (b) is any withdrawals plus any increase in the loan balance since the start of that period.

Reinstatement

If this policy terminates as provided under Grace Period, it may be restored to full force within 5 years after the date of termination and before the Maturity Date. Evidence of insurability satisfactory to Ætna must be submitted. A premium sufficient to keep the policy in force for the current and next policy month must be paid. The cash value of this policy upon reinstatement will be that provided by the premium then paid.

Policy Values

Cash Value

The cash value on the Date of Issue will be the first premium paid less the monthly deduction for the first month.

The cash value after the Date of Issue and before the Maturity Date will be (a) minus (b) where

(a) is the sum of

(1) the cash value on the last previous monthly deduction day with interest to date; and

(2) premiums paid since the last previous monthly deduction day with interest to date;

and (b) is the sum of

(1) any withdrawals since the last previous monthly deduction day with interest to date; and

(2) the monthly deduction for the month which is then starting, if the date of calculation is a monthly deduction day.

Interest Rate

Ætna will credit interest on the cash value at not less than the guaranteed rate. The guaranteed rate is 0.36748% per month, compounded monthly. This is equivalent to 4½% per year.

Ætna may credit interest at a rate in excess of the guaranteed rate.

Excess interest will not be credited to any portion of the cash value which is used to secure a loan balance.

Monthly Deductions

The monthly deduction is equal to the Cost of Insurance for the policy plus the cost of any riders attached to the policy. It is deducted from the cash value on each monthly deduction day.

The first monthly deduction day is the Date of Issue. Monthly deduction days occur each month thereafter on the same day of the month as the Date of Issue.

Cost of Insurance

The Cost of Insurance on any monthly deduction day will be (1) multiplied by the result of (2) minus (3) where

(1) is the Cost of Insurance Rate on that date, divided by 1000

(2) is the Death Benefit on that date, divided by 1.0036748

(3) is the cash value on that date before computing the monthly deductions for the Cost of Insurance for the policy and any waiver of premium rider.

Cost of Insurance Rate

The Monthly Cost of Insurance is based on the Insured's sex, attained age and premium class. Attained age means age on the birthday nearest the first day of the policy year in which the monthly deduction day occurs. For the Initial Specified Amount, the premium class on the Date of Issue will be used. For each increase, the premium class for that increase will be used.

The monthly Cost of Insurance rates may be adjusted by Ætna from time to time. Adjustments will be on a class basis and will be based on Ætna's estimates for future cost factors, such as mortality, investment income, expenses and the length of time policies stay in force. Any adjustments will be made on a uniform basis. However, the rate during any policy year may never exceed the rate shown for that year in the Table of Guaranteed Maximum Insurance Rates in this policy. Those rates are based on the 1958 Commissioners Standard Ordinary Mortality Table, male or female.

Non-Forfeiture Provision

Continuation of Coverage

If planned premiums are not paid, coverage under this policy will continue to the Maturity Date as long as the Surrender Value is sufficient to cover each monthly deduction. If the Surrender Value is not sufficient to cover a monthly deduction, the Grace Period provision will apply. If the policy continues to the Maturity Date, the provisions of the policy concerning Proceeds Payable Upon Maturity will apply.

This provision will not continue coverage beyond the Maturity Date. Nor will it continue any rider beyond the termination date stated in the rider.

Surrender Value

This policy may be surrendered for its Surrender Value at any time while the Insured is alive and before the Maturity Date. Partial surrenders will also be allowed. In either case, Ætna may defer payment for up to 6 months, except payment used to pay premiums due Ætna.

The Surrender Value will be equal to (a) minus (b) where

(a) is the cash value on the date of surrender;

and (b) is the sum of

(1) the Surrender Charge determined from the Table of Surrender Charges in this policy, and

(2) any existing contract debt.

However, if surrender occurs during the first 31 days of a policy year, the Surrender Value will be not less than it was on the first day of that year, less any subsequent loans and partial surrenders. At no time will the Surrender Value be less than zero.

Surrender Charge

The Surrender Charge is a charge made against the cash value. The amount and duration of the charge are determined from the Table of Surrender Charges.

If an increase in the Specified Amount is requested and approved, additional Surrender Charges will apply to the policy. Ætna will provide written notice of the amount and duration.

Any decrease in the Specified Amount will not reduce the original or any additional Surrender Charge.

Upon reinstatement of this policy, no Surrender Charge will apply to coverage which was in force for 2 years prior to the date on which the policy terminated. For coverage which was not in force for such two years, future Surrender Charges will be reduced. The reduction will be in the same proportion which the Surrender Charge on the due date of the unpaid deduction bears to the cash value on that date.

Partial Surrender

Partial surrenders may be made while the Insured is living and before the Maturity Date. However, no partial surrenders may be made in the first policy year and no more than 3 partial surrenders may be made in each subsequent policy year.

A partial Surrender Charge will be made against the amount of the cash value which is surrendered. The charge will be in proportion to the charge that would apply to a full withdrawal. The proportion will be computed as the amount of cash value that is surrendered divided by the total cash value. When the partial surrender is made, future Surrender Charges will be reduced in the same proportion.

The minimum Surrender Charge for a partial surrender will be $25. The minimum amount of any partial surrender will be that amount which, after any partial Surrender Charge is applied, equals $500.

A partial surrender will reduce both the cash value and the Death Benefit. If Option 1 is in effect, the Specified Amount will be reduced by the amount of the cash value reduction. The reduction will reduce any past increases in the reverse order in which they occurred.

Basis of Calculation

Minimum cash values are based on the 1958 Commissioners Standard Ordinary Mortality Table, male or female, age nearest birthday. Interest is assumed at the rate of 4 1/2% per year. Death is assumed to occur at the end of the policy year.

The values of this policy equal or exceed those required by law in the state where this policy is delivered. A detailed statement has been filed with that state which shows how to compute those values.

Policy Loans

Cash Loans

Ætna will grant loans while this policy is in force. The loan when added to any existing loan balance may not be more than the loan value when the loan is made. A loan agreement which assigns the policy as sole security for the loan will be required. Ætna may defer payment of loans, except loans to pay premiums due Ætna, for up to 6 months.

Loan Values

The loan value will be the amount such that the non-loaned portion of the surrender value will be sufficient to keep the policy in force to the end of the policy year, calculated using the guaranteed cost of insurance and interest rates.

Interest

Loans bear interest at the rate of 7.4% per year in advance. Interest accrues daily from the date of the loan and is due on the first day of each policy year. If not paid when due, the interest will be added to the loan and will itself bear interest on the same terms.

The loan balance consists of all outstanding loans including accrued interest. If the loan balance grows to more than the Surrender Value, the Grace Period provision will apply.

Repayment

Any loan balance may be repaid in full or in part at any time before the Maturity Date while the Insured is living and the policy is in force. Any loan balance will reduce any benefit under this policy.

Changes in Insurance Coverage

The following changes may be made in this policy more than one year after its Date of Issue. A written request will be required. A new Policy Specifications page will be sent when a change occurs.

Increase In Amount

For an increase in the Specified Amount, a new application must be submitted. Evidence of insurability satisfactory to Ætna will be required. The Surrender Value, less any outstanding loan balance, must be sufficient to cover the next monthly deduction. The effective date of any increase will be shown in a supplement to page 2.

The Basic Monthly Premium will be increased when the Specified Amount is increased or when a benefit rider is added or increased. A new period will begin during which the policy will not terminate if the conditions of the Basic Monthly Premium provision are met. The new period will begin on the effective date of the increase. It will continue through the current policy year to the end of the succeeding policy year.

Decreases in Amount

For a decrease in the Specified Amount, the effective date will be the monthly deduction day on or next following the date on which the request is received. The decrease will be applied first to any past increase in the reverse order in which they occurred. The minimum Specified Amount after a decrease shall be Ætna's published minimum for this type of policy at the time of the request.

Change in Death Benefit Option

A change from one Death Benefit option to the other will take effect on the monthly deduction day on or next following the date on which the request is received.

If a change from Option 1 to Option 2 is made, the Specified Amount will be reduced to equal the death benefit less the cash value at the time of change.

If a change from Option 2 to Option 1 is made, the Specified Amount will be increased to equal the death benefit at the time of change. No evidence of insurability will be required.

Exchange

This policy may be exchanged for a new policy on any plan of insurance, except term insurance, which Ætna then issues. Written notice at least 31 days in advance of the exchange will be required.

The amount of the new policy may not exceed (a) minus (b) where:

(a) is the Insured's current Death Benefit under this policy plus the cash value of the new policy;

and (b) is the Cash Value, minus any outstanding loan balance of the policy.

The new policy will take effect upon surrender of this policy.

Annual Report — Projection of Benefits

Annual Report

Ætna will send a report at least once during each policy year. The report will show the cash value and the Surrender Value on the date of the report. It will also show since the last report at least the following information.

(1) premiums paid;

(2) the cost of insurance and the cost of riders;

(3) interest credited;

(4) the amount of any surrenders or partial surrenders;

(5) the amount of surrender charges made;

(6) a summary of loan activity.

Projection of Benefits

Ætna will provide a projection of illustrative future death benefits and cash values at any time upon written request. Ætna reserves the right to charge a fee for this service.

The illustration will be based on (1) the assumptions specified in the request as to Death Benefit Options and premium payment, and (2) other necessary assumptions made in the request or by Ætna.

General Provisions

The Contract

This policy and the application are the whole contract. A copy of the application is attached to the policy at issue. Any new application for changes approved by Ætna will become part of the policy.

Only an officer of Ætna may agree to a change in the policy, and then only in writing. All statements made by or for the Insured are representations and not warranties. No statement will be used to void the policy or defend against a claim unless it is contained in an application.

Payment of Benefits

All benefits are payable at Ætna's Home Office. Ætna may require submission of the policy before it grants loans, makes changes or pays benefits.

Age and Sex

If age or sex is misstated, the policy values will be changed to those which would have been provided for the correct age and sex. The change will be based on the difference between the monthly deductions made and the correct monthly deductions.

Incontestability

Ætna will not contest this policy after it has been in force during the lifetime of the Insured for 2 years from its Date of Issue.

For coverage which takes effect on a later date as an increase or reinstatement of insurance, Ætna will not contest such coverage after it has been in force during the lifetime of the Insured for 2 years from its effective date. Any contest of such later coverage will be based on the supplemental application.

These incontestability paragraphs do not apply to any waiver of premium rider.

Suicide

If the Insured commits suicide, while sane or insane, within two years from the Date of Issue, only a limited benefit will be paid. The limited benefit will be the premiums paid minus any outstanding contract debt and minus any withdrawals.

If the Insured commits suicide while sane or insane, within 2 years from the effective date of any increase in coverage, Ætna will pay only the monthly deductions for the increase.

Protection of Proceeds

To the extent provided by law, the proceeds of this policy are not subject to claims by a beneficiary's creditors nor to any legal process against any beneficiary.

Non-Participation

This policy is not entitled to share in surplus distribution. No dividends are paid.

Settlement Options

Income Options

All or part of the proceeds of this policy may be applied under one or more of the following options, or in any other manner to which Ætna agrees.

Interest

1. Payment of interest on funds left with Ætna. Funds may be left for a period longer than one lifetime only with the consent of Ætna.

Fixed Amount

2. Payment of a fixed amount until the proceeds and interest are paid in full. The amount to be paid in a year must be at least $60 for each $1,000 of proceeds applied. However, Ætna will have the right to make as a minimum payment during any year an amount equal to 105% of the interest for that year.

Fixed Period

3. Payment for a fixed period, not longer than 30 years, as elected from the following table.

PAYMENT PER $1,000 PROCEEDS									
YEARS OF FIXED PERIOD	ANNUAL	SEMI-ANNUAL	QUARTERLY	MONTHLY	YEARS OF FIXED PERIOD	ANNUAL	SEMI-ANNUAL	QUARTERLY	MONTHLY
1	$1000.00	$504.29	$253.24	$84.65	10	$116.18	$58.59	$29.42	$9.83
2	508.60	256.49	128.79	43.06	15	83.89	42.31	21.24	7.10
3	344.86	173.91	87.33	29.19	20	67.98	34.28	17.22	5.75
4	263.05	132.65	66.61	22.27	25	58.62	29.56	14.85	4.96
5	213.99	107.92	54.19	18.12	30	52.53	26.49	13.30	4.45

Life Income

4. Payment for a fixed period, if any, and life thereafter, as elected from the following table. No payment will become due after death, except payment for any remaining fixed period.

MONTHLY LIFE INCOME PER $1,000 PROCEEDS											
AGE NEAREST BIRTHDAY		WITH FIXED PERIOD			WITHOUT FIXED PERIOD	AGE NEAREST BIRTHDAY		WITH FIXED PERIOD			WITHOUT FIXED PERIOD
MALE	FEMALE	10 YRS.	15 YRS.	20 YRS		MALE	FEMALE	10 YRS.	15 YRS.	20 YRS.	
20	25	$3.44	$3.44	$3.43	$3.45	67	72	$7.01	$6.28	$5.55	$ 7.76
25	30	3.57	3.56	3.55	3.57	68	73	7.18	6.37	5.59	8.04
30	35	3.72	3.71	3.70	3.73	69	74	7.35	6.46	5.62	8.34
35	40	3.92	3.91	3.88	3.93	70	75	7.52	6.54	5.65	8.67
40	45	4.17	4.14	4.09	4.19	71	76	7.70	6.62	5.67	9.01
45	50	4.49	4.43	4.34	4.54	72	77	7.88	6.69	5.69	9.39
50	55	4.89	4.77	4.62	4.98	73	78	8.05	6.76	5.71	9.79
55	60	5.37	5.17	4.92	5.54	74	79	8.22	6.81	5.72	10.22
60	65	5.96	5.62	5.22	6.27	75	80	8.39	6.87	5.73	10.69
61	66	6.09	5.72	5.27	6.44	76	81	8.56	6.91	5.74	11.20
62	67	6.23	5.81	5.33	6.63	77	82	8.72	6.95	5.74	11.74
63	68	6.38	5.91	5.38	6.82	78	83	8.87	6.99	5.75	12.34
64	69	6.53	6.00	5.43	7.04	79	84	9.01	7.02	5.75	12.98
65	70	6.68	6.10	5.47	7.26	80 and	85 and	9.14	7.04	5.75	13.67
66	71	6.84	6.19	5.52	7.50	over	over				

Joint Life Income Reducing for Survivor

5. Payment for the joint lifetime of two payees, with payments reducing to one-half of the original amount when either payee dies, in accordance with the following table. No payment will become due after the death of the surviving payee.

MONTHLY JOINT LIFE INCOME WITH ½ TO SURVIVOR PER $1,000 PROCEEDS													
AGE NEAREST BIRTHDAY	RATES FOR OTHER AGE COMBINATIONS WILL BE FURNISHED UPON REQUEST												
MALE		45	50	55	60	61	62	63	64	65	70	75	80
	FEMALE	50	55	60	65	66	67	68	69	70	75	80	85
50	55	$4.75	$4.98	$5.24	$5.55	$5.61	$5.68	$5.76	$5.83	$5.91	$6.32	$6.79	$7.30
55	60	4.99	5.24	5.54	5.88	5.95	6.03	6.11	6.20	6.28	6.76	7.30	7.88
60	65	5.26	5.55	5.88	6.27	6.35	6.44	6.53	6.63	6.73	7.27	7.90	8.59
61	66	5.32	5.61	5.95	6.35	6.44	6.53	6.63	6.72	6.83	7.39	8.04	8.76
62	67	5.39	5.68	6.03	6.44	6.53	6.63	6.72	6.82	6.93	7.51	8.18	8.93
63	68	5.45	5.76	6.11	6.53	6.63	6.72	6.82	6.93	7.04	7.64	8.33	9.10
64	69	5.52	5.83	6.20	6.63	6.72	6.82	6.93	7.04	7.15	7.77	8.49	9.29
65	70	5.59	5.91	6.28	6.73	6.83	6.93	7.04	7.15	7.26	7.90	8.65	9.49
66	71	5.66	5.98	6.37	6.83	6.93	7.04	7.15	7.26	7.38	8.04	8.82	9.69
67	72	5.73	6.07	6.46	6.94	7.04	7.15	7.26	7.38	7.50	8.19	9.00	9.90
68	73	5.80	6.15	6.56	7.04	7.15	7.27	7.38	7.51	7.63	8.34	9.18	10.13
69	74	5.88	6.24	6.66	7.16	7.27	7.39	7.51	7.63	7.77	8.50	9.37	10.36
70	75	5.96	6.32	6.76	7.27	7.39	7.51	7.64	7.77	7.90	8.67	9.57	10.61
75	80	6.37	6.79	7.30	7.90	8.04	8.18	8.33	8.49	8.65	9.57	10.69	12.00

Interest Rate

The guaranteed interest rate is 3½% per year compounded annually. This rate applies to funds held under Options 1, 2 and 3 and under Option 4 during any fixed period. As to these funds, Ætna will allow such excess interest as it may declare each year. As to Option 1, Ætna may from time to time offer higher interest rates with certain conditions on withdrawal as are then published by Ætna.

Preferred Option

An election of Option 4 or 5 may specify "Annuity Option" 4 or 5. If that is done and if the guaranteed payments are less than those of a preferred annuity on the same plan, the larger amounts will be paid instead. But in that case no excess interest will be paid. A preferred annuity is an annuity which could be purchased from Ætna by the proceeds at a reduced single premium rate. That rate will be Ætna's base premium rate on the due date of the first payment, adjusted for immediate first payment, less a percentage. The percentage will be that which is then provided by Ætna's published rules.

Purchase of Additional Income

Additional income may be purchased when the proceeds are applied to these options upon the death of the Insured. If this policy is part of a retirement plan, such a purchase may be made when proceeds of the policy are so applied at other times as well. But in that case, the plan must be one which qualifies for favored federal income tax treatment. Each purchase must be made no later than 120 days after the date as of which the proceeds are so applied.

The amount which Ætna accepts for this purpose will become part of the proceeds. But Ætna will first deduct the amount of any premium tax which may be payable. In each case, the purchase will be subject to Ætna's then published limits as to amount.

Conditions

An election shall be made by written request filed with Ætna or by the exchange of this policy for a contract which covers the election. Ætna may require such an exchange before payments are made. If no election has been made when the payee becomes entitled to proceeds, the payee may make the election.

Payments will be made at intervals of 1, 3, 6 or 12 months in equal amounts as elected. Rates for ages and intervals not shown will be furnished upon request.

These options will be allowed only with the consent of Ætna (1) if the payee is other than a natural person receiving payments in his or her own right; (2) if the payee is an assignee of the policy; or (3) if payments would be less than $25 each or less than $120 in a year.

Withdrawal and Death of Payee

As to funds held under Options 1, 2 and 3, withdrawals and changes of option may be made if the payee makes the election or if the election so permits. No withdrawals or changes of option may be made under Options 4 and 5. Upon the death of the payee, the value of any guaranteed payments not yet paid will be paid in one sum to the estate of the payee, unless the election states otherwise.

Withdrawal values and death values will be discounted at the guaranteed interest rate. However, for preferred options, such values will be discounted at the rate provided by Ætna's published rules.

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AMENDMENT TO SETTLEMENT OPTIONS

Tables for Options 4 and 5 are based on the Annuity Table for 1949 for males, set back one year for males and six years for females, with interest at the rate of 3½% per year, compounded annually.

The following is made part of and completes the table shown in the policy for Option 4:

MONTHLY LIFE INCOME PER $1,000 PROCEEDS											
AGE NEAREST BIRTHDAY		WITH FIXED PERIOD			WITHOUT FIXED PERIOD	AGE NEAREST BIRTHDAY		WITH FIXED PERIOD			WITHOUT FIXED PERIOD
MALE	FEMALE	10 YRS.	15 YRS.	20 YRS.		MALE	FEMALE	10 YRS.	15 YRS.	20 YRS.	
6 and under	11 and under	$3.21	$3.21	$3.21	$3.22	33	38	$3.84	$3.82	$3.80	$3.85
7	12	3.23	3.22	3.22	3.23	34	39	3.88	3.86	3.84	3.89
8	13	3.24	3.24	3.23	3.24	35	40	3.92	3.91	3.88	3.93
9	14	3.25	3.25	3.25	3.25	36	41	3.97	3.95	3.92	3.98
10	15	3.27	3.26	3.26	3.27	37	42	4.02	3.99	3.96	4.03
11	16	3.28	3.28	3.27	3.28	38	43	4.07	4.04	4.00	4.08
12	17	3.30	3.29	3.29	3.30	39	44	4.12	4.09	4.05	4.14
13	18	3.31	3.31	3.30	3.31	40	45	4.17	4.14	4.09	4.19
14	19	3.33	3.33	3.32	3.33	41	46	4.23	4.20	4.14	4.26
15	20	3.35	3.34	3.34	3.35	42	47	4.29	4.25	4.19	4.32
16	21	3.36	3.36	3.36	3.37	43	48	4.36	4.31	4.24	4.39
17	22	3.38	3.38	3.37	3.39	44	49	4.42	4.37	4.29	4.46
18	23	3.40	3.40	3.39	3.41	45	50	4.49	4.43	4.34	4.54
19	24	3.42	3.42	3.41	3.43	46	51	4.57	4.50	4.40	4.62
20	25	3.44	3.44	3.43	3.45	47	52	4.64	4.56	4.45	4.70
21	26	3.47	3.46	3.46	3.47	48	53	4.72	4.63	4.51	4.79
22	27	3.49	3.49	3.48	3.50	49	54	4.80	4.70	4.56	4.88
23	28	3.52	3.51	3.50	3.52	50	55	4.89	4.77	4.62	4.98
24	29	3.54	3.54	3.53	3.55	51	56	4.98	4.85	4.68	5.08
25	30	3.57	3.56	3.55	3.57	52	57	5.07	4.93	4.74	5.18
26	31	3.60	3.59	3.58	3.60	53	58	5.17	5.01	4.80	5.30
27	32	3.63	3.62	3.61	3.63	54	59	5.27	5.09	4.86	5.41
28	33	3.66	3.65	3.64	3.66	55	60	5.37	5.17	4.92	5.54
29	34	3.69	3.68	3.67	3.70	56	61	5.48	5.26	4.98	5.67
30	35	3.72	3.71	3.70	3.73	57	62	5.59	5.35	5.04	5.80
31	36	3.76	3.75	3.73	3.77	58	63	5.71	5.44	5.10	5.95
32	37	3.80	3.79	3.77	3.81	59	64	5.83	5.53	5.16	6.10

ÆTNA LIFE INSURANCE AND ANNUITY COMPANY

Louise L. McCormick

Secretary

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MONTHLY EXPENSE CHARGE RIDER

Each monthly deduction shall be increased by the Monthly Expense Charge shown on page 2. This charge will not apply on any monthly deduction day when the Specified Amount is $100,000 or more.

Ætna Life Insurance and Annuity Company

Louise L. McCormick
Secretary

AETNA LIFE INSURANCE AND ANNUITY COMPANY
Hartford, Connecticut 06156

APPLICATION SUPPLEMENT

Policy Number U1070058
or
Contract Number

Name HELEN R HANKS

Date of Application NOVEMBER 15, 1983

Agency DA2

Ætna is authorized to amend the application as follows: The answers to the question(s) below should read as follows:

10A,B,C ALL NO.

11,12,13 ALL NO.

I hereby accept the above policy (or annuity contract) based upon the amended application.

Signed at _____ on _____
(City, State) (Mo.-Day-Yr.)

X _____ X _____
Witness Signature of Proposed Insured

X _____
Signature of Applicant (if other than Proposed Insured). If corporation or partnership, an officer or partner other than proposed insured must sign and state title.

Both signatures required if Applicant and Proposed Insured are different persons, unless Proposed Insured is under age 15.

38215-A

☐ ÆTNA LIFE INSURANCE COMPANY ☒ ÆTNA LIFE INSURANCE AND ANNUITY COMPANY
Hartford, Connecticut 06156

LIFE INSURANCE APPLICATION

[redacted]

4. Policy Information (Describe as in Manual) ☒ Non-Participating ☐ Participating Amount
   a. Basic Plan: Aeconoflex E Option I $ 50,000
   b. Waiver of Premium ☐ YES ☒ NO Accidental Death ☐ YES ☒ NO $
   c. Other Benefits $
   d. Make Automatic Premium Loan Provision operative, if available. ☒ YES ☐ NO
   e. If Participating, Dividend Option: ☐ Pay in Cash ☐ Reduce Prem. ☐ Paid-Up Ins. ☐ Accumulated ☐ Other

5. a. Beneficiary (Name and Relationship to Proposed Insured):

[redacted]

   equally, or, if none survives, to contingent beneficiaries who survive, equally, or if none survives, to Insured's estate.
   b. Policyowner The Applicant Unless otherwise requested, Applicant is to be Policyowner.

6. Will life insurance or annuity in any company be replaced or modified if insurance applied for is issued?

[redacted]

8. Have you smoked any cigarettes within the past 12 months?
9. Have you consulted a physician within 3 years?

10. Have you ever had or been treated for:
    a. Heart or lung disease, stroke or high blood pressure?
    b. Cancer, diabetes, mental illness or any disease of the brain or nervous system?
    c. Alcohol or drug use or any disease of the stomach, intestines, liver or kidneys?
11. Have you, within 5 years, had insurance either refused or offered only with an extra premium?
12. Have you, within 2 years, flown as a pilot or engaged in vehicular racing, hang gliding or sky or scuba diving? (If yes, submit aviation or avocations supplement.)
13. Have you, within 3 years, had motor vehicle moving violations or license suspended?

If any YES answers give details in No. 14 to include dates, reasons, diagnoses, and physicians' names and addresses.

14. ADDITIONAL INFORMATION (Refer to specific question number)

[redacted]

IT IS MUTUALLY AGREED THAT:

1) The statements and answers in this application are complete and true to the best of my knowledge and belief.
2) If a payment is made with this application or a Salary Deduction Authorization signed, Temporary Insurance begins on the LATER of the following dates: (a) The date of this application, (b) The date of the last medical examination initially required by age and amount. Temporary Insurance ends on the EARLIEST of the following dates: (a) 60 days from the date insurance begins, (b) The date insurance begins on the policy applied for, (c) The date the Company notifies the applicant that the application is declined. (Five days after mailing will be considered effective notice.)
3) No agent may alter the terms of the application or the policy or waive any of the Company's rights or requirements.

Signed at Palestine, Texas (City, State) on (Mo.-Day-Yr.) 11-15-83

I certify that I have accurately recorded on the application the information supplied by the proposed insured.
X [signature]
Signature of Agent

X Helen R. Hanks
Signature of Proposed Insured
X
Signature of Applicant (if other than Proposed Insured)

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EXHIBIT 4

PLAN OF ALLOCATION[1]

1. Each Settlement Class Member who is the current or most recent owner of a policy according to Voya's and Lincoln's records ("Recipient") shall be issued a check for that policy equal to the Recipient's pro-rata share of the remaining Net Settlement Fund after payment of any attorneys' fees, costs, and incentive award approved by the Court. No claim form or claims process will be used.

2. Each Recipient's pro-rata share of the Net Settlement Fund shall be computed as follows:

    a. First, each Recipient's alleged damages shall be the sum of the Recipient's alleged COI Overcharge as a result of the 2016 COI Increase.

        i. Each Recipient's alleged COI Overcharge shall be determined in accordance with the methodology set forth in paragraphs ¶¶ 23–31 of the March 1, 2018 Expert Report of Robert Mills, which determines the COI Overcharge for a Policy as the difference between the COI charges Voya and Lincoln actually assessed on the Policy since June 1, 2016 and the COI charges that would have been deducted from the policy accounts but-for the 2016 COI Increase. The data used for this analysis is current through May 31, 2021. *See* December 23, 2021 Declaration of Robert Mills ¶ 4.

    b. Second, divide each Recipient's alleged damages by the total alleged damages for all Recipients.

    c. Third, multiply the resultant percentage for each Recipient by the Net Settlement Fund.

3. If a Settlement Class Member would receive multiple checks pursuant to paragraphs 1–2 above, such checks may be consolidated into a single check.

4. Proceeds will be mailed within 30 days after the Final Settlement Date.

5. Within one year plus 30 days after the date the Settlement Administrator mails the first Settlement Fund Payments, any funds remaining in the Settlement Fund shall be redistributed on a *pro rata* basis to Settlement Class Members who previously cashed the checks they received, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair. All costs associated with the disposition of residual funds – whether through additional distributions to Settlement Class Members and/or through an alternative plan approved by the Court – shall be borne solely by the Settlement Fund.

6. The plan of allocation may be modified upon further order of the Court.

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[1] Unless otherwise noted, all Capitalized Terms mean the same as in the Settlement Agreement, which is attached as Exhibit 2 to the Declaration of Seth Ard.

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

HELEN HANKS, on behalf of herself and all others similarly situated,

Plaintiffs,

v. 16 Civ. 6399 (PKC)

VOYA RETIREMENT INSURANCE AND ANNUITY COMPANY, formerly known as Aetna Life Insurance and Annuity Company,

Conference

Defendant.

----------x

New York, N.Y.
May 12, 2021
12:40 p.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

SUSMAN GODFREY LLP
Attorneys for Plaintiffs
BY: STEVEN G. SKLAVER
NICHOLAS N. SPEAR
SETH D. ARD

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
Attorneys for Defendant
BY: MOTTY SHULMAN
ROBIN HENRY
GLENN L. RADECKI

BOIES, SCHILLER FLEXNER LLP
Attorneys for Defendant
BY: JOHN F. LA SALLE, III

(In open court)

THE DEPUTY CLERK: This is the case of Helen Hanks v. Voya Retirement Insurance and Annuity Company.

For the plaintiff?

MR. SKLAVER: Good afternoon, your Honor. Steven Sklaver of Susman Godfrey for the plaintiff and the class.

THE COURT: Good afternoon.

And also appearing?

MR. ARD: Good afternoon, your Honor. Seth Ard from Susman Godfrey for the plaintiff and the class.

MR. SPEAR: Good afternoon, your Honor. Nick Spear from Susman Godfrey for the plaintiff and the class.

THE COURT: Good afternoon to all of you.

And for the defendant, Voya?

MR. SHULMAN: Good afternoon, your Honor. Motty Shulman with Fried, Frank for Voya.

MS. HENRY: Robin Henry, also from Fried, Frank, also for Voya.

MR. LA SALLE: John La Salle, Boies Schiller Flexner for defendant Voya.

THE COURT: Good afternoon to you all.

I have spent time visiting with the final pretrial submissions, the *in limine* motions, the joint pretrial order. The case, of course, is now down to the following: The argument that the COI rate was adjusted on other than estimates

for future cost factors, such as mortality, investment income, expenses, and the length of time policies stay in force. The policy language has been argued to be unambiguous. The Court concludes it's unambiguous. The estimates for future cost factors is followed by the term "such as," these are examples, it's nonexclusive. Mortality, investment income, expenses, and the length of time policies stay in force are included among proper items to be included in an estimate for future cost factors, but they're not exhaustive.

A lot of time is spent in the *in limine* motions on issues that should be self-evident. No expert in this case is going to be able to take the witness stand and opine on the meaning of the contract, the construction of the contract. That will not happen.

There is a question with regard to custom and usage under Texas law. And under Texas law, as under the law in many jurisdictions, custom and usage, trade usage can be used not to alter or vary the terms of a contract, but to shed light on how a particular term is used in a particular industry. And I may wind up spending much of my time sustaining objections where experts depart from that very limited role.

So let me begin with the plaintiffs' *in limine* motions. The first one relates to the guaranteed maximum cost of insurance rate provision in the policy and urges exclusion or reference to the guaranteed maximum COI rate. Are the

parties content to rest on their submissions on that?

MR. SPEAR: Yes, your Honor.

MR. SHULMAN: Yes, your Honor.

THE COURT: It seems to me that reference to the guaranteed maximum COI rate provides helpful context, background to the jurors on damages and calculation and on liability. Prejudice from having the jury become aware of this is low. It's right in the policy. Of course, no one may argue that the insurer had the right to bump up to the guaranteed maximum COI rate, that that in essence is, by definition, the lawful rate one may charge. That's not what the policy says. And if there is argument to that effect, the Court will shut it down.

Next, expert testimony on legal interpretation of the policy. I've intimated where I'm going to come out on that. Anything further from the plaintiffs?

MR. SPEAR: No, your Honor.

THE COURT: From the defendants?

MR. SHULMAN: No, your Honor.

THE COURT: So the plaintiffs' motion, as well as the defendant's third motion *in limine*, which seeks to have the plaintiffs' actuarial expert precluded from giving legal interpretations, both of those are granted; the plaintiffs' second and the defendant's third motion *in limine*.

Next, evidence that the state regulators did not

disapprove of COI increases, and plaintiff argues that the fact that no state regulator other than arguably the New York Department of Financial Services challenged the 2016 COI increase is probative of nothing. The defendant urges that or has no issue with that being excluded, except it argues, therefore, that no reference should be made to the New York State Department of Financial Services' investigation. Certainly, evidence of regulatory inaction in response to the 2016 COI increase is probative of nothing and is excluded on grounds of relevance. It doesn't directly address whether the defendants breached the policy. And I'll discuss the New York State Department of Financial Services' investigation a little bit later in discussing the second motion *in limine* by defendants.

The fourth motion raised by the plaintiffs relates to speculative effects of defendants complying with the terms of a policy, if found liable. Anything further from the plaintiff?

MR. SPEAR: No, your Honor.

THE COURT: From the defendant?

MR. SHULMAN: No, your Honor.

THE COURT: Certainly, defendants ought to be and are precluded -- and I don't understand that they intended to argue -- but they are precluded from arguing that a finding of damages would affect defendant's financial condition, period. That's not a relevant consideration. And that argument will be

precluded. So to that extent, I'm granting the motion. It's sort of moot because I don't understand the defendants will be offering such arguments. In general, just as the plaintiffs, to some extent, can stand up before a jury and say, this cost of insurance provision protects my clients from being overcharged, there's nothing wrong in general with the defendants saying that provision enables my client to pay death benefits. They're the flip side of the same coin. And if it's an argument, in essence, for jury nullification because a judgment would hurt the defendant, that's precluded. But other type of argument I'll take up on a case-by-case basis.

The fifth argument, the fifth motion by defendant refers to dismissed parties' claims -- I'm sorry, this is the plaintiffs' fifth motion regarding dismissed parties claims, theories, or discovery orders. And the defendant doesn't oppose the motion. It only argues that if the Court admits evidence regarding the New York inquiry, that the defendants would then seek to introduce evidence on the claim basis and uniform basis theories that have been dismissed from the case. Well, I'll say right up front that both sides are precluded from referring to dismissed claims, parties, and theories. When I say "dismissed parties," the name Lincoln Life undoubtedly will come up, Aetna will come up, that's not what I'm referring to. I'm talking about a reference to the fact that an entity was a party to this litigation but is no longer

or a claim was asserted in the case but the judge tossed it out. That's absolutely precluded.

Plaintiff has moved *in limine* to preclude argument regarding the engagement and fee arrangement with counsel, as well as plaintiffs' counsel's motivation for filing the litigation. Certainly, that is not probative of any issue in this case. Now, I understand the defendants want to cross-examine plaintiff Hanks and the fact that she showed the policy to her son-in-law. I don't know of what relevance her showing it to her son-in-law is or her son-in-law showing it to a plaintiff's lawyer. I'm just not going to rule on the scope of cross-examination at this juncture. So the motion is granted. And if on cross-examination there is something in the testimony that suggests that you should be allowed to cross-examine, I will hear you and rule at that time.

Now, before we get to the damage *in limines*, I've looked at the defendant's *in limine* motions on issues other than the experts, and it's sort of the flip side of the argument that the plaintiffs advanced about raising the fact that theories were dismissed in this case. Plaintiff correctly states that just because a theory of liability is out of the case, it doesn't mean that there couldn't be evidence that would have related to one or the other theory, dismissed theory, the class basis theory, the uniform basis theory that might otherwise be relevant in this case. That's fine.

Anybody who thinks that you're going to blow it past me trying to argue your case to the jury on the basis of a dismissed theory of liability hasn't spent much time in my courtroom. That won't be happening, and no one should worry about that. Particularly in a civil case, I'm not at all shy to stop in the middle of an examination of a witness or an argument or presentation by counsel and make it plain to the jury what is and is not in the case before them. And I will not hesitate to do so.

Now, with regard to the New York State investigation, let me hear from the defendant.

MR. SHULMAN: Thank you, your Honor. This case has nothing to do with New York. None of the policyholders in this case are in New York. None of the class members are in New York. New York has no jurisdiction over the policies that are in this case. It has nothing to do with New York. The issues raised by the New York DFS were related to several issues, some of which your Honor in his order on the motion for summary judgment expressly found had nothing to do with the contract. For example, the New York DFS was making arguments under New York regulations relating to class basis. Your Honor found that the class basis claim that plaintiffs made, which mirrored the DFS claim, was inconsistent with the contract. So injecting New York into this case, apart from the toxicity associated with a regulator looking at this which is highly

prejudicial, will also bring in all of those elements of the case that your Honor has found are not appropriate for this case, namely class basis. It's hard, if not impossible, to pull those two apart. And almost all of the evidence -- and we haven't seen anything that plaintiffs have presented -- is available in other documents with the other witnesses. So New York over here is, A, not relevant; B, highly prejudicial. And the evidence that they want to bring in about profitability or cost factors is available through other means.

THE COURT: Let me hear from the plaintiff.

MR. SPEAR: Your Honor, a couple of responsive points. First, we are not, as your Honor said, seeking to bring in NYDFS evidence that relates to dismissed claims. So to the extent NYDFS comments on class basis, we understand that's out, and we have no intention of bringing it in. Second, we're not seeking to bring in NYDFS's legal conclusions. For the same reason that the regulatory inaction statement is out, we understand that we should not be bringing in the fact that NYDFS thought certain things, we understand that.

But there's a number of relevances to the NYDFS evidence outside of those. First, there's a number of statements by Voya. These are party communications that Voya made describing specific aspects of the increase; what they did, why they did it. One thing that's relevant. Second thing that's relevant or second point on that, Voya's counsel said

it's impossible to disentangle these things, but Judge McMahon did exactly this in *US Bank*. And what Judge McMahon did was a document-by-document analysis. Every party communication from the insurer she let in, she found them not prejudicial and probative. And for the insurer communications, she reviewed them document by document. And for the documents that she found either didn't have hearsay or didn't have legal conclusions, she let them in. For the documents that had a mix, she tried to either redact or use a limiting instruction. And then for a few, she found they were so overwhelmingly filled with legal conclusions, she excluded them. That's exactly the analysis the Court should do here. And a problem for defendants with that analysis is they don't, until their reply brief, even analyze a specific document. They talk all in generalities. So our position is that this should be left to trial. We can do it on a document-by-document issue, and we're happy to walk through that at the appropriate time. But there's been no briefing on that, other than some statements in reply.

And then the final point is for defendant's damages model -- our damages model, we say it's the overcharge that resulted from the increase. Defendant says, no, no, no, it should be what Voya would have done --

THE COURT: Well, we're going to get to that. We're going to get to that.

MR. SPEAR: So I'll just leave it and say that we think it's probative in that aspect too. So we would ask the Court to look at a document-by-document analysis, we explain why the few we identify are relevant. Otherwise, these issues should all be available.

MR. SHULMAN: On the document-by-document analysis issue, your Honor, I believe there are some documents that are very straightforward and can be ruled on on a document-by-document basis. However, here is the concern with some of the documents. The New York DFS comes back to Voya and says, we want you to do a following analysis, an analysis that looks at this increase on a class basis and using a different pricing model than Voya. And they go ahead and they prepare that analysis and they send it back to the DFS. That analysis has two different things that are separate. One is the class basis, and one is whether it was profitable more than plaintiffs say we're allowed, less than plaintiffs say we're allowed. But once we start looking at analyses relating to the DFS that have that class basis analysis in it, we've crossed the line that can have a series of cascading events that will bring in all those other things that your Honor just ruled has to stay out of this case.

THE COURT: Listen, I don't do well with the horror scenario, oh, my goodness, okay. This seems to me a question of both sides deciding to deal with this as adults or not deal

with it as adults. You might say, it's easier not to deal with it, we'll throw it at the judge. I don't think you want to do that. The fact of the matter is, statements by Voya to NYDFS are potentially party admissions, party statements that come into evidence if they're relevant. If they disclose more than is needed for the point of the party's statement about the investigation, then that should be redacted out. And the redaction should be worked out between counsel ahead of time, in terms of what you want to redact out.

Now, what I'm not going to do is allow into evidence evidence that is not probative of the single question before this jury but sounds like it has something to do with it. If you're being asked a question by the regulator on a different subject and responding on a different subject, it's likely that that will have nothing of probative value in it. I can't assess that wholesale, except in the context. But you -- not the junior member of your teams -- but the trial counsel are going to be spending a lot of time on working out those redactions, okay.

Let me talk about Christopher Hause. There are a number of issues, and I have spoken about some of them. One of them is that you could read Hause's testimony as suggesting that there are actuarial principles that have been violated and that standing alone is a breach of the policy. That will not be permitted. We're dealing with the contract, not with

actuarial principles. Actuarial principles may have relevance to the evidence in this case, so that's the case, and it may explain why something is or is not properly a future estimate of cost. So that testimony has to come out before I can rule on it, what exactly it is that Hause is proposing to say. But if he is endeavoring to lay on a layer or a standard different from that which is in the contract, that's not going to be allowed.

And that's true also with custom and practice. Simply sitting back in the chair and saying nobody includes this in their COI rates doesn't address what this contract provides. And he's not going to be allowed to do that. If there is something in the custom and usage and practice that does not vary or modify but enlightens how the words are used in the industry, that's a different story. And of course, he's not going to be permitted to testify on his opinion of whether Voya did or did not comply with its contractual obligations.

I'm not going to at this stage rule upon what Hause may or may not say based on reinsurance issues. It depends on -- I have to hear his expertise and his experience, and I will, so that I'm reserving on.

With regard to plaintiffs' three motions related to damages, the first relates to the substitution of David Babbel with Craig Merrill. And I don't mean to be unfair to anybody here, but it looks to me that there is a distortion of what the

purpose and meaning of an expert report is. An expert report is a disclosure device. It's a disclosure requirement to put someone on fair notice of an expert's opinion on a subject and the basis for the opinion. A variation or explanation in a deposition does not mean that that which was testified to in the deposition, including out-of-pocket damage theory, is off limits. If anything, you learned about it in the deposition, you got to cross-examine him. So I don't see where the prejudice flows. And I am not going to preclude Merrill in that regard. I also understand that the parties proposed to supplement their damage data, including updating their expert reports on damages. So maybe there's some other remedy the plaintiff could seek, but I'm not precluding the testimony.

Now, very interesting issue is hypothetical alternative cost of insurance increases. And I'm not really sure I know what the defendant is arguing. Certainly, if a future estimate is made on what is a valid cost factor and the estimate is too high, it does not mean that it is therefore replaced by the number zero. That makes no sense. Measure of damages is between, as I understand Texas law, what a party bargained for and what they got. And if the increase was too high, it doesn't mean that a lower increase would have been appropriate or if the estimate was too high, it doesn't mean that a lower estimate wouldn't have been appropriate. Where I am less certain is whether the defendants are suggesting in

this case that they should be able to come up with new areas of costs, new items that were not contemplated at the time and say, well, if we go back and we were going to do this all over again, these people left out A, B, C, and D, and so I want to create a hypothetical universe that now allocates costs to A, B, C, and D. If that's permissible under Texas law, somebody has to demonstrate that to me. So what is the defendant arguing here?

MS. HENRY: Robin Henry, your Honor.

THE COURT: Yes.

MS. HENRY: What we are arguing, your Honor, is not a setoff, which I think is the way the plaintiffs has characterized it. But rather, we are arguing that there is a causation element on which the plaintiffs bear the burden of proof. They have to prove that some cost factor was improperly considered and therefore caused damage to their clients.

THE COURT: Can't they also show that a cost factor was properly considered but at an inflated amount?

MS. HENRY: I don't think that that's the argument that's being made, your Honor. What we're talking about here --

THE COURT: Let me pause on it because it would be helpful to me. Is it correct that that's not part of what you're arguing?

MR. SKLAVER: Well, your Honor, our argument is

consistent with the summary judgment order that the COI increase imposed by Voya is based on Lincoln's profitability goals. So its profitability is what's at issue, not cost factors. What's happening here is the defendant is arguing, let's imagine this hypothetical world where reinsurance, which is one example, which is a pure profit grab for Lincoln -- remember, Lincoln is the reinsurer, they did this increase to impact their reinsurance margins. It's the reinsurance company's reinsurance money that they're trying to get from the class. And our argument is that that's a profitability goal for which there is a breach. The defendant's argument is there's some hypothetical world where let's take out that reinsurance --

THE COURT: Hang on a second, now. You have read my summary judgment decision and you've been around the block. You understand that costs and profits are interrelated, no?

MR. SKLAVER: The summary judgment order does say, of course, that --

THE COURT: I know it says it. But you don't buy that? You don't agree with that?

MR. SKLAVER: I'm not disagreeing with your statement.

THE COURT: You agree with it?

MR. SKLAVER: Sure.

THE COURT: So if somebody says, this is outrageous, our profits are going to zero because our costs have gone up

and we haven't adjusted the rates, is that a bad thing to say? Is that a breach? Is that a bad, impure thought?

MR. SKLAVER: Well, that's not the issue in this case. The issue in this case is that reinsurance is a profit center, not a cost, right, it's pure profit that the reinsurer is trying to recapture from members of the class. And so the --

THE COURT: Wait. Let's just make this plain, because it's being thrown around in different respects. So Lincoln Life, are you characterizing it as a reinsurer of Voya? Is that what you're characterizing it as?

MR. SKLAVER: Yes, they are the hundred percent indemnity reinsurer of Voya.

THE COURT: You're not talking about Lincoln Life, then, laying off the risk to other reinsurers, that's not what you're referring to?

MR. SKLAVER: Well, I'm also referring to that.

THE COURT: All right. So you're maintaining that when a premium is ceded to a reinsurer, that's not a cost?

MR. SKLAVER: So it depends on which reinsurer we're referring to. When Lincoln engaged in a reinsurance transaction for this block, it was a profit center for Lincoln. And they anticipated that there would be -- they wanted to make more money off of that profit center in order to recover losses that they were suffering based on the 1998 transaction in which they became the reinsurer.

THE COURT: You just have to help me out here. And I suspect this may be important in this case, so it's worth taking a minute or two. Let's refer to Lincoln Life as Lincoln Life. I understand the argument that the nature of the agreement between Voya and Lincoln Life has maybe a reinsurance transaction or not, but let's just call it Lincoln Life.

When Lincoln Life cedes risk to a reinsurer, with that risk it cedes some of the premium that it would otherwise collect; right?

MR. SKLAVER: It can pay money. I don't know if it's directly --

THE COURT: Pay money, that's perfect. Pay money to the reinsurer, who then takes on this risk. I agree. That's a good way to put it, better way to put it, in fact; right? That's what happens?

MR. SKLAVER: Okay.

THE COURT: Is that not a cost?

MR. SKLAVER: Well, it's not a -- first of all, is that a cost? There is a debate about whether or not that is a cost, actually. There are some carriers that don't consider reinsurance to be an expense; they consider it some other factor.

Here, just to lay out -- because it does matter Lincoln's role -- they paid Voya a billion dollars to get all of the flow of premium of this block of policies and other

policies. They also took over the obligation to pay the death benefits. So that's why they're the hundred percent indemnity reinsurer. Lincoln lays off some of that risk, as the Court has explained, to another reinsurer. And that whole transaction has ruined, they claim, the profitability that was expected of the transaction in 1998 when they paid a billion dollars. And so they are comparing some of those issues now, as it's all part of the profitability goals to make more money off the 1998 transaction than they are now. And what happens is Mr. Pfeiffer, in his report -- and that's how we got to this motion -- imagines a but-for world where reinsurance is taken out of the entire equation back in 2016 and starts opining on what that would look like for the COI increase. It's not a liability issue; it's a damages issue. And Professor Babbel even has a chart -- we put a picture of it in our brief -- where he says, well, if you include reinsurance or other factors, then damages should go down by 5 percent, 10 percent, 15 percent, goes all the way up to 30 percent in 5 percent increments. And as Judge McMahon held in the *US Bank v. PHL* case, that's not an appropriate approach for an expert because it's made up out of thin air. You have to prove that at the time, under consideration for the COI increase, there was actual evidence of this modeling that took out this impermissible factor.

THE COURT: Wait a minute. You are suggesting that at

the time, what, the policy was written and the COI increase provision was written that you look at that moment in time, and what the costs were then are the only costs that can be considered at a later point in time; is that your position?

MR. SKLAVER: One of our positions is the baseline comparison, when you look at costs or profitability, it's what happened when the policies were sold to the members of the class. The contract was entered into, let's say for Mrs. Hanks, in 1984. So you don't look at some fancy transaction that happened with a stranger company in 1998 to figure out what the appropriate costs and profits are. So to put it in concrete terms, Voya now is making more in profit, after the COI increase, than they were projecting to make at sale in 1984 and even in 1998 with the indemnity reinsurance transaction. So whether or not it's a cost or a profit, the spread, the projected profit is much higher than at issuance or in 1998. And that's what the claim is that survived on summary judgment. And on the issue of damages, this hypothetical, what would have happened based on some theory that there's no evidence of is what should be excluded. And in fact, the defendant concedes that. They say they're not -- I mean, their lawyers, in the briefing say, we are not seeking an offset and we are not going to submit evidence of a hypothetical redetermination. But their experts do just that. And that's why the motion should be granted.

THE COURT: Well, we're going to unpack this, okay. When were the policies first issued?

MR. SKLAVER: Roughly between, I believe, 1983 through, I think, 2000. There's over 45,000 policies in the class, but that's roughly the --

THE COURT: What's the starting year?

MR. SKLAVER: 1983.

THE COURT: So only future costs that were considered in 1983 may be considered or only future costs that were considered as late as 2001 may be considered in your view of the world?

MR. SKLAVER: Well, it's in view of the summary judgment order as well, right. The summary judgment order -- can I quote from the summary judgment order?

THE COURT: Sure.

MR. SKLAVER: So --

THE COURT: Maybe I screwed up.

MR. SKLAVER: "But the Court finds genuine disputes of material fact as to Hanks' contention that the 2016 COI adjustment was calculated based upon impermissible profit factors. This, Hanks alleges" -- and this is on Page 23 to 24 of the order -- "This, Hanks alleges, was done in order to remedy Lincoln Life's disappointing returns from the 1998 reinsurance indemnity transaction. Hanks further asserts that the rationale underlying the 2016 COI adjustment was profit

driven, failing to consider actual costs of insurance and resulted in profits at a level exceeding that anticipated when the class policies were originally sold."

THE COURT: That was your position?

MR. SKLAVER: Yes.

THE COURT: Did I accurately summarize it in my decision?

MR. SKLAVER: Yes.

THE COURT: So what are you saying I ruled?

MR. SKLAVER: On Page 23, "But the Court finds genuine disputes of material fact as to Hanks' contention that the 2016 COI adjustment was calculated based on impermissible profit factors. This, Hanks alleges, was done in order to remedy Lincoln Life's disappointing returns from the 1998 reinsurance indemnity transaction. Hanks further asserts that the rationale" -- so then it goes through our position -- and then the Court says, "COI rates adjustments may only be based on estimates of future cost factors."

THE COURT: Now you are getting to my ruling, so go ahead.

MR. SKLAVER: "Which can include, but are not limited to, mortality, investment income, expenses, and the length of time policies stay in force. Accordingly, the rate increase embodied in the 2016 COI adjustment should have been based on increase in the costs associated with the in force policies.

Implementing an increase in the COI rate in order to raise profits without an analysis of relevant cost factors would violate the terms of the policy. However, costs fundamentally have an affect on profits which, generally speaking, are a measure of revenues minus costs. Consideration of spiraling costs is appropriate. And these rising costs may also be reflected in a deteriorating profit margin. Here, an issue of material fact remains as to whether the 2016 COI adjustment was based on analysis of cost factors related to the in force policies, as mandated by the terms of the policy, or was based on Lincoln Life's profitability goals. Hanks puts forth evidence and expert opinions supporting its position that the 2016 COI adjustment was based not on an evaluation of future cost factors but was implemented on the basis of improper considerations with the aim of increasing anticipated future profitability." And then there's a long string cite of the evidence.

THE COURT: I have it here. Do you want me to read the string cite or what do you want to do? Go ahead.

MR. SKLAVER: No, your Honor. So the point is that this all goes to the issue of liability. The motion *in limine* here at issue has to do with damages. And the question on the motion *in limine* is, a hypothetical COI increase that Voya contends complies with the contract and is not improperly based on Lincoln Life's profitability goals, is that a defense to

damages. And the answer is no, because there is no evidence, nothing in the record that any of this was considered in 2016. And under the *US Bank* case, that means it should be excluded because it's hypothetical. That's it. This is a damages issue. And they have no evidence of the but-for world being ever considered by Voya.

THE COURT: I'm not sure I understand your argument, but let me give the defendant an opportunity to respond.

MS. HENRY: Thank you, your Honor.

So I'd like to start with the question your Honor posed or the framework that your Honor posed, which is reflected in your Honor's summary judgment ruling. If Voya determined that its profits were going to zero because costs were going up, is that bad? Is that an inherently bad thing? And I think that Mr. Sklaver said that is not what this case is about. That's exactly what this case is about. That's exactly what happened. And what we're talking about here in respect of this motion and damages -- I'm sorry, your Honor, with the masks.

THE COURT: Take your time.

MS. HENRY: -- is not a hypothetical but-for world. It is exactly what was considered at the time of the analysis in 2016. In 2016, the evidence is clear that what was considered, among other things, was a deterioration in investment income and reinsurance costs. And that is exactly

what was told to Ms. Hanks and the other policyholders. That is what the internal analysis will show, does show. There's been inordinate amounts of testimony about this. That is what the evidence at trial will show.

THE COURT: Well, let me pause. Do you contend that those were impermissible future costs on which to base an increase, the deterioration in investment income? I don't know anything. I don't know whether there was or there wasn't or whether that was a lie or not. But I'm asking, is a deterioration in investment income and increased costs of reinsurance, meaning reinsurance secured by Lincoln Life laying off the risk, improper cost considerations?

MR. SKLAVER: The answer is yes, due to how the COI increase was implemented and adopted. So let me explain it very simply, I hope. Let's say, in 2004, when the policy was sold, using those cost factors, Voya had a projection of profits of X. In 1998, when Lincoln did the transaction, they had a projected profit factor of Y. The COI increase using these factors came out with a profit projection of Z. Z is greater than both Y and X, and Z is the profit. And our claim is that that is an improper profit consideration. They didn't just move the numbers appropriately. They padded it to --

THE COURT: No, I got it. Padding sounds to me like it's likely actionable. So I'm not arguing about padding.

I'm arguing is deterioration in investment income

properly documented and properly considered? Can it be properly considered as a future cost estimate?

MR. SKLAVER: As a theoretical matter, yes.

THE COURT: All right. Well, this is helpful. And I'm totally open minded. I have no idea. They may have lied or exaggerated or inflated. And that's what I understand we're having a trial about. So I don't have a problem with you endeavoring to prove that their future estimates were not good-faith future estimates, they were something else.

And the same way with the cost of reinsurance. Do you dispute that increases in the future costs of or estimates of future costs of reinsurance are -- if done in good faith and not inflated -- a proper consideration?

MR. SKLAVER: Depends on the contract and the terms, it can be. Theoretically, it could be. But it was not done here, and that's the disputed question.

THE COURT: And it was not done here on a good-faith, noninflated basis is what you're saying?

MR. SKLAVER: That's one argument, yes.

THE COURT: So far, that sounds like an appropriate theory to pursue at trial. I don't have a problem with that.

Go ahead.

MS. HENRY: And your Honor, in respect of damages, what we are saying is that if the plaintiff wants to pursue the argument that reinsurance, although it's proper under the

contract, was in effect not done properly here -- which we obviously dispute -- but if that's an argument they want to pursue, but what the jury ultimately determines is that consideration of investment income which justifies 95 percent of the cost of insurance increase was proper, but the reinsurance which justifies only 5 percent of the cost of insurance increase wasn't proper, right, they can't collect $100 of damage, if $95 of it was proper and $5 of it was not because --

THE COURT: They are not arguing that. I don't believe it.

MS. HENRY: They are arguing that, your Honor.

THE COURT: I don't believe that.

MS. HENRY: They are arguing that. That's what this motion is about.

THE COURT: You're under an obligation to state fairly what the papers say. I can't believe the plaintiffs would argue that.

MR. SKLAVER: We're not.

THE COURT: Good. Thank goodness.

MS. HENRY: Let me clarify that. If they're not arguing that, your Honor --

THE COURT: That's good. You just won something big.

MS. HENRY: Good. Thank you, your Honor.

THE COURT: I'm glad to hear that. That's good news.

Because I wasn't sure myself what folks were arguing.

So we're having a trial. We need a trial. I'm fine with that. And I'm fine with you going forward in front of this jury that they were obligated to make an estimate of future costs, they were allowed to make estimate of future costs on deterioration or lack of deterioration on investment income and on cost of reinsurance. But instead of doing a good-faith estimate of these costs, they lied or inflated or didn't act in good faith. That's what I think this case is about, from the plaintiffs' standpoint and from the defendant's standpoint.

Tell me what I'm missing from the plaintiffs' standpoint. And then I'm going to ask the defendant what I got wrong from their standpoint. So go ahead. You need to educate the trial judge.

MR. SKLAVER: I think, your Honor, I have no quibbles with what the Court just said. And this is a damages motion *in limine*, and they have admitted that they are not seeking an offset, so the motion should be granted.

THE COURT: Let me hear from the defendants first on my articulation of what we're trying here.

MS. HENRY: Your Honor, we agree with the articulation of what we're trying here.

THE COURT: I hope someone will do me the favor of kind of framing this and putting it under glass someplace. And

we'll keep it up on the bench here so that I know at trial what I'm trying. Because that's worth the final pretrial conference just in that.

Now, getting back to the application to the *in limine* motion. Argument inconsistent with what I've just said from Merrill or anyone else or Pfeiffer will not be allowed. So if the plan was to offer a new set of cost considerations that were never considered, defendants have not demonstrated that that would be a proper thing to do. If it had never been considered and wasn't in fact considered, that is what I would consider to be an alternate or hypothetical rationale. But with regard to the arm wrestle on whether the costs were estimated in good faith, the future costs were estimated in good faith, that's the appropriate arena for the experts to opine.

With regard to theoretical interest rate and duration, I don't quite understand the point and maybe the plaintiff could explain it to me.

MR. SPEAR: Your Honor, on the duration motion, the issue there is the analysis is entirely divorced from the facts of this case, because Professor Merrill admitted at his deposition that he had no idea what Lincoln or Voya's investment plans were, what rates they use internally, what assumptions they use, what cost factors they use. So abstract statements about what could have happened if certain things

looked certain ways aren't helpful to the jury and is impermissible *ipse dixit* by an expert. So our position isn't that those are improper areas if done correctly, but because Professor Merrill admittedly has no idea about the facts of this case, he shouldn't be allowed to go to the jury and just sort of speak in the abstract because he doesn't tie it to anything.

THE COURT: Well, I'm not going to allow anybody to testify in the abstract, particularly about the facts of this case, if they don't have a factual basis to it. So you can either raise an objection and I'll sustain it or if the testimony comes in and it's inappropriate, I'll strike it.

MR. SPEAR: Thank you, your Honor.

THE COURT: I don't understand the defendant's argument that no damages are suffered by policyholders who had level death benefit policies and are now deceased or who had level death benefits with policies and remain in force where the policy never made increased payments into the policy following the 2016 COI rate increase. Maybe I understand the first part of it. If the death benefit didn't change and there was no rate increase, then there's no damage, if that's your argument. I really don't think I understand your argument. So why don't you put it to me in simple terms.

MS. HENRY: Yes, your Honor. So to step back, there are basically two kinds of policies at issue here. And we're

focused on the so-called level death benefit component of the policies. And with a level death benefit, you purchase a policy, which has, as a death benefit, whatever the enumerated number is, $3 million in the case of some that we use as exemplars in the motion. And as long as that policy remains in force, your beneficiaries get that $3 million when you pass away.

If your account value when you die is $2,999,999, your beneficiaries get $3 million. If your account value when you die is $1, your beneficiaries get $3 million. The account value is irrelevant to the death benefit that you purchased. That is what a life insurance policy is. You purchase the death benefit. You pay a certain amount of money in exchange for the death benefit. In a level benefit policy, that death benefit does not change with the value or the amount of the account value.

And so the point that we are making here is that for people who passed away after the cost of insurance increase was implemented and their beneficiaries were paid the full amount of the death benefit, there was no damage. They got what they paid for, and they did not pay any more for it. They never made additional payments into their account value. Yes, more money was taken out of the account value, but that is of no moment because, when they die, all their beneficiaries get is the level death benefit, irrespective of what's in there,

whether it's $1 or whether it's $2,999,999. So those people simply were not damaged. And the mistake that the plaintiffs are making is that they're equating account value to damage. They are treating it like a bank account. It is not a bank account. It's just fundamentally different. When they die, when these people die, the value of the account value is reduced to zero. It goes nowhere. It's not like your Citibank checking account where you bequeath that to your heirs. It's not what happens here.

THE COURT: Let me give the plaintiff an opportunity to respond.

MR. SKLAVER: Yes, two points. First, I want to just correct a statement that was asked of defense counsel. The hypothetical that was provided where no future premiums are paid into the account value and the insured dies, there is still a COI overcharge deduction made from the account value. So even in those situations, more money is taken from your account than should have been but for the breach.

THE COURT: And if this were a disgorgement action, that would be highly relevant. It's not.

MR. SKLAVER: Correct. It's a breach of contract action.

THE COURT: If you were a government agency and you were seeking disgorgement, I would say right on, you go right for that. But why would it be true on a breach of contract

theory?

MR. SKLAVER: Because this is a claim brought on behalf of policy owners, not beneficiaries to the policy. So put into context -- all of her arguments were about beneficiaries of the policy -- think about the plaintiff, class plaintiff Helen Hanks. The initial beneficiary on her policy was her husband, and the contingent beneficiaries were her children. She owns the account. The Court held on Page 2 of its summary judgment order, under the terms of the policies, each policyholder would hold the rights to an account containing any amount paid by the policyholder plus earned interest. That account is the policyholder's. They can take money out. They can do a partial surrender. They can take a loan against it. It's their asset. And that's why courts consistently have held -- that's the *Vogt v. State Farm* case in the Eighth Circuit and the *Bally v. State Farm* case in the Northern District of California -- that if there is an overcharge to your account value, no matter what is paid to the beneficiaries upon death, that's your asset for which money has been taken and you're entitled to it back. All of this has to do with damages.

And let's take one more step back. This is a case, as we just went through on the liabilities side, about the padding of profits, let's say. Lincoln, in year one alone earned $23 million in pre-tax profit than they would have but for the

increase. That money came from somewhere. It came from the policy owners. And this attack on level death benefits would wipe out 72 percent of the damages of the class, because that's the vast majority, including the plaintiff, who has it. It's her account, it's been harmed, that's been a recognized form of damages. It is like a bank account, actually. And Voya markets it like a bank account. We submitted that on our oppositions. It's an accumulation of cash value.

If this were a case brought by beneficiaries for death benefits, it would be a different argument. But that's not who owns the claim here for breach of contract.

THE COURT: And the breach, what is the period of time that you go back on the breach? In other words, how far back do you go on a breach?

MR. SKLAVER: When the first monthly deduction is made at the account value under the new COI rates post-increase.

THE COURT: And you're asserting that these people were alive at that point; is that your point?

MR. SKLAVER: Yes. There would not have been a deduction from your account value if the policy had matured, correct. So everyone for which a level death benefit has been paid has paid a COI overcharge under the new rate scale at issue for trial.

THE COURT: Well, you all can dust off your *in limines*, dust off your cases and get me a brief on that issue

in the next 30 days. You can cull out arguments you have already made, but focus on this issue and let me see. Let me see.

MS. HENRY: Thank you, your Honor.

THE COURT: And future overcharge damages, why isn't that speculative? You don't know whether, if this court, the jury in this court finds for the plaintiff and the Court enters judgment based on that finding and denies a post-verdict motion, you don't know whether they'll still continue to unlawfully overcharge; right? You don't; right? Lots of things can happen.

MR. SKLAVER: Well, your Honor, we do. Because we have squarely asked the defendant to take the position right now to commit to reversing the increase if there's a finding of liability.

THE COURT: And they haven't answered you; right?

MR. SKLAVER: Well, they have refused to make that commitment. So they have answered.

THE COURT: So that's an answer of no, because they refuse to make a commitment to you?

MR. SKLAVER: Well, that, and combined with the following: The COI increase was designed to be permanent. It's projected to last. There's a COI rate scale as part of the increase that's designed to last for 30 years. They have the spreadsheets that they apply the deductions every month.

And so the standard under Texas law is whether the damages can be proven with reasonable certainty. And it's not epistemological certainty, right, there would never be future damages allowed because no one knows if the sun will come up tomorrow, in theory. But the point is you have an actuarial system that has COI rate scales that go for the life of the policies. And all Mr. Mills did in this report is use that system to calculate damages. At best, what's going to happen -- that's a jury question -- they can get up on the stand and say, we don't know what we're going to do or, if they say we promise to reverse it, we'll withdraw the request for future damages. That's all we are asking for. We're just trying to prevent them from having it both ways.

THE COURT: And that commitment would not be admissible; right?

MR. SKLAVER: Well, the commitment would be admissible -- if they provide the commitment now that they will reverse the increase, we will withdraw our request for future damages.

THE COURT: You didn't answer my question. The commitment would not be admissible?

MR. SKLAVER: It would be admissible, because I think it would thereby gut their request for future damages if they commit right there --

THE COURT: So you get to put it in front of the jury?

If the jury is not presented with a claim for future damages, what business is it of the jury?

MR. SKLAVER: I'm sorry, your Honor. You are right. I misunderstood the premise. If future damages are not at issue at trial, we can't ask that question. I agree.

THE COURT: You can't offer and have received into evidence that commitment; is that correct?

MR. SKLAVER: If future damages are not permitted, I agree, your Honor, yes. We don't intend to do that. Agreed.

THE COURT: So I'm going to require the defendants to state their position in writing 21 days from now.

MS. HENRY: Thank you, your Honor.

THE COURT: So let's talk about trial. It seems to me this case can be tried in ten days. Does that sound reasonable?

MR. SKLAVER: Probably less, your Honor. I think the parties have estimated between five to seven.

THE COURT: Is that the estimate, five to seven? Seven days is your estimate of the trial, the defendant's estimate?

MR. SHULMAN: Your Honor, in light of the Judge's rulings today, I think seven days or less.

THE COURT: Seven days or less, all right. So the way this works is -- and I want to give you some context here -- the folks that you saw when you walked in who were here for a

sentencing tried their case last fall, jury was impaneled, jury reached a verdict on October 21st. In this court, we have had 1,400 jurors report for jury service since last fall. And from September 29th to April 30th, 2021, we've had 32 jury trials. We've scheduled many more than that, but we have conducted 32 jury trails. Since September 29th, I have tried four jury trials to completion.

I will put this case in for a jury selection date. The days that used to exist when a judge could say I am the monarch of this courtroom, I say this case goes to trial on such and such a date, and that's the law don't exist under the present pandemic regime. And so what happens is by Sunday night at midnight, I will put in a request for the third quarter of 2021. And on August 15th, I will put in a request for the fourth quarter of 2021. The placement of the request will be based on a protocol -- which I had a hand in drafting -- which prioritizes cases based on a variety of factors; obviously, criminal over civil, criminal felony over criminal misdemeanor, criminal detained defendant over criminal nondetained defendant, and then civil cases, including the length of trial and the like. I looked at the dates of your availability, and I think there was one week in September where no one has any objection. That was it. So I can put in for the third quarter, but you seem to be telling me you're not available to try the case in the third quarter.

Do you want a trial date in the third quarter? Tell me what date you would like, and I can put in for it.

MR. SKLAVER: Well, the plaintiff does, your Honor. We were available the entire third quarter, except for we've noted the Jewish holidays. I think with the overlap, if you assume all defendant's unavailabilities applied, I think the last week of September is the only one I saw --

THE COURT: Well, maybe you guys have a better diagram. July 6th through July 16th, there are professional commitments of somebody's actuarial expert. July 22nd to August 3, there's the wedding of a child for Voya's counsel. Mid July to mid August, the regulatory expert is not available for medical reasons. August 11th, 12th, 13th, and 16th are not available because of a child's wedding. August 23 through 26, due to a previously scheduled professional commitment. And August 16th through August 20th due to previously scheduled family commitments for an important witness. I didn't make that up.

MR. SKLAVER: Those are all the defendant's, your Honor.

THE COURT: So when is everybody available to go to trial?

MR. SHULMAN: May I, your Honor.

THE COURT: You may.

MR. SHULMAN: I would suggest the fourth quarter is

more appropriate for two reasons. First of all, there are scheduling issues. But separate from that, as your Honor reflected earlier, the parties have made various commitments with regard to refreshing the data and supplemental expert reports. The parties intend to mediate this case in August. So I think all of those things point towards giving the parties some time to absorb your Honor's rulings today, deal with the data issues, give every opportunity to deal with the conflict issues and to schedule this in the fourth quarter, which is sufficiently far away that I think the conflicts will be minimal, and it's still within this calendar year.

THE COURT: Let me start with the defendant, then. What blackout dates, if any, are there in the fourth quarter?

MR. SHULMAN: There are none, your Honor, besides the secular holiday, Christmas and things like that.

THE COURT: Right.

MR. SKLAVER: The plaintiff has substantial conflicts in the October, both in the beginning with the class representative, as well as another trial that's scheduled in the District of Connecticut that Mr. Ard is trying. And then we have an expert unavailability at the end of October. So if we're going to the fourth quarter, it seems like November or December would be available.

THE COURT: What I will do, then, is I'll put this case in for November and December of the fourth quarter, and

we'll see what happens. But the one thing that you all should understand is when I come back to you and I say, it's November 13th, it's not going to work like in other times, judge, that's great, could you just make that November 21st. Can't do it. Can't do it. I have that spot in the jury assembly room that morning, and that's where we are. And you may find out you're also a backup trial. And that's likely to be the case when you are a civil case. Nevertheless, hundreds of cases are getting scheduled and they're resolving out or getting tried. So it's as good as it can be under the present circumstances.

MR. SKLAVER: Your Honor, a mechanical question -- and it may be unknown -- when would you know or when would the parties know when in November or December?

THE COURT: Very good question. First of all, I have been faithful to this all the way through. When I find out, I would say, not more than 72 hours, it's probably maybe even within 24 hours of my finding out, you'll know. If I put it in on August 15th, I will probably not know until the end of August. It takes a lot of work by the clerk's office to put together the calendar and sort things through. And then the calendar would be released to judges, and then I would know. And then I would issue an order.

And it is my practice, if you are a backup case, and it's a backup to another specific case, I would give you the

docket number of that case. No secret there. So I have a civil case on right now for June 30, they're the second backup. And I told them promptly, as soon as I found out, and I gave them the docket number of the case ahead of them. The civil case that went on September 14th was a backup to a class action that was going to trial, and I guess what happened was I was able to substitute a different civil case for the one that was going, which is something of an exception to the rule. But I was allowed to do that, and then that other civil case got dropped in. So we'll see.

It would probably not be tried in this courtroom. It would probably be tried in one of the larger courtrooms. If you go up to the 26th floor, you can see the setup. It works. There is Plexiglas around the witness with a HEPA filter extracting the air and a similar device around the podium so that lawyers can take their face masks off during jury addresses or examinations of witnesses. And once the trial is underway, it's more like any other trial than it is a pandemic trial. The difficulty for you all is you're only going to get two people at counsel table. We can work on wiring so that you'll be able to have your paralegal or your tech person in the gallery. But you won't likely have more than two at counsel table. That's the way it works. Sometimes we can do it the way it's being done today with a third person at the table, but there's no guarantee. It depends on the particular

courtroom.

MR. SKLAVER: Is that two human beings total or is that two lawyers, although we are human --

THE COURT: Human beings. You can do it any which way you want.

MR. SKLAVER: Okay.

THE COURT: And this Court has been very fussy about cell phones, but the ban has been lifted so that you can, even in the courtroom, text your paralegal, I need the next witness. How else is this going to work? So we've made accommodations in that regard.

Anyway, I want to commend you all for the work done on the pretrial order and the motions *in limine*. You are well organized, which is important, and very clear in your briefing. And so I'm very pleased, I'm very happy to have you as lawyers appearing before me, because I don't always get that. So this is really great. I don't apologize for asking whatever question comes to mind or asking people to explain something three times because I didn't pick it up the first two times, but that's all part of the process.

So I wish you good luck with the mediation. But this case is going to go. It's not in some pile with a hundred other cases. It's, at this point, pretty much at the top of my list, and it's going to go.

Anything further from the plaintiff?

MR. SKLAVER: No, your Honor. Thank you, and to the staff, for everyone's time.

THE COURT: Well, thank you for great presentations all around.

Anything further from the defendant?

MR. SHULMAN: No. Thank you, your Honor. It's a pleasure to be back here. And it's a sign that hopefully things are getting back to normal.

THE COURT: Let's hope so. And thank you all for the hard work on the motion papers and excellent work on the oral presentations. Thank you.

(Adjourned)