

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ADVANCE TRUST & LIFE ESCROW )  
SERVICES, LTA, AS NOMINEE OF LIFE )  
PARTNERS POSITION HOLDER TRUST, and )  
JAMES KENNEY, on behalf of themselves and )  
all others similarly situated, )

Plaintiffs, )

v. )

PHL VARIABLE INSURANCE COMPANY, )

Defendant. )

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Case No. 1:18-cv-03444 (MKV)

**DECLARATION OF SETH ARD IN SUPPORT OF PLAINTIFF’S MOTION FOR  
PRELIMINARY APPROVAL AND CLASS CERTIFICATION**

I, Seth Ard, declare as follows:

1. I submit this declaration in support of preliminary approval of the proposed class action settlement in this matter between Plaintiff, on behalf of himself and the proposed class, and Defendant PHL Variable Insurance Company (“PHL” or “Defendant”).

2. I am a partner in the law firm of Susman Godfrey L.L.P., which is counsel for Plaintiff and the Court-appointed Interim Class Counsel (referred to herein as “Class Counsel”) in the above-captioned matter. (Dkt. 92.) I am a member in good standing of the bar of this Court. I have personal, first-hand knowledge of the matters set forth herein and, if called to testify as a witness, could and would testify competently thereto.

3. Susman Godfrey has significant experience with insurance litigation and class actions, including cost of insurance (“COI”) class actions and settlements thereof. Susman Godfrey has represented numerous classes of policyowners seeking recovery of COI overcharges

against insurers, including Phoenix Life Insurance Company, AXA Equitable Life Insurance Company, Voya Retirement Insurance and Annuity Company, and Security Life of Denver Insurance Company.<sup>1</sup> A copy of the firm's class action profile and the profiles of myself and my fellow Class Counsel, are attached hereto as **Exhibit 1**.

4. I was among the principal negotiators of the proposed class action settlement with Defendant. Following extensive negotiations, the parties signed a memorandum of understanding on November 15, 2022, and the final Settlement Agreement was reached on February 17, 2023. I attach a true and correct copy of the Settlement Agreement as **Exhibit 2**. It is the opinion of Class Counsel that this settlement with PHL is fair, adequate, and reasonable. Plaintiff similarly supports this settlement and believes it to be fair, adequate, and reasonable.

5. The Settlement Agreement is the result of extended negotiations between the parties with the assistance of an experienced mediator, Professor Eric D. Green of Resolutions LLC.

6. Following several years in discovery, the parties held an in-person mediation session at Professor Green's offices in Boston, Massachusetts on January 20, 2022, after exchanging detailed mediation position statements. The parties were unable to reach agreement at that in-person mediation. The parties continued to negotiate with the assistance of Professor Green and attended a second in-person mediation session on November 8, 2022 following the close of expert discovery and after briefing on class certification was complete. After the second mediation session, Professor Green continued to work with the parties, after which the parties reached an

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<sup>1</sup> Susman Godfrey has been found adequate counsel in numerous COI cases, including *Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 12224042, at \*12 (S.D.N.Y. July 12, 2013); *Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y.*, 2022 WL 986071, at \*5 (S.D.N.Y. Mar. 31, 2022); *In re AXA Equitable Life Ins. Co. COI Litig.*, 2020 WL 4694172, at \*16 (S.D.N.Y. Aug. 13, 2020); *Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374, 387 (S.D.N.Y. 2019); *Advance Tr. & Life Escrow Servs., LTA v. Security Life of Denver Ins. Co.*, 2021 WL 62339, at \*9 (D. Colo. Jan. 6, 2021); *Advance Tr. & Life Escrow Servs., LTA v. ReliaStar Life Ins. Co.*, 2022 WL 911739, at \*11 (D. Minn. Mar. 29, 2022); *Advance Tr. & Life Escrow Servs., LTA v. N. Am. Co. for Life & Health Ins.*, 592 F.Supp.3d 790, at 809-10 (S.D. Iowa 2022); and *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, 15 Civ. 9924 (S.D.N.Y. Nov. 1, 2018), Dkt. 139 ¶¶ 7-8.

agreement on November 15, 2022 after clarifying certain issues. The parties reached a memorandum of understanding for a settlement, and promptly informed the Court on November 15, 2022. (Dkt. 237.) On February 17, 2023, the parties agreed to the terms of a long-form settlement agreement.

7. The terms of the settlement were negotiated after the parties exchanged numerous offers and counteroffers, submitted briefing to the mediator, and participated in teleconferences and email discussions. By the time the settlement was reached, Class Counsel was well informed of material facts, and the negotiations were hard-fought and non-collusive.

8. 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.

9. Fact discovery lasted until February 23, 2022, with supplemental discovery obligations under Federal Rule of Civil Procedure 26(e) continuing thereafter. (Dkt. 194.) Plaintiff and his experts analyzed over 375,000 pages of documents, which included extensive actuarial tables, policy-level data reflecting the historical credits and deductions to the account value of all Class members' policies, and over one thousand spreadsheets. Plaintiff also issued ten subpoenas to relevant third parties, including PHL's parent companies, consultants, and actuarial and financial advisors. Plaintiff obtained thousands of pages of valuable documents from these subpoenas, much of which had not already been produced by PHL.

10. One of the subpoena requests was to PHL's actuarial consultant, Milliman, Inc., seeking a copy of the proprietary MG-ALFA software that PHL and Milliman used to model the 2017 COI Increase. When Milliman refused to provide the software, Plaintiff filed a motion to compel supported by multiple expert declarations explaining the importance of this software and

the importance of examining Milliman's COI increase modelling in its native format. (Dkt. 106.) Plaintiff prevailed (Dkt. 138), which resulted in Milliman's producing critical MG-ALFA models that formed the basis of Plaintiff's theories that PHL acted unlawfully in imposing the 2017 COI Increase. For example, Plaintiff's actuarial expert Howard Zail used the MG-ALFA models to determine that the modeled assumption for premium funding was changed to result in a benefit to PHL and detriment to policyholders. As another example, Zail was able to use the MG-ALFA models to support the contention that PHL and Milliman's use of certain factors resulted in a recoupment of prior losses for PHL.

11. Plaintiff took and defended 17 highly technical fact depositions (some of which took place over two days). All these depositions were taken virtually during the COVID-19 pandemic, and, therefore, required numerous hours of additional coordination.

12. Expert discovery lasted until September 30, 2022. (Dkt. 198.) Plaintiff designated three experts and produced expert reports from: actuarial expert Howard Zail, regulatory-practices expert Jeffrey Angelo, and damages expert Robert Mills. Plaintiff produced opening expert reports from Zail and Mills on April 19, 2022. Plaintiff produced rebuttal reports from Zail, Mills, and Angelo on August 26, 2022. PHL designated three experts: Darryl Wagner for actuarial issues, Maria T. Vullo for regulatory practices, and Professor Craig Merrill for damages. PHL's expert reports were submitted on July 29, 2022. Collectively, the parties produced eight reports and took and defended six expert depositions. Plaintiff's opening and reply reports totaled 286 pages, with over 5,000 pages of exhibits and appendices.

13. The parties next briefed class certification. Plaintiff's opening motion was filed on September 2, 2022; PHL's opposition was filed on October 6, 2022; and Plaintiff's reply was filed on November 3, 2022. (Dkts. 200-06, 209-10, 223-27.) Collectively, Plaintiff filed 35 pages of

briefing supported by 38 exhibits.

14. The parties also filed premotion letters regarding PHL's anticipated motion to exclude Plaintiff's experts and motion for summary judgment. (Dkts. 230-36, 238-44.)

15. Documents produced by PHL indicate that about 4,973 Phoenix Accumulator Universal Life and Phoenix Estate Legacy universal life policies were subject to the 2017 COI increase. Data produced by PHL indicate that these policies' owners paid \$29,435,208 more than they would have had the 2017 COI increase not been implemented.

16. Initially, PHL and Milliman projected that the 2017 COI Increase would generate \$163.7 million in additional after-tax profits for PHL over the course of decades, discounted at a rate of 10%, and that the 2017 COI Increase would remain in effect for the life of the policies. (Dkt. 204-3, at 8, 10 (PHL\_AT\_010905, PHL\_AT\_010907)).

17. However, the overcharge damages in this case are fixed at \$29,435,208. This is because PHL implemented a new COI increase in 2021 (the "2021 COI Increase") that replaced the 2017 Increase. Ex. 2 ¶¶ 1-2. The 2021 COI Increase is subject to separate litigation, *Kenney v. PHL Variable Ins. Co.*, No. 3:22-cv-0052-OAW (D. Conn.), and claims challenging that increase are not part of this settlement.<sup>2</sup> Thus, unlike in other COI cases, where damages continue to accrue throughout trial and post-verdict proceedings, the damages caused by the 2017 Increase would remain the same, no matter how much time passed until a final judgment.

18. Plaintiff's actuarial expert, Howard Zail, opined that PHL violated uniformity provisions of the Class Policies in four different ways and improperly recouped prior losses, determined its change of COI rates retrospectively, and based the 2017 COI Increase on non-

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<sup>2</sup> The Court denied leave to add allegations challenging the 2021 COI Increase to this lawsuit. *See* Dkts. 177-78 (denying leave to file a second amended complaint).

enumerated factors. PHL's expert Darryl Wagner opined that the 2017 COI Increase was consistent with the policies and actuarial standards and disagreed with the damages calculations of Plaintiff's damages expert Robert Mills. With respect to Mills's calculations, Wagner opined that they were based on the incorrect premise that the entire 2017 COI Increase was improper for each and every class policy. PHL's damages expert Craig Merrill similarly challenged Mills's calculations on the ground that the calculations presume none of the 2017 COI Increase was justified.

19. Discovery also showed that PHL's credit had been downgraded, *see* Ex. 4, PHL is a privately owned company, *see* Ex. 5, at 1, and PHL no longer issues any new insurance products, *see id.* at 3 (describing PHL's decrease in assets due to the business "being in run-off").

20. The specific terms and conditions of the settlement are set forth in the Settlement Agreement, which is attached as **Exhibit 2**. The principal terms of the settlement are as follows:

- **Cash**: An \$18,500,000 all-cash settlement fund, reduced pro-rata for any opt-outs. This is not a claims-made settlement. Class members will not need to fill out any claim forms. Following final approval, checks will be mailed directly to Settlement Class Members using their addresses on file with PHL. The Final Settlement Fund can never revert to PHL.
- **COI Increase Ban**: PHL agrees to a moratorium on any new COI rate scale increases on the Class Policies for a period of at least two years from the Effective Date of the Settlement Agreement. In the event that PHL thereafter imposes a new increase, Plaintiff and the Class retain all of their rights to challenge such an increase. And if PHL agrees to a longer moratorium for any opt-outs, PHL will provide an equal extension to the Class.
- **Policy Validity Guarantee**. PHL will not challenge the validity and enforceability of any eligible policies owned by participating Class members on grounds of lack of an insurable interest or misrepresentations in the applications. This is a significant benefit as well to

owners who did not previously have such protection and reduces the risk that policyholders will be denied policy benefits at maturity so long as sufficient premiums are paid. Absent this agreement, if a policy were subjected to a successful challenge for lack of insurable interest or misrepresentation, the policy could be voided and rendered worthless.

21. In my opinion, the consideration to the Class adequately and excellently compensates the members of the proposed Settlement Class for their damages in view of the risks of litigation. The Class further benefits because none of the cash in the Settlement Fund will be returned to PHL.

22. In addition, the cash component represents 62.8% of the damages that have accrued as a result of the 2017 COI Increase. In Class Counsel's experience, this is an outstanding recovery, particularly given the complexity of COI cases, the conflicting expert testimony on technical issues that a jury would be required to weigh, and the inherent uncertainties of litigation.

23. Moreover, as mentioned above, the damages stemming from the 2017 COI Increase are fixed. This makes the result for the Class even more favorable. The cash consideration also allows the Class to be repaid without further delay.

24. The nonmonetary benefits, such as the COI increase ban, are also valuable in light of PHL's past conduct. The 2017 Increase is the third out of four COI increases PHL has implemented since 2010. According to Zail, COI charges are also typically the largest deduction from a policyholder's policy value. (Dkt. 204-4 ¶ 21.) The moratorium on new COI increases thus provides policyholders with certainty as to their COI rates for a period of time. Additionally, the requirement that PHL, if it agrees to grant a longer moratorium for opt-outs, grant a corresponding extension for Class policies is valuable in ensuring policyholders affected by the 2017 COI Increase are treated equitably.

25. Likewise, the validity guarantee adds value. Members of the *Fleisher* class previously received this validity guarantee, which is expanded here to cover all members of the Settlement Class, including owners of PAUL 1, 2, 4, 4A, PEL 2/3, 3A products that had no such protections in *Fleisher*, which addressed COI increases on PAUL Series 2(c), Series 3, Series 3(a), Series 3(b), and Series 3(c) policies. *See Fleisher v. Phoenix Life Ins. Co.*, 11 Civ. 8405, Dkt. 299-2 ¶¶ 10-11.

26. Class Counsel recommends the proposed distribution plan described in the Notice and attached in full as **Exhibit 3**. Under the plan of allocation, Settlement Class Members will be distributed the Net Settlement Fund in proportion to their share of the overall COI overcharges paid as a result of the 2017 COI Increase. Class Counsel prepared the plan of allocation with the assistance of Plaintiff's damages expert, Robert Mills, who also has significant experience in preparing plans of allocation that have been approved by numerous federal courts, using the data produced by PHL in this litigation. COI overcharges are measured as the difference between the actual COI charges each member of the class paid and the charges that would have been imposed but for the 2017 COI increase.

27. There are no agreements beyond the Settlement Agreement. The Settlement agreement refers to a confidential termination provision, Ex. 2 ¶ 54, and Counsel can provide this to the Court upon request. The confidential termination provision allows PHL, in its discretion, to terminate the Settlement if a certain threshold of opt-outs is reached.

28. The proposal is fair, adequate, and reasonable, especially in light of Counsel's detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery.



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

Dated: March 7, 2023

SUSMAN GODFREY LLP

/s/ Seth Ard

Seth Ard

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# EXHIBIT 1

## The Susman Godfrey Difference

For over forty years, Susman Godfrey has focused its nationally recognized practice on just one thing: high-stakes commercial litigation. We are one of the nation's leading litigation boutique law firms, with offices in Houston, Los Angeles, New York and Seattle. We have a unique perspective, the will to win, and an uncommon structure, which taken together provide the way to win.

### 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.

Susman Godfrey has a 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 both plaintiffs and defendants. 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.

### **An Uncommon 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 two-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, 100% of our Associates and over 90% of our Partners served in these highly sought-after clerkships after law school. Ten of our trial lawyers 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.

## 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 include:

- Secured a \$600 million settlement for residents of Flint, Michigan in the nationally followed Flint Water Crisis litigation.
- Won a \$706.2 million unanimous jury verdict for client HouseCanary, in a breach of contract and misappropriation of trade secrets case against Quicken Loans affiliate, Title Source, Inc. The judgement appears at number four on *The National Law Journal's* "Top 100 Verdicts of the Year" list.
- Won a \$25.25 million jury verdict for client, Steven Lamar, in a contract and intellectual property dispute with Dr. Dre and Jimmy Iovine over the iconic Beats headphones — this verdict was also included on *The National Law Journal's* "Top 100 Verdicts of the Year" list.
- Secured a favorable settlement for Uber in its epic battle against Google's Waymo over self-driving car technology.
- Won a jury verdict valued at \$128 million for client General Electric, in its legal battle against the Nebraska Investment Finance Authority.
- Secured one of the largest settlement awards ever to a single whistleblower in a False Claims Act case—over \$450 million from Novartis Pharmaceuticals, who was accused of defrauding Medicare and Medicaid by illegally paying kickbacks to pharmacies so they would recommend Novartis's medications to doctors and patients.
- Secured a settlement valued at \$100 million for a certified class of plaintiffs in a copyright infringement class action against well-known music streaming service, Spotify.
- Recovered \$40 million for a class of derivatives investors in a securities class action against Valeant Pharmaceuticals International, Inc. The deal is believed to be the largest recovery ever obtained on behalf of derivative investors in history.
- Won a \$50.3 million federal jury verdict for client, Green Mountain Glass, in a patent infringement lawsuit against Ardagh Glass, Inc. This verdict was #34 on *The National Law Journal's* "Top 100 Verdicts of 2017" list.
- Secured a \$91.25 million settlement for insurance policy owners in *37 Besen Parkway, LLC v. John Hancock Life Insurance Company*
- Secured nearly \$600 million with various international investment banks on behalf of our plaintiff clients in the ongoing LIBOR antitrust class action. The agreement with these banks represents the resolution of claims by investors that transacted directly with the

international banks on the panel to determine US Dollar LIBOR. Just recently the class that Susman Godfrey represents became the first and only class certified by the SDNY.

- Won a \$70 million judgement for Wellstat Therapeutics against BTG International, Inc. in a pharmaceutical contract dispute in the Delaware Court of Chancery.
- Secured a settlement valued at \$73 million while representing Flo & Eddie (the founding members of 60's music group, The Turtles) along with a class of owners of pre-1972 sound recordings for copyright violations by music provider Sirius XM. Susman Godfrey attorneys on this matter were named "California Lawyer Attorneys of the Year" by *The Daily Journal* for their legal work on this case.
- Won an over \$43.2 million federal court jury award in favor of Apache Deepwater LLC and against W&T Offshore in an oil and gas related breach of contract case having to do with deepwater wells in the Gulf of Mexico. This verdict was named by *The National Law Journal* as one of "The Top 100 Verdicts of 2016" and appeared on Texas Lawyer's "Hall of Fame Verdicts" in 2019.
- Secured over \$1.2 billion with several international automobile parts suppliers in the In Re Automotive Parts (Auto Parts) price-fixing class action. The multidistrict litigation, pending in the United States District Court for the Eastern District of Michigan, alleges long-running global collusion by auto parts companies to fix prices of automotive component parts.
- Secured as lead counsel in a case that challenged Phoenix Life Insurance Company's and PHL Variable Insurance Company's decision to raise the cost of insurance ("COI") nationwide on life insurance policy owners. The case settled with plaintiffs receiving a \$48.5 million cash fund, COI freeze through 2020, and a covenant by Phoenix not to challenge the policies, worth \$9 billion in face value.
- Secured a \$244 million settlement in a federal monopolization and antitrust class action against News Corporation (News Corp) on behalf of a certified class of more than 500 consumer packaged goods companies. The media giant also agreed to change its business practices regarding in-store advertising.

## Pro Bono

Susman Godfrey is committed to improving the laws and the legal system by representing those who cannot afford to pay for legal services. We encourage our attorneys to participate in pro bono opportunities and make firm resources available to ensure our pro bono efforts are meaningful and effective.

Lawyers at Susman Godfrey are often tapped by trial and appellate courts across the country to assist on precedent-setting pro bono matters. We also regularly partner with various organizations to drive forward significant and timely pro bono litigation. These organizations include, among many, the American Civil Liberties Union (ACLU), the Civil Rights Corps, the Texas Fair Defense Project, the Next Generation Action Network Legal Advocacy, and the International Rescue Committee.

In 2021, Susman Godfrey launched its [Minority-Owned Business \(MOBUS\) Pro Bono Program](#) which provides legal representation to minority-owned businesses in Houston in connection with commercial litigation, such as breach of contract, fraud, and other business disputes.

Susman Godfrey has been included on [National Law Journal's Pro Bono Hot List](#) and our lawyers have been honored with awards such as [Texas Lawyer's Attorney of the Year](#), [University of Texas School of Law's Distinguished Alumnus for Community Service Award](#), and [Texas Appleseed's J. Chrys Dougherty Good Apple Award](#).

Should you want to partner with Susman Godfrey on a pro bono initiative, you can contact our Pro Bono Committee at [ProBono@susmangodfrey.com](mailto:ProBono@susmangodfrey.com).

The cases below illustrate the variety and importance of the matters we litigate pro bono.

#### Constitutional Challenges

- ***O'Donnell v. Harris County***. For decades, the Harris County Jail held tens of thousands of people who were arrested for misdemeanors but were financially unable to post bail. Though arrested for the same minor offense, a person with money could avoid jail entirely while an indigent person would spend days or weeks in jail before determination of merits. Along with Civil Rights Corps and the Texas Fair Defense Project, Susman Godfrey represents on a pro bono basis a class of indigent arrestees who challenged the constitutionality of Harris County's money bail practices. After an eight-day evidentiary hearing, the US District Court found Harris County's system unconstitutional and ordered broad injunctive relief. After the bail reforms went into effect, the US Court of Appeals for the Fifth Circuit affirmed the district court's rulings that the system was unconstitutional. In the first year in which the injunctive relief was in effect, more than 12,000 people were released from jail.

#### Human Rights/Anti-Discrimination

- ***Faculty, Alumni and Students Opposed to Racial Preferences v. New York University Law Review***. Susman Godfrey defended New York University Law Review against allegations that its diversity and inclusiveness initiatives violate federal bias law by favoring female and minority applicants and authors. The Hon. Edgardo Ramos of the Southern District of New York granted the motion filed by Susman Godfrey to dismiss the case. The Second Circuit later affirmed the decision.
- ***Texas v. United States of America and the International Rescue Committee***. Represented the International Rescue Committee (IRC) pro bono when the state of Texas sued to block the federal government and the IRC from resettling any Syrian refugees in Texas. Working with the ACLU, and the Southern Poverty Law Center, the team defeated the state's multiple requests for injunctive relief. The federal district court later dismissed all of the state's claims.

- **Jared Woodfill et al. v. Annise Parker et al.** Served as lead trial counsel for the city of Houston and won a jury verdict and a final judgment in a closely-watched trial over a challenge to Houston's Equal Rights Ordinance, a law that prohibits discrimination based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy in city employment and city services, city contracts, public accommodations, private employment (excluding religious organizations), and housing. The city asked Susman Godfrey to represent it pro bono and defend the ordinance. After a two-week trial, the jury issued its verdict resoundingly in the city's favor. After two months of post-verdict briefing, the court issued a final judgment in favor of the city.
- **International Franchise Ass'n, Inc. et al. v. City of Seattle, et al.** Retained by the city of Seattle on a partial pro bono basis to defend its landmark \$15 per hour minimum wage ordinance. Several Seattle franchise businesses challenged the ordinance on a number of legal grounds, including violation of the Equal Protection Clause and Dormant Commerce Clause of the US Constitution. The district court denied the plaintiff franchise group's motion for a preliminary injunction and found that the plaintiffs had failed to demonstrate a likelihood of succeeding on the merits of any of their claims.

#### Death Penalty Appeals/Prisoners' Rights

- **David Daniels et al. v. Dallas County Sheriff Marian Brown.** Partnered with the American Civil Liberties Union, ACLU of Texas, Civil Rights Corps, and the Next Generation Action Network Legal Advocacy Fund to bring a federal class-action lawsuit for emergency relief to remedy the Dallas County Jail's ongoing failure to manage the extraordinary risks COVID-19 poses to its detainees, staff, and the larger community.
- **In re: Alfred DeWayne Brown.** Represented a wrongfully convicted man, Alfred Dewayne Brown, in his now successful quest to obtain an "actual innocence" finding from the Harris County D.A.'s office after nearly a decade on death row for a murder he didn't commit.
- **Harris v. Fischer.** Secured an important pro bono appellate victory on behalf of a former Bedford Hills Correctional Facility inmate who alleged her Fourth and Eighth Amendment rights were violated during a body cavity search while she was incarcerated. In its ruling, the US Court of Appeals for the Second Circuit vacated the district court's decision dismissing the case and remanded for further consideration.
- **Death Penalty Appeals.** Handled several death penalty appeals focusing on the requirement for the State of Texas to release information about the chemicals used to put prisoners to death in order for counsel to protect the rights of their clients not to be subject to cruel and unusual punishment. In one case, the Susman Godfrey team obtained an injunction against execution due to this issue.

#### Other Significant Pro Bono Work

- **Alley Theater v. Hanover Insurance Co.** The Tony Award-winning Alley Theatre, the oldest professional theatre company in Texas and the third-oldest resident theatre in the



country, suffered devastating destruction during Hurricane Harvey, incurring millions in losses from property damage, lost income and expenses. Susman Godfrey represented the Theatre pro bono in insurance litigation related to hurricane-caused business interruption. Susman Godfrey first secured a partial summary judgment ruling on behalf of Alley in a coverage lawsuit against Hanover over claims the theatre was not properly reimbursed for hurricane-related business interruption losses. The firm later scored a second victory for the theater when they settled the final piece of the litigation.

- ***First Presbyterian Church of Houston v. Presbytery of the New Covenant, Inc.*** Represented First Presbyterian Church of Houston (FPC), one of the oldest congregations in Houston, in a property dispute against the Presbyterian Church (PCUSA), which claimed for close to 30 years that it has a trust interest in FPC's property in Houston, Texas. The Court ruled in FPC's favor on summary judgment, entering final judgment and a permanent injunction against the Presbytery of the New Covenant and finding that the PCUSA has no interest in FPC's property. After appellate arguments, the parties settled, with the denomination releasing any claim to any interest in FPC's property.
- **Law Center to Prevent Gun Violence.** For years, Susman Godfrey has provided pro bono legal research, consultation, and strategy advice to the Law Center to Prevent Gun Violence regarding measures to regulate the sale and use of firearms.

## Office Locations

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## Overview

Named one of [Lawdragon's 500 Leading Lawyers](#) since 2020, a recipient of the [California Lawyer Attorneys of the Year](#) award in 2017 and selected as "Top Plaintiff Lawyers in all of California" in [2016](#) and [2017](#) by *The Daily Journal*; Steven Sklaver has secured substantial litigation victories for both plaintiffs and defendants. For plaintiffs, Sklaver was 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." You can read the Court's statement in full [here](#). You can also read more about the case in The Deal's profile on the litigation [here](#). Sklaver was also lead trial and appellate counsel for investors against an insurance company that resulted in a complete victory and full pay-out of a \$20 million life insurance policy. A copy of the appellate court decision is available [here](#). To listen to Sklaver's appellate oral argument, click [here](#). That matter was the feature cover story of the [April 2012 California Lawyer](#).

Sklaver also represents the former members of the legendary rock group The Turtles in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* (C.D. Cal.) in a certified class action lawsuit against Sirius XM that settled less than 48 hours before the jury trial was scheduled to begin. Sirius XM agreed to pay at least \$25.5 million (over \$16 million after fees and expenses) and royalties under a 10-year license that is valued up to \$62 million (over \$41 million after fees and expenses) as compensation for publicly performing without a license Pre-1972 sound recordings. The settlement was [approved by the Court](#), and has received widespread media coverage from publications such as [The New York Times](#), [Billboard](#), [The Hollywood Reporter](#), [Law360](#), [Rolling Stone](#), [Variety](#), [Reuters](#) and [Managing IP](#).

Within six months after the Sirius XM class action settled, so did Sklaver's [copyright class action](#) brought on behalf of artists owed mechanical royalties for compositions made available by Spotify, the leader in digital music streaming. [Spotify agreed to a class action settlement valued at over \\$112 million](#) (over \$95 million after fees and expenses), a settlement for which the district court granted final approval and remains subject to a pending appeal. You can read more about this matter in [Billboard](#).

Sklaver's many significant and widely covered class action results in 2016 helped secure Susman Godfrey's recognition as *Law360's* "Class Action Group of the Year" in early 2017. You can read that article announcing the award [here](#).

For defendants, Sklaver has handled numerous employment class actions across the country. He served, along with the Managing Partner of Susman Godfrey, as trial counsel for Wal-Mart, the world's largest retailer, trying a large employment class action in California. He also successfully defended and defeated class certification in numerous, substantial wage and hour matters for Alta-Dena Certified Dairy, LLC, dairy producers for Dean Foods, one of the leading food and beverage companies in the United States. Copies of the pro-employer decisions are available [here](#), [here](#), and [here](#).

Sklaver has tried complex commercial and class action disputes — including jury trials and bench trials in federal and state court, as well as arbitrations. Sklaver graduated cum laude from Dartmouth College, magna cum laude and Order of the Coif from Northwestern University School of Law, and clerked for Judge David Ebel on the United States Court of Appeals for the Tenth Circuit. Sklaver also won the National Debate Tournament for Dartmouth College, and is just one of four individuals in debate history to win three national championships at the high school and collegiate level. From 2010-2022, Sklaver has been recognized every year as a “Super Lawyer” in Southern California, awarded to no more than the top 5% of the lawyers in the state of California (Law & Politics Magazine, Thomson Reuters).

Sklaver currently serves on the Board of Directors for the Western Center on Law & Poverty, the Los Angeles Metropolitan Debate League, and the Association of Business Trial Lawyers. Sklaver was also selected as the 2016-2017 Ninth Circuit Judicial Conference Lawyer Representative.

## Education

- Dartmouth College (B.A., *cum laude*)
- Northwestern University School of Law (J.D., *magna cum laude* and Order of the Coif)

## Clerkship

Law Clerk to the Honorable David M. Ebel, United States Court of Appeal for the Tenth Circuit

## Honors and Distinctions

- *Lawdragon* 500 Leading Litigator ([2022](#))
- [Litigation Star](#), Benchmark Litigation (2022, Euromoney)
- Recommended Lawyer – Litigation – Labor and Employment, Best Lawyers in American (2020 – 2023, Woodward White, Inc.)
- Southern California California Super Lawyer (2010 – 2022, Thomson Reuters)
- *Lawdragon* 500 Leading Lawyers in America ([2020](#), [2021](#), [2022](#), [2023](#))
- *Lawdragon* 500 Leading Plaintiff Financial Lawyers ([2019](#), [2020](#), [2021](#), [2022](#))
- [Outstanding Antitrust Litigation Achievement in Private Law Practice](#) by the [American Antitrust Institute](#) (2019) for work on *In re: Automotive Parts Antitrust Litigation*.
- [California's Lawyer Attorneys of the Year](#) in 2017 by *The Daily Journal*. Click [here](#) for a photo of Sklaver, along with co-counsel, receiving the award.
- [Top 30 Plaintiff Lawyers in all of California in 2016](#) by *The Daily Journal*
- Southern California “Super Lawyers” awarded to no more than the top 5% of the lawyers in the state of California (2010 – 2021, *Law & Politics Magazine*, Thomson Reuters)
- Northwestern Law Review member and editor
- National Debate Tournament (NDT) collegiate championship winner

## Articles and Speeches

“Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism,” 32 Ind. L.

Rev. 71 (1998) (with Martin H. Redish, Professor, Northwestern University School of Law).

### Speaking Engagements

- “Compliance Track: Cost of Insurance Litigation Overview” – The 24th Annual Fall Life Settlement and Compliance Conference (Orlando, Florida)
- “Cost of Insurance” – The Life Settlements Conference 2018 (New York City, NY)
- “Cost of Insurance: What Has Been Filed and Decided and What Will Happen Next?” Anticipating Tomorrow – A Symposium on Emerging Legal Issues in Life Insurance. (Philadelphia, PA)
- “Current COI Increases – What’s it All About? The Legal Perspective.” ReFocus2017 Conference (Las Vegas, NV)
- “Litigation Update: Will the Arthur Kramer Insurable-Interest Decision Lift the Cloud Over Much of the Litigation in the Market?” The 2011 International Life Settlements Conference (London, England)
- “Seeking Interlocutory Appellate Review of Class-Certification Rulings: Tactics, Strategies, and Selected Issues.” Bridgeport 10th Annual Class Action Litigation Conference (Los Angeles, CA)
- PwC 2010 Securities Litigation Study Luncheon. (Los Angeles, CA)
- Life Settlement Litigation Update. 2010 Life Settlement Compliance Conference and Legal Round Table (Atlanta, GA)
- “Litigation: What are the Legal Trends Affecting the Market?” The Life Settlements Conference 2010 (Las Vegas, NV)

### Professional Associations and Memberships

- United States Supreme Court
- United States Court of Appeals for the Ninth and Tenth Circuits
- United States District Courts for the Central, Southern, Northern, and Eastern Districts of California and District of Colorado
- Admitted to state bars of Illinois, Colorado, and California
- Board of Directors, Los Angeles Metropolitan Debate League
- Board of Directors, Western Center on Law & Poverty

### Notable Representations

#### Class Actions

- **Copyright Infringement:** Sklaver serves as co-lead counsel with the Gradstein & Marzano firm representing Flo & Eddie (the founding members of 70’s music group, The Turtles) along with a class of owners of pre-1972 sound recordings for copyright violations by music provider Sirius XM. The day before trial was to commence before a California jury in federal court in late 2016, Flo & Eddie reached a landmark settlement with Sirius XM on behalf of the class in a deal potentially worth \$99 million. The Court granted [final approval of the settlement](#) in May 2017. Click [here](#) for more. Sklaver with his co-leads were recently named “[California Lawyer Attorneys of the Year](#)” by *The Daily Journal* for their outstanding legal work on this case.
- In May 2017, Sklaver, as co-lead counsel with Gradstein Marzano, secured a deal valued at \$112 million to settle a class-action lawsuit with Spotify brought on behalf of music copyright owners. The suit alleged that Spotify made music available online without securing mechanical rights from the tracks’ composers. Under the terms of the deal, Spotify will pay songwriters \$43.45 million for past royalties, as well as commit

to pay ongoing royalties that are valued at \$63 million. Read more about the case [here](#) and see Billboards coverage of it [here](#).

- **Insurance:** In a seminal insurance class action filed in the Southern District of New York, resolved in September 2015, Mr. Sklaver served as lead counsel in a case that challenged Phoenix Life Insurance Company's and PHL Variable Insurance Company's decision to raise the cost of insurance ("COI") nationwide on life insurance policy owners. 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 — less than two months before trial. Settlement terms included: \$48.5 million cash fund (\$34 million after fees and expenses), COI freeze through 2020, and a covenant by Phoenix not to challenge the policies, worth \$9 billion in face value, when the policies mature on the grounds of lack of insurable interest or misrepresentations in the application. At the final approval hearing, the Court concluded, ***"I want to say publicly that I think this is an excellent settlement. I think this is a superb – this may be the best settlement pound for pound for the class that I've ever seen."*** You can read the statement in full on page 3 [here](#). You can also read more about the case in *The Deal's* feature on the matter [here](#).
- **Antitrust:** *In re Automotive Parts Antitrust Litigation*. In the largest price-fixing cartel ever brought to light, Mr. Sklaver and a team of Susman Godfrey lawyers run a massive MDL litigation in which the firm serves as co-lead counsel for a class of consumer plaintiffs in multidistrict price-fixing cases pending in a Detroit, Michigan federal court. The actions, alleging anti-competitive conduct, were brought by indirect purchasers of component parts included in over 20 million automobiles, and involve parts such as wire harnesses, instrument panel clusters, fuel senders, heater control panels and alternators. The Department of Justice has imposed fines exceeding \$2.6 billion pursuant to guilty plea agreements with some of the defendants, and its investigation is still ongoing. The Susman Godfrey team together with its co-lead counsel has defeated multiple motions to dismiss. Settlements have been reached with a certain defendants for a combined \$620 million thus far. Final settlement (after fees and expenses) has not yet been determined. The case remains ongoing against the remaining defendants.

## LIFE SETTLEMENTS

- Represented Jonathan Berck, as Trustee of the Rosamond Janis Insurance Trust in a \$5 million rescission claim brought by the Lincoln Life and Annuity Company of New York for alleged violations of New York's insurable interest laws and other "STOLI" (stranger originated life insurance) related claims. RESULT: Summary judgment granted in favor of my client. A copy of the summary judgment order is available [here](#).
- Won reversal in a \$20 million life settlement rescission lawsuit against Lincoln Life & Annuity Company of New York. Lincoln's lawsuit was based on allegations that the insurance policies lacked an insurable interest because they were procured by third-parties for investment purposes and because there were net worth and other misrepresentations in the applications. The appellate court ordered that the trial court enter judgment in favor of the trust. The appellate court also affirmed our trial court victory that Lincoln's fraud claim was time barred because the policies were incontestable. The case is *Lincoln Life & Annuity Co. of New York v. Jonathan Berck, as Trustee of the Jack Teren Insurance Trust*, Court of Appeal Case No. D056373 (Cal. Ct. App. May 17, 2011). A copy of the appellate court decision is available [here](#). To listen to Mr. Sklaver's appellate oral argument, [click here](#). The *Teren* case was the feature, cover story of the [April 2012 California Lawyer](#).
- Represents investors, trusts, trustees, brokers, and insureds in life settlement and STOLI litigation across the country against insurance companies seeking to rescind policies with face values worth more than \$125 million. Mr. Sklaver is also a frequent speaker and commentator on life settlement and STOLI litigation, in both [trade publications](#) and [conferences](#).

## FINANCIAL FRAUD

- Represented Royal Standard Minerals, which was the plaintiff in a federal securities lawsuit against a "group" of more than ten dissident shareholders for failing to file Schedule 13-D disclosures. RESULT: Preliminary injunction granted and final judgment entered that, among other things, required for three years

the votes of all shares owned by any of the defendants to be voted as directed by the Board of Directors of my client.

- Represented plaintiff who held millions of WorldCom shares as an opt-out to the class in *In re WorldCom Securities Litig.* RESULT: Settled on confidential terms.
- Represented plaintiff Accredited Home Lenders in a TRO and breach of contract action over a wrongful default declared by Wachovia in a credit re-purchase agreement. RESULT: The case was resolved favorably, following the entry of a TRO.
- Represented Walter Hewlett in his challenge to the Hewlett-Packard/Compaq merger. In preparation for that trial, Mr. Sklaver deposed Compaq's former CEO Michael Capellas about his famous handwritten journal note which, describing the merger, stated "at our course and speed we will fail." Mr. Capellas was right.

## EMPLOYMENT

- Represented one of the world's largest retailers in the defense of a four month long jury trial, wage and hour class action pending in California. One of the world's largest retailers appointed Susman Godfrey L.L.P. to be its national trial counsel for wage and hour litigation.

## ANTITRUST

- Lead day-to-day lawyer for the class in *White, et al. v. NCAA*, a certified, antitrust class action alleging that the NCAA violated the federal antitrust laws by restricting amounts of athletic based financial aid. ESPN Magazine coverage of the lawsuit may be found [here](#). RESULT: The NCAA settled and paid an additional \$218 million for use by current student-athletes to cover the costs of attending college, paid \$10 million to cover educational and professional development expenses for former student-athletes, and enacted new legislation to permit Division I institutions to provide year-round comprehensive health insurance to student-athletes.

## ENTERTAINMENT

- Represented NAACP image award winner Morris Taylor "Buddy" Sheffield in his breach of contract lawsuit against ABC Cable Networks Group regarding the creation of *Hannah Montana*. RESULT: Defendant settled less than four weeks before trial.

## PRO BONO

- Appointed to represent Carl Petersen, who was charged by the United States Attorney's Office with being a felon in possession of a firearm — a charge that carries a five-year prison sentence and an 89% conviction rate. RESULT: Acquittal. Jury deliberation lasted less than four hours. Appointed by the United States Court of Appeals for the Tenth Circuit as appellate counsel in five cases, including: [United States v. Petersen](#); [United States v. Blaze](#) (specifically noting Mr. Sklaver's "good workmanship"); and [Sorrentino v. IRS](#) (appointed as amicus curiae by and for the Court)

# SUSMAN GODFREY L.L.P.



## Seth Ard Partner

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### Overview

Seth Ard, a partner in Susman Godfrey's New York office and a member of the firm's Executive Committee, 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. Since 2019, Mr. Ard has been named one of the country's Leading Plaintiff Financial Lawyers by *Lawdragon*.

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

- Michigan State University, first in class, highest honors (B.A., Philosophy & French Literature, 1997)
- Northwestern University (M.A., A.B.D., Philosophy, 2003)
- Harvard Law School, magna cum laude (J.D. 2007)

### 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

- *Lawdragon* 500 Leading Litigator ([2022](#))
- *Lawdragon* 500 Leading Plaintiff Financial Lawyers ([2019](#), [2020](#), [2021](#) [2022](#))

- New York Super Lawyer ([2022](#), Thomson Reuters)
- New York Rising Star (2013-2018, 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

## Professional Associations and Memberships

State of New York

## Notable Representations

***In re LIBOR-Based Financial Instruments Litigation (SDNY)*** 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)*** 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)*** 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)*** 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)*** 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)*** 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)*** 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 (Bkrcty. Del.)*** 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)*** 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.

# SUSMAN GODFREY L.L.P.



## Ryan Kirkpatrick

### Partner

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## Overview

Ryan Kirkpatrick rejoins Susman Godfrey after spending four years as General Counsel and Senior Managing Director of McCourt Global, an alternative asset management firm. In that role, Ryan served as head of the New York office where he oversaw all legal affairs of the firm and its business verticals, including a \$1 billion commercial real estate development joint venture, MG Sports & Media (which owns the LA Marathon and co-owns Global Champions Tour and Global Champions League), and MG Capital (owner of a private direct lender and registered investment adviser).

Ryan's experience at McCourt equipped him with a deep understanding of how to successfully manage and direct a wide variety of multi-national legal matters. Ryan obtained or negotiated billions of dollars in judgments, settlements, and transactions while at McCourt. Working on both the plaintiff and defense sides, Ryan also developed a deep understanding of and how to successfully leverage litigation (and the threat of it) to accomplish financial and business objectives while at the same time managing and mitigating the financial and operational costs of litigation to a business. For example, while serving as director of Global Champions League, Ryan initiated an EU competition law action against Fédération Equestre Internationale, the international governing body for equestrian sports. After obtaining a landmark preliminary injunction that was upheld by the Brussels Court of Appeals—and has implications for all international sports federations—Ryan helped negotiate a highly favorable settlement with the FEI. As of 2017, Global Champions League has now sold/licensed 18 team franchises and holds 15 events around the world. This use of EU competition law to effect worldwide relief for a client was reminiscent of one of Ryan's first cases at Susman Godfrey, where he and Steve Susman guided start-up mainframe manufacturer Platform Solutions, Inc. to a \$200 million buy-out by IBM following years of contentious antitrust, patent infringement, and copyright infringement proceedings in both the Southern District of New York and the European Commission.

Ryan was first elected to the Susman Godfrey partnership in 2011. At the time, he was representing Frank McCourt and the Los Angeles Dodgers in connection with Mr. McCourt's highly-publicized divorce and the team's bankruptcy. This three-year representation culminated in a favorable settlement of the divorce, the sale of the Dodgers to Guggenheim Partners for \$2.15 billion—the highest amount ever paid for a professional sports franchise—and the formation of a \$550 million joint venture with affiliates of Guggenheim Partners. Ryan has been interviewed and quoted by numerous media outlets regarding the case, including the Wall Street Journal, Bloomberg News, the Los Angeles Time, ESPN, the National Law Journal, the Associated Press, KABC, and KTLA. Shortly following the sale, Mr. McCourt asked Ryan to help lead McCourt Global.

Ryan was named among Lawdragon's [500 Leading Litigators in America](#) in 2022. Prior to his time at Susman Godfrey, Kirkpatrick clerked for the Hon. Ruggero J. Aldisert of the US Court of Appeals for the Third Circuit.

## Education

- Yale University (B.A., Political Science, 2001)
- University of California, Los Angeles (J.D., Order of the Coif, 2005)

## Clerkship

- Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit (2005-2006)

## Notable Representations

During his previous tenure at Susman Godfrey, Kirkpatrick led numerous successful litigation matters in a variety of legal areas including intellectual property, insurance, securities, antitrust and class actions. For example,

- Successfully represented various hedge funds investing in “stranger-owned life insurance,” including obtaining complete defense victory for a hedge fund in a case in which an insurer sued to rescind a \$20 million life insurance policy for alleged fraud and lack of an insurable interest, and initiating a class action against an insurer relating to cost of insurance increases that resulted in a settlement valued at \$134 million.
- Obtained a \$45 million damages judgment on behalf of Masimo Corporation in an antitrust case against Tyco Healthcare involving pulse oximetry products, which judgment was upheld by the Ninth Circuit on appeal, with the client receiving a net recovery of approximately \$27 million.
- Defeated class certification of a putative wage and hour class action brought against a subsidiary of Dean Foods.
- Obtained a \$16.5 million settlement for a group of investors in Seattle-based Dendreon Corporation in a case alleging securities fraud and insider trading, with the class receiving approximately \$12 million.
- Guided start-up mainframe manufacturer Platform Solutions, Inc. to a \$200 million buy-out by IBM following years of contentious of antitrust, patent infringement, and copyright infringement proceedings in both the Southern District of New York and the European Commission.
- Represented Frank McCourt and the Los Angeles Dodgers in connection with Mr. McCourt’s highly-publicized divorce and the team’s bankruptcy. This three-year representation culminated in a favorable settlement of the divorce, the sale of the Dodgers to Guggenheim Partners for \$2.15 billion—the highest amount ever paid for a professional sports franchise—and the formation of a \$550 million joint venture with affiliates of Guggenheim Partners.

## Articles

“Rat Race: Insider Advice on Landing Judicial Clerkships,” 110 *Penn. St. L. Rev.* 835 (2006) (co-authored with the Honorable Ruggero J. Aldisert and James R. Stevens, III)

## Professional Associations and Memberships

- State Bar of New York
- State Bar of California
- District of Columbia Bar
- United States District Court for the Central District of California
- United States District Court for the Northern District of California
- United States Court of Appeals for the Seventh Circuit
- United States District Court for the Eastern District of Texas

# SUSMAN GODFREY L.L.P.



## Krysta Kauble Pachman

### Partner

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## Overview

Krysta Pachman represents plaintiffs and defendants in high-stakes commercial litigation, including class actions, patent cases, trademark & copyright matters, and other disputes. Ms. Pachman has a track record of obtaining trial wins, favorable settlements and arbitration victories for her clients, who range from small businesses and individuals to Fortune 500 companies.

***“Krysta absorbed a lot of technical information, digested it, and helped the team understand the challenges with our case. [She] developed and recommended strategies and stood [her] ground when the other side and their expert tried to bully [her]. Krysta’s professionalism and skill was essential to the outcome we received from the panel.”***

– Denise M. Buffington, Director, Federal Regulatory Affairs & Corporate Counsel, Kansas City Power & Light Company

In 2021 Ms. Pachman was [appointed to serve as co-lead counsel](#) in the [Blackbaud Data Breach Class Action](#). She will lead a class action brought over a data breach involving cloud management software firm Blackbaud. Ms. Pachman represents a class of plaintiffs who are suing Blackbaud for negligence, as well as violations of California’s Consumer Privacy Act and other state law statutes. The leadership team is being hailed as ‘[most diverse leadership team ever](#)’ in data breach class action.

In the landmark copyright action, *Ferrick, et al. v. Spotify USA*, Ms. Pachman was an integral part of a trial team that secured a settlement valued at more than \$100 million dollars, including a \$43.45 million cash settlement fund and an agreement to pay future royalties to settle a class-action lawsuit with Spotify brought on behalf of music copyright owners. This case made national news, receiving press from [Billboard](#), [Forbes](#), and [Reuters](#).

Ms. Pachman was also part of a team that secured a \$40 million settlement for a class of derivatives traders in *Timber Hill v. Pershing Square Capital Management, L.P., et al.* Timber Hill alleged Defendants violated federal securities laws through their illicit insider trading and front-running scheme that damaged Timber Hill and other investors by artificially deflating the value of options and equity forwards traded by Timber Hill and Class Members. This is the largest ever stand-alone options settlement and the largest ever Section 20A options settlement.

Ms. Pachman played a key role in [Schulein, et al. v. Petroleum Development Corp.](#), representing a class of more than 7,000 limited partners who invested in 12 oil and gas limited partnerships, who alleged the defendants made false and misleading statements and omitted material information regarding the value of the

assets held by the partnerships in proxy statements used to solicit votes in favor of mergers that caused the investors to be cashed out of their investments. Ms. Pachman took key depositions, wrote the opposition to defendants' motion for summary judgment, and wrote the successful opposition to defendants' motion to decertify the class. The case was settled for \$37.5 million in March 2015, with the class receiving approximately \$24 million.

Ms. Pachman also represented Kansas City Power & Light Company (KCPL) in a high-stakes renewable energy arbitration. During arbitration she delivered the opening statement, cross-examined the other side's expert, presented fact and expert witnesses, handled depositions, managed expert reports, and wrote the pre-and post-hearing briefs. The panel unanimously ruled in KCPL's favor.

Ms. Pachman currently serves as counsel for one of the largest-ever certified consumer classes, which encompasses nearly all U.S. cellular phone purchasers, all of whom have been impacted by Qualcomm's anti-competitive conduct. This complex case straddles the intersection of antitrust and technology and involves Qualcomm's monopoly in the cellular modem chip market to extract supra-competitive licensing fees on its intellectual property. Ms. Pachman briefed and successfully obtained class certification for the group – synthesizing hundreds of pages of expert analyses, voluminous fact evidence, and case law spanning complex antitrust and intellectual property issues. In 2018, the Court granted class certification in a 66-page order finding “substantial,” “strong” and “compelling” evidence to support the certification. Click [here](#) for the certification order.

For these wins and more, in 2022 Pachman was recognized as a [Top Woman Lawyer](#) in California by *The Daily Journal*. In 2021, she was named a [Rising Star of the Plaintiffs Bar](#) by *National Law Journal's* Elite Trial Lawyers (ALM) and one of the [Top 40 Lawyers Under 40](#) by the Daily Journal (Daily Journal Corp.). *The Recorder* named her a [California Trailblazer](#) in 2020 (ALM), and *Best Lawyers* called her “[One to Watch, Commercial Litigation](#)” (2021, Woodward White, Inc.).

Prior to joining Susman Godfrey, Ms. Pachman served as a Law Clerk to the Honorable Philip S. Gutierrez in the U.S. District Court for the Central District of California. She also serves on the Board of Governors for the Women Lawyers' Association of Los Angeles and serves on the Board of the Association of Business Trial Lawyers.

## Education

- Northwestern University (B.A., Political Science and Communication Studies, magna cum laude)
- UCLA School of Law (J.D.)

## Clerkship

Law clerk to the Honorable Philip S. Gutierrez, United States District Court for the Central District of California

## Notable Representations

### Ongoing Matters

**[In Re Blackbaud, Inc., Customer Data Security Breach Litigation](#)**. [Appointed co-lead counsel](#) in this multi-district litigation, which relates to a massive data breach. Blackbaud, a cloud computing provider, maintains consumer data on behalf of thousands of non-profit corporations, hospitals, and educational institutions. The complaint alleges that Blackbaud did not maintain adequate security measures, which led to a ransomware attack. The stolen data included bank account information, social security numbers, health care data, usernames, and/or passwords.

**Jane Doe v. MindGeek USA Incorporated et al.** Filed a class action against PornHub and its parent company, MindGeek, alleging MindGeek has violated federal sex trafficking and child pornography laws by knowingly posting, enabling the posting of and profiting from thousands of pornographic videos featuring persons under the age of 18. In September 2021, the court denied PornHub's motion to dismiss this matter, allowing the case to move forward. [Read more.](#)

***In re Qualcomm Antitrust Litigation.*** Serve as counsel for one of the largest-ever certified consumer classes, which encompasses nearly all U.S. cellular phone purchasers, all of whom have been impacted by Qualcomm's anti-competitive conduct. This complex case straddles the intersection of antitrust and technology and involves Qualcomm's monopoly in the cellular modem chip market to extract supra-competitive licensing fees on its intellectual property. Ms. Pachman has played a crucial role in this matter – from taking depositions of key Qualcomm C-level executives and high-ranking Apple third-party witnesses to working with and defending the depositions of antitrust, pass through and licensing experts to representing class members in discovery. Most critically, Ms. Pachman briefed and successfully obtained class certification for the group – synthesizing hundreds of pages of expert analyses, voluminous fact evidence, and case law spanning complex antitrust and intellectual property issues. In 2018, the Court granted class certification in a 66-page order finding “substantial,” “strong” and “compelling” evidence to support the certification. Click [here](#) for the certification order.

#### Wins

***Timber Hill v. Pershing Square Capital Management, L.P., et al.*** Secured a \$40 million settlement for a class of derivatives traders in Timber Hill v. Pershing Square Capital Management, L.P., et al. Timber Hill alleged Defendants violated federal securities laws through their illicit insider trading and front-running scheme that damaged Timber Hill and other investors by artificially deflating the value of options and equity forwards traded by Timber Hill and Class Members. This is the largest ever stand-alone options settlement and the largest ever Section 20A options settlement.

**Ferrick et al. v. Spotify USA.** Secured both a \$43.45 million cash fund and an agreement to pay future royalties to settle a copyright class-action lawsuit with Spotify brought on behalf of music copyright owners. This ground-breaking case gained national media attention, receiving press from [Billboard](#), [Forbes](#), and [Reuters](#). Fees and expenses have not yet been determined.

***General Motors LLC Ignition Switch Litigation.*** Represented plaintiffs in this massive class action against General Motors, hundreds of suits were consolidated into a federal multidistrict litigation in New York over an ignition switch defect in GM vehicles, which causes the engine to switch off during use and disable the car's air bags. Pachman worked with a team of Susman Godfrey lawyers on the sixth personal injury bellwether case, which settled favorably on eve of trial. This case received substantial press from outlets such as [The Wall Street Journal](#).

***Lithium Ion Batteries Antitrust Litigation.*** Defended more than twenty depositions in this nationwide antitrust class action brought against the world's largest manufacturers of lithium ion batteries, which power virtually every laptop computer, cell phone, smartphone, digital music player (e.g., iPods), tablet device (e.g., iPads), digital camera and camcorder, and cordless power tool used today. The suit alleges that the defendants engaged in a long-running conspiracy over more than a decade to unlawfully fix, raise and stabilize prices of lithium ion batteries.

***ZiiLabs v. Apple and Samsung.*** Represented ZiiLabs, a subsidiary of the Singapore-based media company Creative Technologies, Ltd. ZiiLabs brought claims for patent infringement of its patents related to graphics processing technology developed originally by 3DLabs. Pachman took and defended key depositions in this matter, prepared and argued key motions in *limine*, defeated summary judgment and successfully opposed Daubert motions. The case settled on the eve of trial after Apple had taken a license.

***Sentius v. Microsoft.*** Represented Sentius against Microsoft in a patent infringement suit involving automated database technology. Pachman handled the Daubert motions in this matter. The case settled on highly favorable terms within 24 hours of the court issuing orders on those motions.

**Schulein, et al. v. Petroleum Development Corp., et al.** Represented plaintiffs in this class action litigation

in Santa Ana federal court on behalf of more than 7,000 limited partners who invested in 12 oil and gas limited partnerships. Plaintiffs alleged the defendants made false and misleading statements and omitted material information regarding the value of the assets held by the partnerships in proxy statements used to solicit votes in favor of mergers that caused the investors to be cashed out of their investments. On the eve of trial, after three years of hard fought litigation – and following the court’s denial of defendants’ class decertification motion, which Pachman wrote, and denial of defendants’ partial motions for summary judgment, also written by Pachman — the case was settled for \$37.5 million, with the class receiving approximately \$24 million.

**Taylor v. Shippers Transport Express.** Served as counsel to Shippers Transport Express and SSA Marine in a misclassification case. Susman Godfrey was retained to assist with trial preparation, and the case settled on favorable terms just before trial.

**Westmoor v. Ganga.** Represented Westmoor in this copyright and trademark infringement suit in the Central District of California. Pachman briefed cross-motions for summary judgment in this case, which settled on favorable terms shortly after motion for summary judgment briefing.

## Honors and Distinctions

*Lawdragon* 500 Leading Litigator ([2022](#))

[Top Woman Lawyer](#), *Daily Journal* (2022, Daily Journal Corp.)

[Future Star](#), Benchmark Litigation ([2022](#), [2023](#) Euromoney)

*Lawdragon* 500 Leading Plaintiff Financial Lawyers ([2021](#), [2022](#))

One to Watch, Commercial Litigation *Best Lawyers* ([2021](#), [2022](#), [2023](#) Woodward White, Inc.)

[Top 40 Under 40](#), *Daily Journal* (2021, Daily Journal Corp.)

[Rising Star of the Plaintiffs Bar](#), *National Law Journal’s* Elite Trial Lawyers (2021, ALM)

[California Trailblazer](#), *The Recorder* (2020, ALM)

40 and Under Hot List, Benchmark Litigation ([2020](#), [2021](#), [2022](#) Euromoney)

Recommended Lawyer, Dispute Resolution: General Commercial Disputes, The Legal 500, ([2019](#), Legal 500)

[Next Generation Woman Leader in Tech Law](#), *The Recorder* (2018, ALM)

Southern California Rising Star, *Super Lawyers* (2017, 2018, 2019, 2020, 2021, 2022; Thomson Reuters)

[UCLA Law Review, Chief Comments Editor, Vol. 58](#)

## Professional Associations

State Bar of California

Board of Governors, Women Lawyers Association of Los Angeles

## Articles and Speeches

### Articles

The Music Modernization Act’s Impact on Pre-1972 Works, *The Daily Journal*, April 2019

### Speaking Engagements

The Notable Recent & Pending Cases in the 9th Circuit and SCOTUS, Bridgeport Continuing Legal Education, July 2, 2021



Gender Issues in the Practice of Law, Bridgeport Continuing Legal Education, January 29, 2021

Class Actions 2020: State vs. Federal Filing Considerations, Bridgeport Continuing Legal Education, September 11, 2020

# SUSMAN GODFREY L.L.P.



## Michael Adamson Associate

Los Angeles  
(310) 789-3187  
madamson@susmangodfrey.com

### Overview

Recognized by *Los Angeles Business Journal's* [Leaders in Law](#) series as a Rising Star Finalist (2021) and by *Daily Journal* as a [Top 40 Lawyer Under 40](#) (2022), trial lawyer Michael Adamson represents and has secured victories for his clients in a diverse set of commercial disputes, including class action, patent, trade secret, unfair competition, environmental torts, and breach of contract suits. His clients range from industry leaders to small businesses and classes of individuals. Michael has litigated in federal and state courts across the country and outside of court in mediations and arbitrations. His financial and accounting background has enabled him to develop and implement strategies that benefit his clients' business and financial goals, in addition to vindicating their legal rights.

#### Legal Victories

#### **Industry Titans**

Michael served as counsel for American multinational energy corporation, Chevron, in a complex contractual dispute regarding oil production and gas balancing. Michael developed significant theories of breach, identified experts, and worked with them on their reports in the lead-up to mediation and arbitration. Prior to arbitration, Michael helped achieve a business solution to the dispute on favorable terms for Chevron.

Michael has also served as counsel to Wyle Labs, a subsidiary of science, technology, and engineering company, KBR, in a trade secrets case filed by Positron Systems. Michael played an essential role in developing legal defenses that hadn't been asserted by prior counsel. By the end of the four-week trial, the Court had struck most of the damages, and the jury had rejected the most significant remaining claims. Through post-trial briefing, Michael helped defeat some of the jury's few unfavorable findings. The case ultimately settled for a tiny fraction of the tens of millions in damages asserted – a knockout win for Wyle.

#### **Repeat Clients**

Michael defended cybersecurity company, Bitdefender, in a patent infringement case with millions of dollars at stake. Michael argued claim construction, led all aspects of discovery, and took and defended key depositions in multiple countries around the world, eliciting critical testimony. The case settled on favorable terms for Bitdefender. Because of his excellent work on this matter, Michael was again hired by Bitdefender to defend it in a consumer class action that asserted claims under California's Unfair Competition Law. In that case, Michael helped achieve a favorable pre-discovery settlement.

#### Current Litigation

Michael is currently leading efforts for the firm on several important putative class actions.

In *Advance Trust & Life Escrow Services v. PHL Variable Life Insurance*, Michael represents plaintiffs who are asserting breach of contract claims related to PHL's increase of cost of insurance rates on universal life

insurance policies. Michael leads the day-to-day aspects of this case and has scored several wins for the putative class, including defeating a motion to dismiss for lack of jurisdiction, getting appointed as interim class counsel despite an earlier-filed case, and successfully arguing a major discovery dispute.

In similar matters, *Iwanski v. First Penn-Pacific Life Insurance Co.* and *TVPX ARS Inc. et al. v. Lincoln Nat'l Life Ins. Co.*, Michael represents a putative class of thousands of insurance policyholders who are asserting breach of contract claims against major insurance companies that failed to reduce cost of insurance rates to reflect improvements in mortality rates, as the contracts require. Michael is again running all day-to-day aspects of these cases, including offensive, defensive, and expert discovery, and has won multiple key discovery motions.

Michael is also again counsel for Chevron – this time in a portfolio of cases around the country involving states and municipalities asserting claims related to climate change.

#### Background

Michael joined Susman Godfrey after clerking for Judge Gerald Tjoflat on the U.S. Court of Appeals for the Eleventh Circuit. He received his law degree from Duke University School of Law and his undergraduate degree from the Marriott School of Business at Brigham Young University where he studied accounting and later became a Certified Public Accountant.

Before law school, Michael worked in Washington, D.C. as a legislative aide for the Ranking Member of the Senate Finance Committee, specializing in tax, banking, and financial policy.

## Education

Duke University School of Law  
(J.D., *magna cum laude*, Order of the Coif, 2016)

BYU (B.S., Accounting, 2011)

## Clerkship

Honorable Gerald B. Tjoflat, United States Court of Appeals for the Eleventh Circuit

## Honors and Distinctions

- [Top 40 Under 40](#), *Daily Journal* (2022)
- Finalist, [Leaders in Law Rising Star](#), *Los Angeles Business Journal* (2021)
- Duke Law Journal, Executive Editor
- Top 5 Percent of Graduating Class
- Governing Faculty Award for Excellence in Business and Finance Law
- Order of the Coif
- Dean's Award
- Former Member of the Board of Directors, Vaccine Ambassadors

## Articles

*Earned Income Tax Credit: Path-Dependence and the Blessing of Undertheorization*, 65 Duke L.J. 1439

(2016)

## Professional Associations and Memberships

State Bar of California

State Bar of New York

Eastern District of New York

Southern District of New York

## Experience

Certified Public Accountant.

# SUSMAN GODFREY L.L.P.



## Komal Patel Associate

New York  
(212) 729-2049  
kpatel@susmangodfrey.com

### Overview

Komal Patel joined Susman Godfrey after clerking for Judge Rosemary Pooler of the United States Court of Appeals for the Second Circuit and Judge Victor Marrero of the United States District Court for the Southern District of New York. Before clerking, she practiced litigation at another leading firm. Ms. Patel graduated summa cum laude and Phi Beta Kappa from New York University. She earned her J.D. from Columbia Law School, where she was a Managing Editor on the board of the *Columbia Law Review* and recipient of the Whitney North Seymour Medal, an honor awarded to a student who shows the greatest promise of becoming a distinguished trial advocate.

### Education

Columbia Law School (J.D.)

New York University  
(B.A., Anthropology and Journalism, *summa cum laude*)

### Clerkship

Honorable Victor Marrero, United States District Court for the Southern District of New York

Honorable Rosemary S. Pooler, United States Court of Appeals for the Second Circuit

### Professional Associations and Memberships

New York State Bar

### Honors and Distinctions

Columbia Law School

- Harlan Fiske Stone Scholar
- James Kent Scholar
- Whitney North Seymour Medal

## Publications

Note, *Testing the Limits of the First Amendment: How a CFAA Prohibition on Online Antidiscrimination Testing Infringes on Protected Speech Activity*, 118 Colum. L. Rev. 1473 (2018).

## EXHIBIT 2

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

ADVANCE TRUST & LIFE ESCROW	)	
SERVICES, LTA, AS NOMINEE OF LIFE	)	Civil Action No. 18-cv-03444-MKV
PARTNERS POSITION HOLDER TRUST, and	)	
JAMES KENNEY on behalf of themselves and	)	
all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
PHL VARIABLE INSURANCE COMPANY,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

**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) Plaintiffs Advance Trust & Life Escrow Services, LTA and the party proposed to be substitute in its stead, PHT Holding I, LLC, and James Kenney (“Plaintiffs”), individually and on behalf of the Settlement Class; (ii) Defendant PHL Variable Insurance Company (“PHL”), that the causes of action and matters (the “Released Claims”) raised by, related to, and/or interrelated with this lawsuit (the “Action”), as captioned above and defined below, 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 Plaintiffs and PHL, 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. “2017 Adjustment” means the adjustment to the COI rate scales for Phoenix Accumulator Universal Life (“PAUL”) and Phoenix Estate Legacy (“PEL”) policies, specifically in series PAUL 1, PAUL 2, PAUL 2C, PAUL 3, PAUL 3A, PAUL 3B, PAUL 3C, PAUL 4, PAUL 4A, PEL 2, PEL 3, and PEL 3A, effective beginning on each policy’s first policy anniversary date falling on or about November 5, 2017 and ceasing with the onset of the 2021 Adjustment, as defined below.

2. “2021 Adjustment” means the adjustment to the COI rate scales for PAUL and PEL policies, specifically in series PAUL 1, PAUL 2, PAUL 2C, PAUL 3, PAUL 3A, PAUL 3B, PAUL 3C, PAUL 4, PAUL 4A, PEL 2, PEL 3, and PEL 3A, effective beginning on each policy’s first policy anniversary date falling on or after January 1, 2021, and which is currently at issue in the Connecticut Action. For the avoidance of doubt, the adjustment to COI rate scales resulting from the 2021 Adjustment is the difference between (i) the COI rate scales in effect following the 2021 Adjustment and (ii) the COI rate scales in effect prior to the 2017 Adjustment.

3. “Action” means this lawsuit, captioned *Advance Trust & Life Escrow Services, LTA et al. v. PHL Variable Insurance Company*, Case No. 18-CV-3444 (MKV), currently pending in the United States District Court for the Southern District of New York, filed April 19, 2018.

4. “Advance Trust” means Advance Trust & Life Escrow Services, LTA and its respective agents, heirs, relatives, representatives, attorneys, successors, trustees, subrogees, executors, and assignees, including PHT Holding I, LLC and all other persons or entities acting by, through, under, as successor-in-interest to, or in concert with Advance Trust.

5. “Agreement” means this Joint Stipulation and Settlement Agreement.

6. “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.

7. “Class” means all owners of PAUL and PEL policies issued by PHL whose policies experienced an increase to the COI rate scales between (i) November 5, 2017 and (ii) the monthly deduction immediately preceding the policy’s first policy anniversary date falling on or after January 1, 2021. Specifically excluded from the Class are the Excluded Policies; Class Counsel and their employees; PHL, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing; and the Court, the Court’s staff, and their immediate families.

8. “Class Counsel” means Susman Godfrey L.L.P., which was appointed interim lead class counsel in this Action. *See* Dkts. 92–93.

9. “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.

10. “Class Notice” means the notice of the Settlement approved by the Court to be sent by the Settlement Administrator to the Class.

11. “Class Policies” means all Policies in the Class.

12. “COI” means cost of insurance.

13. “Confidential Information” means material designated as “Confidential” in accordance with the terms of the Protective Order (Dkt. 64).

14. “Connecticut Action” means the action entitled *Kenney v. PHL Variable Insurance Company*, Case No.3:22-cv-00552 (OAW), currently pending in the United States District Court for the District of Connecticut.

15. “Court” means The United States District Court for the Southern District of New York, Hon. Mary Kay Vyskocil.

16. “Effective Date” means February 17, 2023.

17. “Excluded Claims” means all claims related to (a) the 2021 Adjustment or (b) any future COI rate scale increases, or changes to any other policy charges and credits, imposed after December 31, 2020. For the avoidance of doubt: all of the claims raised in the Connecticut Action are Excluded Claims and are expressly not being released herein. In addition, in reaching this Settlement and releasing claims related to the 2017 Adjustment, the Parties acknowledge that the COI charges assessed as a result of the 2021 Adjustment are not related to, or interrelated with, and did not arise out of the 2017 Adjustment, that the 2021 Adjustment and the 2017 Adjustment are separate and independent COI adjustments, and that no aspect related to the 2021 Adjustment is in any way herein released (including but not limited to any claims that the 2021 Adjustment was allegedly calculated using an improper baseline), and that the fact and amount of this Settlement may not be used to defend against any claims or offset any damages for any claims raised in the Connecticut Action. Nothing in this paragraph with regard to the relationship, if any, between the 2021 Adjustment and 2017 Adjustment can be used as a defense by PHL in the Connecticut Action.

18. “Excluded Policies” means (a) Policy Nos. 97523677 and 97523828, which are owned by Conestoga Trust and Conestoga Trust Services, LLC and subject to separate litigation against PHL; and (b) the policies listed in Exhibit A, which are subject to prior settlement agreements. To the extent an Owner owns both Class Policy(ies) and Excluded Policy(ies), the Owner is included in the Class with respect to the Class Policy(ies) but not with respect to any Excluded Policy(ies).

19. “Fairness Hearing” means the Court approval hearing referenced in Federal Rule of Civil Procedure 23(e)(2).

20. “Final Approval Date” means the date on which the Court enters its Order and Judgment approving the Settlement.

21. “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, meaning the date when no further appeal or motion for rehearing is permitted; (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.

22. “Final Settlement Fund” means an \$18,500,000 cash fund, reduced proportionally by policy face amount for any Opt-Outs as described in paragraph 52 below and increased to account for any interest as described in paragraph 51 below.

23. “Government Regulators” means the Connecticut Insurance Department (“CID”), any other government entity (or their duly appointed delegate) with regulatory authority over PHL or its successors in interest, or any court appointed administrator or receiver.

24. “Incentive Award” means the amount of an award approved by the Court to be paid to Plaintiffs from the Final Settlement Fund, in addition to any settlement relief they may be eligible to receive, to compensate Plaintiffs for efforts undertaken by them on behalf of the Settlement Class.

25. “Mediator” means Eric Green, Esq., with Resolutions, LLC.

26. “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.

27. “Opt-Out Period” means the period of time that begins the day after the earliest date on which the Class Notice is first mailed, published, or appears online, and that ends no later than 30 days prior to the Fairness Hearing. The deadline for the Opt-Out Period will be specified in the Class Notice.

28. “Opt-Out Policy(ies)” means the Policy or Policies that are validly excluded from the Settlement Class during the Opt-Out Period.

29. “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.

30. “Owner” or “Owners” means a Policy’s owner, whether person or entity, as recorded on PHL’s books (or the books of its third-party administrator) as of January 1, 2023. For Policies that have lapsed, surrendered, matured, or otherwise terminated, Owner means a Policy’s owner as recorded on PHL’s books (or the books of its third-party administrator) as of the date the Policy lapsed, surrendered, matured, or otherwise terminated.

31. “Parties” means, collectively, Plaintiffs and PHL. The singular term “Party” means either of Plaintiffs or PHL, as appropriate.

32. “PAUL” means universal life insurance policies and certificates marketed as Phoenix Accumulator Universal Life.

33. “PEL” means universal life insurance policies and certificates marketed as Phoenix Estate Legacy.

34. “PHL” means PHL Variable Insurance Company.

35. “Plaintiffs” means Advance Trust and James Kenney, as representatives of the putative class, and their heirs, assigns, and successors-in-interest.

36. “Policy” or “Policies” means any PAUL or PEL policies that were subjected to the 2017 Adjustment.

37. “Released Claims” means all Claims that were alleged or could have been alleged in the Action arising out of the same factual predicate relating to and/or arising out of the 2017 Adjustment as alleged in the Action, including all Claims that were alleged or could have been alleged by Advance Trust and its respective agents, heirs, relatives, representatives, attorneys, successors, trustees, subrogees, executors, and assignees, including PHT Holding I, LLC, and all other persons or entities acting by, through, under, as successor-in-interest to, or in concert with Advance Trust, as well as all claims that were alleged or could have been alleged by James Kenney, as representatives of the putative class, and his heirs, assigns, and successors-in-interest. Released Claims do not include Excluded Claims.

38. “Released Parties” means PHL, PHL Holdings, LLC, Nassau Financial Group, L.P., and each of their past, present, and future parent companies, direct and indirect subsidiaries, affiliates, predecessors, successors, and assigns, together with each of 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 PHL and within the scope of their agency). To the extent a Settlement Class Member is an Owner (as defined herein) of both an Excluded Policy and a Class Policy, any release by that Class Member will only be applicable for the Class Policy and not for the Excluded Policy.

39. “Releasing Parties” means Plaintiffs Advance Trust, James Kenney, and each Settlement Class Member, as defined in this Agreement and on behalf of themselves and their respective agents, heirs, relatives, representatives, attorneys, successors, trustees, subrogees, executors, and assignees, including PHT Holding I, LLC, and all other persons or entities acting by, through, under, as successor-in-interest to, or in concert with any of them.

40. “Settlement” means the settlement set forth in this Agreement.

41. “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.

42. “Settlement Administrator” means the third-party settlement administrator of the Settlement who is selected by the Plaintiffs. The Settlement Administrator’s fees shall be paid from the Final Settlement Fund.

43. “Settlement Class” means the Class excluding the Opt-Out Policies.

44. “Settlement Class Member(s)” means all persons and entities that are included in the Settlement Class.

45. “Settlement Class Policy” means any policy in the Settlement Class.

46. “Settlement Fund” means a cash fund consisting of the consideration paid for the

benefit of the Settlement Class.

47. “Settlement Fund Account” means the account designated and controlled by Class Counsel at one or more national banking institutions into which the Final Settlement Fund will be deposited for the benefit of the Class pursuant to this Agreement.

48. “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.

49. 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.

50. 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**

51. Within thirty (30) calendar days after the Final Settlement Date, PHL will fund or will cause to be funded the Final Settlement Fund into the Settlement Fund Account. If there is an appeal of the Order and Judgment, PHL will either (1) fund or will cause to be funded the Final Settlement Fund into the Settlement Fund Account within forty-five (45) calendar days of the date of the Order and Judgment or (2) include interest on the Final Settlement Fund calculated as 4% annualized simple interest from the date of the Order and Judgment through the date of payment.



52. Approval of the Settlement shall provide for Opt-Outs pursuant to Federal Rule of Civil Procedure 23(e)(4). The Settlement Fund shall be proportionately reduced, on a pro-rata basis measured by the total face amount of all Opt-Out Policies as compared with the total face amount of all Class Policies.

53. Any disputes regarding the reduction of the Settlement Fund shall first be presented to the Court for a determination. The Settlement Fund, after any proportionate reduction pursuant to paragraph 52, is referred to herein as the Final Settlement Fund. The Class Policies that do not timely and validly opt-out during the Opt-Out Period provided in Paragraph 27 constitute the Settlement Class. An Owner of multiple Class Policies cannot exclude less than all Class Policies owned. For the avoidance of doubt, an Owner who owns multiple Class Policies in a representative or agency capacity (such as a trustee, securities intermediary, or other similar agency) for more than one principal, may request to exclude Class Policies from the Settlement held on behalf of one principal while participating in the Settlement with respect to Class Policies held by other principals. A representative Owner may not request to exclude less than all policies held on behalf of any single principal; in other words, the party holding the ultimate economic interest in multiple Class Policies must choose to be a part of the Settlement Class or excluded from the Settlement Class for all such Class Policies. The Parties agree that the opt-out reduction methodology set forth in paragraph 52 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 PHL.

54. Notwithstanding anything in this Agreement, if the total percentage of the Settlement Class (as measured by the face amount of the Policy) that submits 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 number set forth in the confidential agreement between

the Parties, PHL shall have the option, but not the obligation, to terminate this Agreement no later than fourteen (14) business days after the Opt-Out Period expires.

55. 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. 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.

56. Following the occurrence of both (1) the Final Settlement Date and (2) PHL's funding of the Final Settlement Fund into the Settlement Fund Account, PHL shall no longer have any right, title, or interest in the sums held in the Settlement Fund Account. The Parties agree that this is a non-reversionary settlement, and that there shall be no reversion of the Final Settlement Fund to PHL. Class Counsel will petition the Court for approval of the proposed manner in which any unclaimed or unpayable distributions of the Settlement Fund will be further distributed or paid.

57. Class Counsel shall have full discretion over the allocation of the Final Settlement Fund to the Settlement Class, including the formula and manner that will be used to pay claims to the Settlement Class Members, subject to Court approval. Any disputes with respect to allocation shall be separate and severable from this Agreement. Class Counsel may enlist the services of the Mediator, Settlement Administrator, or others to assist with development of a plan of allocation of the Final Settlement Fund.

58. PHL shall not be required make any payments in connection with this Action other than the Final Settlement Fund amount.

**2. Additional Consideration to the Settlement Class**

59. For a period of two (2) years following the Effective Date of this Agreement, PHL agrees that COI rate scales for the Class Policies will not be increased above the current rate scales for PAUL 1, PAUL 2, PAUL 2C, PAUL 3, PAUL 3A, PAUL 3B, PAUL 3C, PAUL 4, PAUL 4A, PEL 2, PEL 3, and PEL 3A that became effective on each policy's first policy anniversary date falling on or after January 1, 2021, unless requested to do so by any Government Regulators. This obligation is referred to as the "COI Increase Moratorium."

60. If, within two years of the Effective Date of this Agreement, PHL reaches an agreement concerning any of the Opt-Out Policies whereby PHL has agreed to not increase the COI rate scales on such policies for a period longer than two (2) years following the Effective Date of this Agreement PHL will extend the duration of the COI Increase Moratorium on the Final Settlement Class Policies to be as long as the duration afforded to the subsequently settling Opt-Out Policies. For the avoidance of doubt: (i) any agreement that would exempt any Opt-Out Policies from an additional COI rate scale increase, including any type of rebate, refund, or discount of an additional COI rate scale increase, shall be treated as triggering this provision extending the COI Increase Moratorium; and (ii) no party shall have any rights under this provision until such time as PHL actually implements an additional COI rate scale increase on the Settlement Class Policies.

61. PHL agrees 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. If PHL breaches this covenant, it shall also be liable for reasonable attorneys' fees and costs in connection with any such attempted rescission, cancellation, claim, or suit. The covenant set forth in this paragraph is solely prospective and does not apply to any actions taken by PHL in the past. The covenant set forth in this paragraph does not apply to applications for reinstatement of lapsed policies. Nothing contained in this Agreement shall otherwise restrict PHL 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 PHL; making timely payments into insureds' accounts, where applicable; 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; or (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.

### **III. PRELIMINARY APPROVAL AND CLASS NOTICE**

62. The Parties agree that Plaintiffs shall move for an order seeking preliminary approval of the Settlement by March 7, 2023, 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. Plaintiffs will share a draft of the motion seeking preliminary approval of the Settlement with PHL no less than five (5) calendar days before it is filed. 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. For the avoidance of doubt, PHL is not required to agree to alter the terms of the Settlement to its detriment.

63. Plaintiffs' form of Class Notice will be direct mailing to the address of the last known Owner, as recorded in PHL's or its third party administrator's administration system, as well as publication notice through a settlement website.

64. 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 statement of whether the Settlement Class Member intends to appear at the Fairness Hearing; and (6) the signature of the Settlement Class Member or his/her counsel. 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.

65. Within ten (10) calendar days following the filing of this Agreement with the Court, PHL shall serve notices at its own expense 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**

66. Plaintiffs will move for an Incentive Award from the Final Settlement Fund in an amount up to but not more than \$25,000 for each named Plaintiff as representative of the putative class. PHL will not oppose Plaintiffs’ motion. The purposes of such an award shall be to compensate Plaintiffs for efforts undertaken on behalf of the Class. The Incentive Award shall be made to Plaintiffs in addition to, and shall not diminish or prejudice in any way, any settlement relief which they may be eligible to receive.

67. Plaintiffs will move for attorneys’ fees not to exceed 33 1/3% of the gross benefits provided to the Settlement Class (as described in ¶¶ 51–61 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 shall be paid from the Final Settlement Fund within five (5) business days after the funding of the Final Settlement Fund pursuant to paragraph 51. PHL agrees not to oppose Plaintiffs’ motion for Class Counsel’s Fees and Expenses to the extent Plaintiff’s request does not exceed the amounts set forth above.

68. Neither Plaintiffs nor PHL 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.

69. 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**

70. 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 PHL shall not have any obligation 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.

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

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

**VI. RELEASES AND WAIVERS**

73. 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.

74. 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.

75. 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, Released Claims that are 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.

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

77. 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.



**VI. OTHER PROVISIONS**

78. 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 reasonable 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 two mediations on January 20, 2022 and November 8, 2022, and additional follow-on communications, and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

79. No person or entity shall have any claim against Class Counsel, the Settlement Administrator, PHL'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.

80. PHL specifically and generally denies 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, including without limitation in the Connecticut Action. Nothing in this paragraph shall prevent PHL and/or any of the Released Parties from using this Agreement and Settlement or the Order and Judgment 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.

81. PHL agrees to provide, or cause to be provided, all data reasonably necessary for Class Counsel to effectuate the distribution of Class Notice, allocation, valuation, and payments to the Settlement Class.

82. 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, if there is no Final Settlement Date, or in the event of the entry of a final order of a court of competent jurisdiction determining the transfer of the Final Settlement Fund by or on behalf of PHL to be a preference, voidable transfer, fraudulent conveyance, or similar transaction that is required to be returned, then the Parties will be returned to *status quo ante*, as if this Agreement had never been negotiated or executed. 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. The Parties may move the Court for any relief necessary to affect this outcome.

83. 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.

84. 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 Protective Order shall apply to any information necessary to effectuate the terms of this Agreement.

85. 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 paragraph 63.

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

87. 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.

88. 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.

89. 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.

90. 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.

91. The Parties and their counsel further agree that their discussions, in addition to information and drafts exchanged by the Parties, over 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.

92. 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.

93. 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.

94. 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 PHL, then to:

Thomas A. Hetherington  
Jarrett E. Ganer  
**McDowell Hetherington LLP**  
1001 Fannin Street  
Suite 2400  
Houston, TX 77002  
tom.hetherington@mhlhp.com  
jarrett.ganer@mhlhp.com

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

Seth Ard  
Ryan C. Kirkpatrick  
Komal Patel  
**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  
kpatel@susmangodfrey.com


Steven G. Sklaver  
Michael Adamson  
**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  
madamson@susmangodfrey.com

95. 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.

96. 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:**

**PHL Variable Insurance Company**

By:   
\_\_\_\_\_

Eric Marhoun

Title: Secretary

Date: 2/24/23

**AGREED TO BY:**



James Kenney

Date:

2-24-23



**AGREED TO BY:**  
**PHT Holding I, LLC**

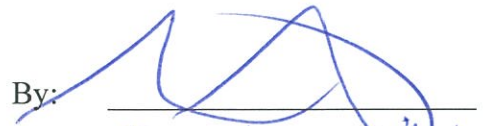
By: Andrew Pless

Title: Authorized Signer

Date: Feb 22, 2023

**AGREED TO BY:**

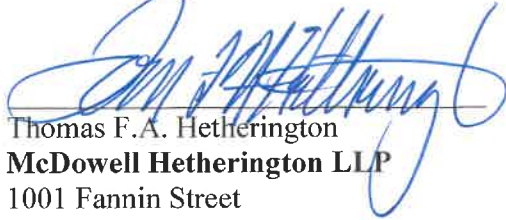
**Advance Trust Life & Escrow Services, LTA, as Securities Intermediary for the Life Partners Position Holder Trust**

By: 

Title: Brandon Gillin  
President

Date: 2/22/2023

**APPROVED ONLY AS TO FORM:**



Thomas F.A. Hetherington  
**McDowell Hetherington LLP**  
1001 Fannin Street  
Suite 2400  
Houston, TX 77002

*Counsel for Defendant PHL Variable Insurance Company*



Steven G. Sklaver  
**Susman Godfrey L.L.P.**  
1900 Avenue of the Stars, Suite 1400  
Los Angeles, CA 90067-6029

*Interim Class Counsel and Attorneys for Plaintiffs*

EXHIBIT A:  
LIST OF EXCLUDED POLICIES

97513181	97519674	97522776	97523386	97524036	97525814
97513826	97519675	97522782	97523390	97524059	97525852
97513947	97519891	97522819	97523469	97524150	97525862
97513959	97520932	97522833	97523489	97524158	97525904
97513963	97521005	97522848	97523508	97524176	97525915
97514213	97521006	97522861	97523512	97524192	97525918
97514277	97521087	97522875	97523560	97524223	97525937
97514279	97521156	97522877	97523610	97524242	97525940
97514311	97521205	97522908	97523617	97524370	97525983
97514670	97521259	97522922	97523623	97524424	97525997
97514671	97521493	97522947	97523624	97524479	97526021
97515078	97521613	97522948	97523628	97524555	97526032
97515342	97521638	97522956	97523630	97524574	97526057
97515502	97521650	97522990	97523631	97524593	97526073
97515559	97521706	97522997	97523645	97524621	97526090
97515596	97521739	97523000	97523650	97524634	97526091
97515597	97521857	97523022	97523654	97524683	97526106
97515662	97521909	97523064	97523661	97524728	97526119
97515667	97522011	97523078	97523700	97524751	97526139
97515743	97522017	97523083	97523707	97524873	97526152
97515745	97522086	97523084	97523731	97524884	97526176
97515795	97522087	97523090	97523741	97524887	97526195
97516060	97522088	97523098	97523743	97524893	97526202
97516106	97522171	97523104	97523748	97524921	97526205
97516138	97522243	97523106	97523759	97524949	97526227
97516269	97522284	97523111	97523766	97525010	97526290
97516307	97522289	97523115	97523773	97525063	97526310
97516324	97522292	97523117	97523778	97525113	97526313
97516375	97522302	97523118	97523810	97525145	97526362
97516376	97522310	97523119	97523811	97525207	97526366
97516379	97522374	97523140	97523812	97525236	97526370
97516389	97522375	97523156	97523829	97525330	97526373
97516394	97522400	97523172	97523833	97525402	97526383
97518600	97522440	97523187	97523846	97525404	97526387
97518606	97522558	97523223	97523859	97525455	97526402
97518647	97522571	97523224	97523861	97525472	97526421
97518723	97522605	97523242	97523874	97525504	97526431
97518725	97522622	97523257	97523882	97525536	97526442
97519064	97522640	97523281	97523888	97525538	97526463
97519065	97522689	97523313	97523889	97525591	97526465
97519083	97522692	97523340	97523891	97525621	97526474
97519088	97522694	97523352	97523903	97525714	97526491
97519155	97522696	97523363	97523935	97525779	97526504
97519664	97522723	97523385	97524032	97525795	97526508

EXHIBIT A:  
LIST OF EXCLUDED POLICIES

97526519	97527787
97526541	97527808
97526555	97527896
97526557	97527899
97526585	97527954
97526594	97528010
97526664	97528066
97526665	97528079
97526668	97528151
97526682	97528165
97526702	97528188
97526806	97528285
97526816	97528331
97526879	97528337
97526926	97528496
97526954	97528497
97526996	97528539
97527003	97528566
97527024	97528675
97527059	97528754
97527083	97528914
97527126	97529272
97527127	97529410
97527141	97529456
97527152	97529483
97527178	97529581
97527218	97529738
97527235	97530026
97527273	97530105
97527294	97530137
97527315	97530152
97527355	97530197
97527412	97530310
97527447	97530323
97527498	97530369
97527523	97530396
97527571	97530453
97527592	97530460
97527610	97530470
97527637	97530633
97527645	97530843
97527702	97531778
97527720	97535603
97527751	

# EXHIBIT 3

### **Plan of Allocation<sup>1</sup>**

1. Each Final Settlement Class Member who is the most recent owner of a policy according to Defendant's records ("Recipient") shall be issued a check for that Recipient's pro-rata share of the Net Settlement Fund.
2. Each Recipient's pro-rata share of the Net Settlement Fund shall be computed as follows:
  - a. First, identify the incremental COI charges resulting from the 2017 Adjustment ("COI Overcharges") for that Recipient;
  - b. Second, divide that amount by the total COI Overcharges for the Final Settlement Class; and
  - c. Third, multiply the resultant percentage for each Recipient by the Net Settlement Fund.
3. If a Recipient would receive multiple checks pursuant to paragraphs 1-3 above, such checks may be consolidated into a single check.
4. Within one year plus 30 days after the date the Settlement Administrator mails the first checks, any funds remaining in the Net Settlement Fund shall be redistributed on a pro rata basis to Recipients 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 Final Settlement Class Members and/or through an alternative plan approved by the Court – shall be borne solely by the Final Settlement Fund.
5. The plan of allocation may be modified upon further order of the Court. Any updates to the plan of allocation will be published on the Class Website.

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<sup>1</sup> All capitalized terms herein are used as defined in the Joint Stipulation and Settlement Agreement.

# EXHIBIT 4



# AM Best

[Print This Page](#)

DECEMBER 11, 2020 04:24 PM (EST)

## AM Best Affirms Credit Ratings of Nassau Financial Group, L.P.'s Insurance Subsidiaries

### CONTACTS:

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+1 908 439 2200, ext. 5133  
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james.peavy@ambest.com

### FOR IMMEDIATE RELEASE

OLDWICK - DECEMBER 11, 2020 04:24 PM (EST)

**AM Best** has affirmed the Financial Strength Rating (FSR) of B+ (Good) and the Long-Term Issue Credit Ratings (Long-Term ICR) of “bbb-” of Nassau Life Insurance Company (NNY), Nassau Life and Annuity Company (NLA), Nassau Life Insurance Company of Kansas (Overland Park, KS) and Nassau Life Insurance Company of Texas (Austin, TX). All of the aforementioned entities, including an unrated entity, Nassau Re (Cayman) Ltd., which is used for internal reinsurance, are collectively referred to as the Nassau Insurance Group (Nassau). Concurrently, AM Best has affirmed the FSR of B (Fair) and the Long-Term ICR of “bb” of PHL Variable Insurance Company (PHL).

In addition, AM Best has affirmed the Long-Term ICR of “b+” of The Nassau Companies of New York, Inc., along with its existing Long-Term Issue Credit Ratings (Long-Term IRs). All companies are headquartered in Hartford, CT, unless otherwise specified.

The outlook of all of these Credit Ratings (ratings) is negative. (See below for a detailed listing of the Long-Term IRs.)

The ratings of Nassau reflect its statutory balance sheet strength, which AM Best categorizes as adequate, as well as its marginal operating performance, neutral business profile and appropriate enterprise risk management (ERM).

The negative outlook reflects the considerable operating losses at PHL Variable and the utilization of excess capital for the recent acquisition of Foresters Financial Holding Company, Inc. and Foresters Life Insurance and Annuity Company (FLIAC); each acquired from The Independent Order of Foresters and merged into NNY, which together have negatively impacted the capitalization and financial flexibility of its parent, Nassau Financial Group, L.P. (NFG). In addition, statutory operating results have trended downward at NNY due to increased mortality in its legacy life insurance business and a decrease in investment income due to a declining invested asset base, as well as investment yields that have been pressured by the low interest rate environment. AM Best notes that NNY has reported statutory net operating losses through the third quarter of 2020 due to the impact from the Covid-19 pandemic, including higher mortality and some volatility within its alternative investment portfolio, as well as non-recurring expenses over the last two years.

Statutory net income at NFG has been trending negatively in recent years due to ongoing adverse mortality in its legacy life businesses, portfolio yield compression, capital losses and non-recurring expenses. However, earnings and revenues have benefited from growth in fixed annuity sales and a modest amount of earnings related to its asset management and distribution segments. AM Best expects NFG's earnings to trend positively once cost of insurance increases are implemented within its legacy life block. Earnings should also benefit from reduced expenses, an expected improvement in overall mortality at NNY and additional earnings from its acquisition of FLIAC over the near to medium-term.

Management has made significant progress in recent years streamlining operations, rebranding under the Nassau name, remediating a significant amount of material weaknesses that existed prior to its acquisition of the group and strengthening its ERM framework and capabilities.

In addition, the highly volatile business within PHL Variable has been ceded to a wholly-owned captive subsidiary that reinsures the total retained risk in PHL. Despite the reinsurance agreement, NFG and its subsidiaries could be negatively impacted if the captive entity does not perform as expected.

AM Best has withdrawn the ratings of PHL Variable as the company has requested to no longer participate in the AM Best interactive rating process.

The following Long-Term IRs have been affirmed with a negative outlook:

The Nassau Companies of New York, Inc. —

— “b+” on \$300 million 7.45% senior unsecured notes, due 2032 (approximately \$253 million outstanding)

Nassau Life Insurance Company —

— “bb-” on \$175 million 7.15% surplus notes, due 2034 (approximately \$126 million outstanding)

**This press release relates to Credit Ratings that have been published on AM Best’s website. For all rating information relating to the release and pertinent disclosures, including details of the office responsible for issuing each of the individual ratings referenced in this release, please see AM Best’s [Recent Rating Activity](#) web page. For additional information regarding the use and limitations of Credit Rating opinions, please view [Guide to Best’s Credit Ratings](#). For information on the proper media use of Best’s Credit Ratings and AM Best press releases, please view [Guide for Media - Proper Use of Best’s Credit Ratings and AM Best Rating Action Press Releases](#).**

AM Best is a global credit rating agency, news publisher and data analytics provider specializing in the insurance industry. Headquartered in the United States, the company does business in over 100 countries with regional offices in New York, London, Amsterdam, Dubai, Hong Kong, Singapore and Mexico City.

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## Related Companies

For information about each company, including the Best’s Credit Reports, group members (where applicable) and news stories, click on the company name. An additional purchase may be required.

AMB#	Company Name
050888	<a href="#">Nassau Companies of New York, Inc.</a>
044343	<a href="#">Nassau Financial Group, L.P.</a>
070171	<a href="#">Nassau Insurance Group</a>
006922	<a href="#">Nassau Life Insurance Company</a>
006977	<a href="#">Nassau Life Insurance Company of Kansas</a>

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# EXHIBIT 5

**PHL Variable Insurance Company  
Management's Discussion and Analysis of the  
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As of and for the Year Ended December 31, 2020**

**Description of Business**

PHL Variable Insurance Company (“PHL Variable” or “the Company”), formerly Dreyfus Consumer Life Insurance Company, was acquired by way of a stock purchase agreement with The Dreyfus Corporation in 1994. The Company’s name was changed to PHL Variable Insurance Company at the time of purchase. PHL Variable is domiciled in Connecticut. The Company is a wholly-owned subsidiary of PHL Delaware, LLC. (“the Parent”).

PHL Variable is a provider of life insurance and annuity products. The Company’s life insurance products include universal life, variable universal life and other insurance products. The Company has both single life and multiple-life products in-force. Under multiple-life policies, several lives may be insured with the policy proceeds paid after the death of the first or last insured. The Company’s annuity products include deferred annuities and fixed indexed annuities. Deferred annuities accumulate for a number of years before periodic payments begin and enable the contract owner to save for retirement and provide options that protect against outliving assets during retirement. The Company’s fixed indexed annuity products include single premium deferred equity indexed annuities and also single premium fixed indexed annuities. In November 2019, PHL Variable stopped marketing and selling new business.

As is customary in the life insurance industry, the reinsurance program is designed to protect against adverse mortality experience generally and to reduce the potential loss from a death claim on any one life. Risk is ceded to other insurers under various agreements that cover life insurance policies. The amount of risk ceded depends on an evaluation of the specific risk and applicable retention limits.

**Outlook**

Since 2009, the Company has pursued a strategy focused on balance sheet strength, policyholder service and operational efficiency. Recent trends in the life insurance industry may affect our mortality, policy persistency and premium persistency for certain blocks of in force business. Deviations in experience from our assumptions have had, and could continue to have, an adverse effect on the profitability of certain universal life products. Most of our current products permit us to increase charges and adjust crediting rates during the life of the policy or contract (subject to guarantees in the policies and contracts). We have made, and may in the future make, such adjustments.

Effective 10/1/2019, the Company entered into a reinsurance agreement with a subsidiary captive entity Concord Re (“Concord”) to reinsure all of the Company’s net retained business on a coinsurance funds withheld and modified coinsurance basis.

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**Financial Position**

The following table summarizes PHL Variable's statutory basis balance sheet at December 31, 2020 and December 31, 2019:

*(\$ in millions)*

	<b>December 31,</b>		<b>Change</b>
	<b>2020</b>	<b>2019</b>	
<b>Assets</b>			
Bonds	\$ 1,343.5	\$ 1,486.3	\$ (142.8)
Preferred and common stocks	19.4	12.9	6.5
Mortgage loans	50.6	42.6	8.0
Cash and short-term investments	58.1	36.3	21.8
Derivatives	4.5	6.0	(1.5)
Contract loans	81.5	85.0	(3.5)
Other invested assets	52.6	36.6	16.0
Receivables for securities	1.8	2.9	(1.1)
Total cash and invested assets	<u>\$ 1,612.0</u>	<u>\$ 1,708.6</u>	<u>\$ (96.6)</u>
Other assets	182.3	194.2	(11.9)
Separate account assets	<u>3,831.2</u>	<u>4,028.3</u>	<u>(197.1)</u>
Total assets	<u><u>\$ 5,625.5</u></u>	<u><u>\$ 5,931.1</u></u>	<u><u>\$ (305.6)</u></u>
<b>Liabilities</b>			
Aggregate reserves for life contracts	\$ 171.5	\$ 158.1	\$ 13.4
Policy benefits in course of settlement	8.3	7.0	1.3
Other amounts payable on reinsurance	49.9	54.0	(4.1)
Payable to parent, subsidiaries and affiliates	2.7	10.5	(7.8)
Accrued expenses and other liabilities	38.0	20.7	17.3
Transfers to separate accounts due/accrued	(23.6)	(27.2)	3.6
Funds held under unauthorized reinsurance	1,466.4	1,578.8	(112.4)
Interest maintenance reserve (IMR)	35.2	32.7	2.5
Asset valuation reserve (AVR)	15.2	15.0	0.2
Separate account liabilities	<u>3,831.2</u>	<u>4,028.3</u>	<u>(197.1)</u>
Total liabilities	<u>\$ 5,594.8</u>	<u>\$ 5,877.9</u>	<u>\$ (283.1)</u>
<b>Capital and Surplus</b>			
Common stock	\$ 2.5	\$ 2.5	\$ -
Surplus notes	55.0	55.0	-
Unassigned surplus	(279.9)	(257.4)	(22.5)
Paid-in capital and surplus	<u>253.1</u>	<u>253.1</u>	<u>-</u>
Total capital and surplus	<u>30.7</u>	<u>53.2</u>	<u>(22.5)</u>
Total liabilities, capital and surplus	<u><u>\$ 5,625.5</u></u>	<u><u>\$ 5,931.1</u></u>	<u><u>\$ (305.6)</u></u>

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*Assets*

PHL Variable's total assets decreased by \$305.6 million to \$5,625.5 million as of December 31, 2020, mainly due to the business being in run-off. Separate account assets, specifically fixed indexed annuity, accounted for the largest decrease in both assets and liabilities.

PHL Variable's general account debt securities portfolio consists primarily of investment grade publicly traded and privately placed corporate bonds, residential mortgage-backed securities, commercial mortgage-backed securities and asset-backed securities. Each year, the majority of our general account's net cash flows are invested in investment grade debt securities. The percentage of the Company's portfolio of debt securities in below investment grade rated bonds increased to 6.4% in 2020 compared with 2.7% in 2019. 2.4% of the increase related to NAIC-3 bonds, which are one rating below investment grade.

PHL Variable emphasizes and monitors the quality, diversification, liquidity, return expectations and asset/liability management of its various investments. PHL Variable's invested assets are managed to support the liabilities of PHL Variable's product lines.

Certain of our variable annuity products include guaranteed living benefits. We use derivative instruments to hedge the liability exposure and the volatility of earnings associated with some of these liabilities

*Bonds*

The following table sets forth PHL Variable's bond portfolio at amortized cost by NAIC rating designation. Investment grade bonds decreased by 3.7%, while NAIC-3 bonds increased by 2.4% as a percentage of total bonds.

NAIC Rating Equivalent	S&P Equivalent Designation	December 31, 2020		December 31, 2019	
<i>(\$ in millions)</i>					
1	AAA/AA/A	\$ 802.4	59.7%	\$ 972.0	65.4%
2	BBB	455.6	33.9%	474.3	31.9%
	Total investment grade	1,258.0	93.6%	1,446.3	97.3%
3	BB	44.9	3.3%	13.0	0.9%
4	B	14.9	1.1%	13.6	0.9%
5	CCC and lower	3.4	0.3%	5.8	0.4%
6	In or near default	22.3	1.7%	7.6	0.5%
	Total bonds	\$ 1,343.5	100.0%	\$ 1,486.3	100.0%

*Separate Account Assets*

The Company utilizes separate accounts to record and account for assets and liabilities for particular lines of business and/or transactions. For the current reporting year, the Company reported assets and liabilities from the following product lines/transactions into a separate account: variable annuity, fixed indexed annuity and variable universal life. Separate account products are authorized by Connecticut General Statute §38a-433.

In accordance with the products/transactions recorded within the separate account, all assets are considered legally insulated from the general account. The legal insulation of the separate account assets prevents such assets from being generally available to satisfy claims resulting from the general account.

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Some separate account liabilities are guaranteed by the general account. In accordance with the guarantees provided, if the investment proceeds are insufficient to cover the rate of return guaranteed for the product, the policyholder proceeds will be remitted by the general account.

Separate account assets decreased \$197.1 million due mainly to surrenders for fixed indexed annuities with no corresponding offset in premiums, as the Company is no longer selling the product.

***Liabilities***

In 2020, PHL Variable's liabilities decreased \$283.1 million from 2019, primarily due to \$197.1 million of lower separate account liabilities due to fixed indexed annuity surrenders.

Funds held with unauthorized reinsurers decreased by \$112.4 million and relate to the reinsurance treaty with Concord.

***Surplus Notes***

On December 28, 2018, the Company issued 9.75% surplus notes that are due December 28, 2048 with a face value of \$25.0 million. Interest and principal payments require the prior approval of the Department and may be made only out of surplus funds that the Department determines to be available for such payments under Connecticut insurance law. The interest on the notes is scheduled to be paid on December 28 of each year, commencing December 30, 2019. The Company did not request approval and made no interest payments for these notes in 2020 or in 2019. The 9.75% surplus notes may be redeemed at the option of PHL Variable at any time at the "make-whole" redemption price set forth in the Note Purchase Agreement. Connecticut insurance law provides that the notes are not part of the legal liabilities of PHL Variable. The Company's affiliate, Nassau Cayman Brac Holding Company ("NC Brac") holds the full balance of the notes

PHL Variable's 10.5% surplus notes are due December 30, 2043 with a face value of \$30.0 million. Interest and principal payments require the prior approval of the Department and may be made only out of surplus funds that the Department determines to be available for such payments under Connecticut insurance law. The interest on the notes is scheduled to be paid on December 30 of each year and commenced December 30, 2014. The Company did not request approval and made no interest payments for these notes in 2020 or 2019. The 10.5% surplus notes may be redeemed at the option of PHL Variable at any time at the "make-whole" redemption price set forth in the Note Purchase Agreement. Connecticut insurance law provides that the notes are not part of the legal liabilities of PHL Variable. The Company's affiliate, NCNY, holds the full balance of the notes.

**Results of Operations and Changes in Surplus**

PHL Variable's results of operations for the years ended December 31, 2020 and 2019 were as follows:

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(\$ in millions)	<b>December 31,</b>		<b>Change</b>
	<b>2020</b>	<b>2019</b>	
Premiums, annuity considerations and other fees	\$ 63.0	\$ (1,093.4)	\$ 1,156.4
Net investment income, including IMR amortization	59.6	70.8	(11.2)
Reserve adjustments on reinsurance ceded	(154.7)	(154.7)	-
Benefits and change in policy reserves	(16.5)	996.3	(1,012.8)
Net transfers to/from separate accounts	449.5	176.5	273.0
Commissions	7.9	(30.6)	38.5
Ceded SA NII and reserve, misc inc and FWH interest ceded	(398.3)	(36.1)	(362.2)
Other expenses	(7.9)	(4.7)	(3.2)
<b>Gain (loss) from operations (GFO) before federal income taxes</b>	<b>2.6</b>	<b>(75.9)</b>	<b>78.5</b>
Federal income tax expense (benefit)	1.9	(14.6)	16.5
<b>Gain (loss) from operations after federal income taxes</b>	<b>0.7</b>	<b>(61.3)</b>	<b>62.0</b>
Net realized capital gains/(losses) after taxes	(4.8)	(47.9)	43.1
<b>Net income (loss)</b>	<b>(4.1)</b>	<b>(109.2)</b>	<b>105.1</b>
Change in net unrealized capital gains (losses)	3.1	(6.5)	9.6
Change in non-admitted assets and deferred income tax	(4.4)	(2.6)	(1.8)
Change in liability for unauthorized reinsurance	(17.0)	-	(17.0)
Change in asset valuation reserve (AVR)	(0.2)	(1.1)	0.9
Dividends to stockholders	-	(48.1)	48.1
Paid in capital and surplus	-	102.9	(102.9)
<b>Net change in surplus</b>	<b>(22.6)</b>	<b>(64.6)</b>	<b>42.0</b>
Capital, surplus notes and surplus, beginning of year	53.2	117.8	(64.6)
<b>Capital, surplus notes and surplus, end of year</b>	<b>\$ 30.6</b>	<b>\$ 53.2</b>	<b>\$ (22.6)</b>

Premiums, annuity considerations and other fees and benefits for 2019 included ceded premiums and benefits from the Concord treaty. The net impact from that treaty to pre-tax GFO was an increase of \$4.9 million. The Concord treaty also is the driver of the \$398.3 million amount for ceded separate account net investment income and reserves and interest on funds withheld. The \$17 million change in liability for unauthorized reinsurance is due to the timing of claim settlements with unauthorized reinsurers occurring in the period subsequent to when the claims are recognized by the Company.

In 2020, the Company paid no dividends and received no capital contributions. In 2019, the Company received \$102.9 million of capital contributions from its Parent and paid a \$48.1 million extraordinary dividend to its parent.



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*Net investment income*

The components of net investment income for the years ended December 31, 2020 and 2019 are detailed below:

<i>(\$ in millions)</i>	<b>Year Ended December 31,</b>	
	<b>2020</b>	<b>2019</b>
Bonds	\$60.2	\$72.4
Contract loans	4.0	3.7
Mortgage loans	2.9	1.6
Preferred and common stocks	0.5	1.2
Other	2.3	4.0
Amortization of Interest Maintenance Reserve (IMR)	3.5	2.4
Less:		
Investment expenses	13.8	14.5
Net investment income	<u>\$59.6</u>	<u>\$70.8</u>

*Realized capital gains and losses*

<i>(\$ in millions)</i>	<b>Year Ended December 31,</b>	
	<b>2020</b>	<b>2019</b>
Bonds	(\$3.0)	(\$0.1)
Preferred stock	\$0.0	\$0.6
Common stock	0.8	(48.5)
Derivatives	(3.9)	2.0
Total realized capital gains (loss) before tax	(6.1)	(46.0)
Less: income tax expense (benefit)	(1.3)	1.9
Realized capital gains (losses)	<u>(\$4.8)</u>	<u>(\$47.9)</u>

Realized capital gains (losses) for 2019 reflected the full impairment of the Company's common stock investment in subsidiary, Concord.

*Unrealized capital gains and losses*

<i>(\$ in millions)</i>	<b>Year Ended December 31,</b>	
	<b>2020</b>	<b>2019</b>
Bonds	(\$0.2)	\$0.3
Derivatives	1.5	(9.0)
Common stock	-	-
Other invested assets	2.6	0.5
Unrealized capital gains (loss) before tax	3.9	(8.2)
Less: income tax expense (benefit)	0.8	(1.7)
Unrealized capital gains (losses)	<u>\$3.1</u>	<u>(\$6.5)</u>

Unrealized capital gains for 2019 reflected decreased derivative valuations due to market performance.

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**Cash Flow**

<i>(\$ in millions)</i>	<b>Year Ended December 31,</b>	
	<b>2020</b>	<b>2019</b>
<b>Operating Activities</b>		
Investment income	\$60.5	\$71.4
Insurance operations	(104.8)	(204.6)
Federal income taxes	(3.8)	3.2
Cash provided by (used in) operations	<u>(48.1)</u>	<u>(130.0)</u>
<b>Investment Activities</b>		
Proceeds from investments sold, matured or repaid	281.9	444.0
Cost of long-term investments acquired	(171.1)	(376.2)
Policy loans and premium notes	3.5	(1.3)
Cash provided by (used in) investment activities	<u>114.3</u>	<u>66.5</u>
<b>Financing Activities</b>		
Paid-in surplus	-	118.9
Net deposits on deposit-type contracts	(1.0)	(13.2)
Dividends paid to stockholders	-	(48.1)
Other cash applications	(43.4)	(20.0)
Cash provided by (used in) financing activities	<u>(44.4)</u>	<u>37.6</u>
Net change in cash and short-term investments	21.8	(25.9)
Cash and short-term investments:		
Beginning of year	<u>36.3</u>	<u>62.2</u>
End of year	<u>\$58.1</u>	<u>\$36.3</u>

**Liquidity and Capital Resources**

In the normal course of business, the Company enters into transactions involving various types of financial instruments such as debt and equity securities. These instruments have credit risk and may be subject to risk of loss due to interest rate and market fluctuations.

The liquidity requirements principally relate to the liabilities associated with various life insurance and annuity products and operating expenses. Liabilities arising from life insurance and annuity products include the payment of benefits, as well as cash payments in connection with policy surrenders, withdrawals and loans.

Historically, cash flow from operations and investment activities as well as capital contributions, have been used to fund liquidity requirements. Principal cash inflows from life insurance and annuities activities come from premiums, annuity deposits and charges on insurance policies and annuity contracts. Principal cash inflows from investment activities result from repayments of principal, proceeds from maturities, sales of invested assets and investment income.

Additional liquidity to meet cash outflows is available from the Company's portfolio of liquid assets. These liquid assets include substantial holdings of United States government and agency bonds and marketable debt and equity securities.

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A primary liquidity concern with respect to life insurance and annuity products is the risk of early policyholder and contract holder withdrawals. Liquidity requirements are closely monitored in order to match cash inflows with expected cash outflows, and the Company employs an asset/liability management approach tailored to the specific requirements of each product line.

**Annuity Actuarial Reserves and Deposit Fund Liability**

**Withdrawal Characteristics:**

*(\$ in thousands)*

	<u>2020</u>	<u>2019</u>
Subject to discretionary withdrawal with market value adjustment	\$ 2,675,227	\$ 2,984,415
Subject to discretionary withdrawal at book value less surrender charge	-	294
Subject to discretionary withdrawal at fair value	986,898	940,610
Subtotal	3,662,125	3,925,319
Subject to discretionary withdrawal with minimal or no surrender charge	275,649	235,916
Not subject to discretionary withdrawal provision	252,406	227,435
Total (Gross: Direct plus Assumed)	4,190,180	4,388,670
Less: reinsurance ceded	464,954	467,676
<b>Total</b>	<b>\$ 3,725,226</b>	<b>\$ 3,920,994</b>

Individual life insurance policies are less susceptible to withdrawals than annuity contracts because policyholders may incur surrender charges and be required to undergo a new underwriting process in order to obtain a new insurance policy. As indicated in the table above, only a small portion of the Company's annuity contract reserves and deposit fund liabilities are subject to withdrawals without adjustment.

Effective October 1, 2019, the Company entered into a reinsurance agreement with a subsidiary captive entity to reinsure all of the Company's net retained business on a coinsurance funds withheld and modified coinsurance basis. The Company entered into the agreement to manage its long-term risk exposure and liquidity. The credit taken for reserves ceded under the agreement at 12/31/2020 and 12/30/2019 was \$1.5 billion.

PHL Delaware committed to its insurance regulator to maintain PHL Variable's Company Action Level ("CAL") Risk Based Capital ("RBC") at or above 200% through 2023. CAL represents the level where a life insurance enterprise must submit a comprehensive plan to state insurance regulators. As of December 31, 2020, PHL Variable's RBC was 240% of CAL.

The Company is continuously monitoring the market and economic turbulence arising from COVID-19, which was declared a pandemic in March 2020 by the World Health Organization. The pandemic, along with efforts to slow and manage the spread of the virus, have resulted in unprecedented impacts on the economy; however, significant monetary support by the Federal Reserve has softened the impact of COVID-19 on capital markets. The Company has seen COVID-19 impacts on mortality in its life business as well as the investment portfolio, including lower net investment income and impairment losses on certain fixed maturity investments. However, it is still too early for the Company to fully assess the impact of the pandemic on long-term policyholder behavior and underwriting risks and the long-term impact on the Company's investments. While capital markets have improved, the fundamental impacts of COVID-19 persist and will continue to do so until vaccines are widely available and administered. In light of the uncertainty as to the length or severity of this pandemic, the Company cannot reasonably estimate the full impact of the pandemic on its operations and financial performance at this time, although it could be material.