

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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,

vs.

PHL VARIABLE INSURANCE COMPANY,

Defendant.

Civil Action No. 18-cv-03444-MKV

**DECLARATION OF MEDIATOR
PROFESSOR ERIC D. GREEN OF
RESOLUTIONS LLC IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT**

I, Eric D. Green, declare as follows:

1. I submit this declaration in connection with the motion for preliminary approval of the proposed class action settlement between the named plaintiffs Advance Trust & Life Escrow Services, LTA, as Nominee of Life Partners Position Holder Trust and James Kenney, on behalf of themselves and all other similarly situated, in Civil Action No. 18-cv-03444-MKV, (together, "Class Plaintiffs" or "Plaintiffs"), for themselves and on behalf of the proposed settlement class, and defendant PHL Variable Insurance Company ("PHLVIC" or "Defendant") (collectively, the "Parties"). 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.

2. I am a principal and co-founder of Resolutions LLC, an Alternative Dispute Resolution ("ADR") firm located in Concord, Massachusetts, and I am a full-time professional mediator. I am a retired Professor at the Boston University School of Law where for thirty years I taught negotiation, mediation, complex ADR processes, resolution of mass torts, constitutional law, and evidence. I am a co-founder and principal of Resolutions, LLC. I previously co-founded

JAMS/Endispute and was a member of the Center for Public Resources Institute of Dispute Resolution virtually since its inception and have served on many of its panels and committees and spoken at numerous of its conferences and programs on mediation and ADR. I was a co-author with Professors Frank Sander and Stephen Goldberg of the first edition of *Dispute Resolution*, the first legal textbook on ADR, and have written numerous books and articles on dispute resolution and evidence. I maintain an active ADR/mediation practice for complex, legally-intensive disputes, including class actions such as the present dispute.

3. I have successfully mediated many high-stakes cases, including the *United States v. Microsoft* antitrust case, the various MasterCard/Visa merchants' class action antitrust cases, portions of the Enron Securities class action cases, the Monsanto PCB cases in Alabama, the childhood and adult cancer cases in Toms River, New Jersey, numerous large construction cases, including most of the disputes arising out of the design and construction of major league baseball and football stadiums, insurance coverage, intellectual property, international disputes, ERISA cases, and consumer cases. I have also mediated many complex, multi-party mass and class action cases involving horizontal and vertical price-fixing anti-trust claims, mergers and acquisitions, contract disputes, patent disputes, securities fraud, shareholder derivative claims, accounting problems, mass torts, employment and consumer claims, and opioid abatement claims by the fifty State Attorneys General, thousands of cities and countries, and hundreds of Tribes.

4. I am a 1968 Honors graduate of Brown University and graduated in 1972 from Harvard Law School, *magna cum laude*, where I was Executive Editor of the Harvard Law Review. I am a member of the bars of the states of California (inactive) and Massachusetts, the United States District Courts for the Northern and Central Districts of California and the District

of Massachusetts, several Courts of Appeal, and the Supreme Court of the United States. Prior to teaching at Boston University School of Law, I clerked for the Hon. Benjamin Kaplan, Supreme Court of Massachusetts and then was an associate and partner at Munger Tolles & Olson in Los Angeles.

5. I have delivered hundreds of lectures, panel discussions, and training sessions on ADR and taught or supervised more than a thousand students in ADR while mediating more than a hundred cases a year for over 30 years. In 2001, I was awarded a Lifetime Achievement Award from the American College of Civil Trial Mediators. I was voted Boston's Lawyer of the Year for Alternative Dispute Resolution for 2011 based on my "particularly high level of peer recognition." In 2011, I received the rarely-awarded James F. Henry Award for Outstanding Contributions to the field of ADR from The International Institute for Conflict Prevention & Resolution.

6. I was retained by the Parties in the above-referenced matter to serve as a private mediator to facilitate potential settlement discussions. As discussed below, I believe the settlement of the class action, negotiated after an extended mediation process and hard-fought litigation represents an arms-length, principled, well-reasoned, and sound resolution of highly uncertain litigation. The Court, of course, will make determinations as to the fairness, reasonableness, and adequacy of the settlement under applicable legal standards. From the mediator's perspective, however, I attest that the proposed settlement is a reasonable result, obtained at arm's-length after a difficult, protracted, adversarial negotiation, and is consistent with the risks and potential rewards of the claims asserted when measured against the "no-agreement alternative" of continued, uncertain litigation. Based on my over 30 years of experience as a mediator, and my personal discussions with the Parties, I believe that the

proposed settlement is fair and reasonable. Without waiving the mediation privilege, I provide the following information in support of my view.

7. The first in-person mediation was conducted at my offices on January 20, 2022. In advance of the mediation, counsel for the Parties provided me with significant information laying out key facts and support for the Parties' positions in connection with the various issues in dispute. During this initial mediation session, the Parties engaged in vigorous, arms-length debate about all aspects of the merits of the case and damages. I met with each Party individually to discern areas of common ground. In these individual sessions, I engaged in multiple candid discussions with each Parties' counsel concerning the risks associated with their respective positions. The session lasted the entire day, and this meeting did not result in an agreement to settle the Plaintiffs' claims.

8. The Parties met again for a second in-person mediation session at my offices on November 8, 2022. The Parties again provided me with a significant amount of key information in connection with the issues, including their briefing on class certification and the Parties' expert reports that had been recently completed. This session was again attended by counsel for both Parties, as well as two representatives of PHLVIC. Again, the Parties engaged in vigorous, arms-length debate about all aspects of the merits of the case and damages. The session lasted another full day and consisted of individual and group sessions to discuss the risks associated with their respective positions. Towards the end of the meeting, I made a "mediator's proposal," and gave the Parties until the following Tuesday to accept or reject it. After clarifying certain aspects of the proposal, both Parties ultimately accepted that proposal.

9. Throughout the settlement process, including the negotiations outside the formal mediation process, this case was conducted on both sides by highly experienced and capable

counsel who were fully prepared and had an excellent understanding of the strengths and weaknesses of the contrasting claims and defenses. The quality of the advocacy on both sides was extremely high. All counsel were professional and cooperative, but each side zealously advanced their respective arguments in the best interests of their clients. Moreover, each side demonstrated a willingness to continue to litigate rather than accept a settlement that was not in the best interest of their clients. During the negotiations, the Parties had multiple discussions with me about various scenarios for a potential resolution, which I discussed extensively with the Parties throughout the mediation in an effort to address and resolve the disputed issues.

10. Although all Parties were confident in the strength of their respective positions, it was clear that continued litigation carried substantial risks for both sides. If the case had not settled, the litigation and appeals process would have continued for a very long time and at great expense to both sides with uncertain results. Defendant, while adamant that it was not liable, could not be sure of a favorable outcome. Similarly, Plaintiffs faced obstacles to establishing liability, as well as challenges to their damages model. In fact, even if the Class was successful and established liability at trial, there was risk in connection with whether the jury would have awarded damages in the amount sought by Plaintiffs. Both sides faced the risk that a jury could react unfavorably to the evidence presented.

11. From the inception of the mediation process, it was apparent that the litigation was extremely complex and involved numerous difficult legal, actuarial, and factual issues. Based on my review of the mediation briefing and supporting information that the Parties provided to me, the detailed presentations and debates by Plaintiffs' Counsel and Defendants' Counsel, the mediation sessions, and the hours of telephone and in-person conversations I

conducted with respective counsel, it is my opinion that continued litigation posed great risks for both sides.

12. Based on the facts and circumstances presented by the Parties and my experience in the mediation of class actions, it is my opinion that the settlement is an excellent result for the putative class that reflects the strenuous negotiations between highly professional counsel to secure a result for the class without the risks of continued litigation where their claims could have been denied at trial or on appeal. Similarly, PHLVIC made a responsible business decision to avoid further litigation that had the potential to expose them to a significant financial loss. All of this I attribute to exceptional and professional legal work on both sides. Both sides' counsel are among the most capable and experienced lawyers in the country in these kind of cases.

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

Dated: February 2, 2023

A handwritten signature in black ink, appearing to read 'E. D. Green', written over a horizontal line.

Professor Eric D. Green
Resolutions LLC