**The following constitutes the ruling of the court and has the force and effect therein described.**

**Signed May 13, 2016**

**United States Bankruptcy Judge**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| In re: | § | |
| | § | Jointly Administered Under |
| LIFE PARTNERS HOLDINGS, INC., | § | CASE NO. 15-40289-RFN-11 |
| *et al.*, | § | |
| Debtors. | § | |
| | § | |
| | § | |
| Steve South, as Trustee for, and on behalf | § | Adversary No. 15-4061 |
| of the South Living Trust, Philip M. Garner, | § | (Consolidated with |
| Michael Arnold, Janet Arnold, John S. | § | Adversary No. 15-4064) |
| Ferris, M.D., Christine Duncan, and all | § | |
| others similarly situated, | § | |
| Plaintiffs, | § | District Court Case |
| | § | No. 4:16-CV-212-A |
| v. | § | |
| | § | |
| Life Partners, Inc., | § | |
| Defendant. | § | |

**REPORT AND RECOMMENDATION REGARDING THE JOINT MOTION TO (I) PRELIMINARILY APPROVE SETTLEMENT AGREEMENT; (II) GRANT CLASS CERTIFICATION PURSUANT TO SETTLEMENT AGREEMENT; (III) APPOINT CLASS COUNSEL AND CLASS REPRESENTATIVE PURSUANT TO SETTLEMENT AGREEMENT; (IV) APPROVE THE FORM AND MANNER OF NOTICE TO CLASS MEMBERS; (V) SET A DEADLINE FOR OBJECTIONS TO THE SETTLEMENT; AND (VI) SCHEDULE HEARING FOR THE FINAL CONSIDERATION AND APPROVAL OF THE SETTLEMENT**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

I, Russell F. Nelms, United States Bankruptcy Judge, make the following report and recommendation regarding the Joint Motion To (I) Preliminarily Approve Settlement Agreement; (II) Grant Class Certification Pursuant To Settlement Agreement; (III) Appoint Class Counsel And Class Representative Pursuant To Settlement Agreement; (IV) Approve The Form And Manner Of Notice To Class Members; (V) Set A Deadline For Objections To The Settlement; And (VI) Schedule Hearing For The Final Consideration And Approval Of The Settlement (the "Joint Motion").

I have considered the Joint Motion, the Settlement Agreement and Class Notice attached thereto, the arguments of counsel, the relevant authorities, and various items of record in these bankruptcy cases. I have not held an evidentiary hearing on the Joint Motion. The schedule proposed by the parties did not permit time for such a hearing. Although the putative class representatives, LPI and others support the Joint Motion, some current investors object to the certification of the class and to the settlement.[1] Because of time constraints and the fact that

[1] When the movants filed the Joint Motion for Procedures and Scheduling Order on April 25, 2016, they alleged the Joint Motion was unopposed. Since that time, several investors have filed pleadings in the bankruptcy case clearly indicating opposition. See Bankruptcy Court Case No. 15-40289, Dkt # 2094, 2100, and 2102. I do not suggest that the movants made any misrepresentations to the District Court or to me; I only point out that these objections have since been raised.

opponents will have the opportunity to respond to this report and recommendation, I have not asked for briefing in opposition to the Joint Motion.

Based on the information available to me, I make the following report and recommendation.

## CONDITIONAL CERTIFICATION OF THE CLASS, AND APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL

The Joint Motion requests certification of two mandatory subclasses under FED. R. CIV. P. 23(b)(2), and the approval of a settlement that will be binding on all subclass members without the ability to opt out.[2]

To certify such a class, the movants must prove by a preponderance of the evidence all of the elements of FED. R. CIV. P. 23(a) and (b)(2). Those elements are: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims and defenses of the representative parties are typical of the claims or defenses of the class; (iv) the representative parties will fairly and adequately protect the interests of the class; and (v) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

The Joint Motion proposes two subclasses, defined as follows.

> **The Ownership Settlement Subclass:** All persons or entities (including all IRAs and their respective individual owners and related IRA custodians) who purchased and hold, as of the Plan Effective Date, securities issued or sold by LPI (directly or in the name of any Original IRA Note Issuer) related to viatical settlements or life

[2] In footnote 5 of the Joint Motion the parties seek alternative relief under 23(b)(1) or (b)(3), but they do not argue or brief that relief. Moreover, the joint disclosure statement filed by the debtors and the creditors' committee in the bankruptcy case—which I have approved as containing adequate information—discloses only a rule 23(b)(2) class with no opt-out rights under the settlement. See Bankruptcy Case 15-40289, Dkt # 2065, p. 146.

> settlements, regardless of how the investments were denominated (whether as fractional interests in life insurance policies, promissory notes, or otherwise) and who are Current Position Holders under the Plan, regardless of whether or not a claim was filed by a class member. Excluded from the Ownership Settlement Subclass are LPI; all affiliated Life Partners companies or entities; Linda Robinson-Pardo; Paget Holdings Ltd.; and investors whose only investments relate to Pre-Petition Abandoned Interests under the Plan.
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> **The Rescission Settlement Subclass:** All persons or entities (including all IRAs and their respective individual owners and related IRA custodians) who purchased and hold, as of the Plan Effective Date, securities issued or sold by LPI (directly or in the name of any Original IRA Note Issuer) related to viatical settlements or life settlements, regardless of how the investments were denominated (whether as fractional interests in life insurance policies, promissory notes, or otherwise) and who are Current Position Holders under the Plan, regardless of whether or not a claim was filed by a class member. Excluded from the Rescission Settlement Subclass are LPI; all affiliated Life Partners companies or entities; Linda Robinson-Pardo; Paget Holdings Ltd.; investors whose only investments relate to Pre-Petition Abandoned Interests under the Plan; Qualified Plan Holder; and all persons and entities listed on Appendix A to the Class Settlement Agreement.

The movants have argued that I can recommend conditional certification of the two subclasses without an evidentiary hearing under a relaxed standard because the certification will be subject to notice and objections to be addressed at a final hearing. See, Joint Motion, p. 21. But, there is a split of authority over the propriety of conditional certification and the standard for it is unclear. NEWBERG ON CLASS ACTIONS § 13:18 (5th ed.).

One line of authorities holds that class certification can never be conditional; rather, it always and at any stage requires full and rigorous consideration of the elements of FED. R. CIV. P. 23(a). *See, e.g., In re Ephedra Prod. Liab. Litig.*, 231 F.R.D. 167, 169-170 (S.D.N.Y. 2005). The *Ephedra* court was faced with a request to certify a settlement-only class and to preliminarily approve a class settlement. That court was also asked to conditionally certify the class using a relaxed application of the requirements of FED. R. CIV. P. 23(a) & (b). It declined to do so, citing both a 2003 amendment to FED. R. CIV. P. 23 that deleted from the rule the provision that class

certification "may be conditional" and the Supreme Court's ruling in *Amchem Prods.v. Windsor*, 521 U.S. 591 (1999). *Id.* at 169-170. In *Amchem*, the Supreme Court held:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [a factor related to Fed. R. Civ. P. 23(b)(3)(D)], for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.

*AmChem*, 521 U.S. at 620.

Based on these authorities, the *Ephedra* court concluded that the requirements of FED. R. CIV. P. 23(a) and (b) must be rigorously applied even at the preliminary stage. *Ephedra*, 231 F.R.D. at 170.

The other line of authority, and what appears to be a majority, uses a less stringent standard, at least initially. NEWBERG ON CLASS ACTIONS § 13:18 For the sake of efficiency, these courts permit a more relaxed standard for conditional class certification at the same time as preliminary approval of a class settlement, with final analysis and approval of each coming after notice to all class members. *See, e.g., Schoenbaum v. E.I. DuPont Nemours and Co.*, 2009 WL 4782082 (E.D. Mo., December 8, 2009). The *Schoenbaum* court noted that conditional certification of a class is not a certification at all because it has no binding effect, but agreed that it can be done for the sake of efficiency. *Id.* at *5-6; *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570, 583 (3rd Cir. 2014)(discouraging use of the term "conditional certification" when the court is really proposing a certification subject to notice and objection, and reserving the decision on certification for a later time).

The *Schoenbaum* court determined that it must evaluate whether the class "could possibly be satisfied" and whether there are any "obvious impediments" to certification, but that a less rigorous standard applies to a conditional certification, reasoning as follows:

> Preliminary class certification contemplates that formal class certification will be combined with the fairness hearing, and exists to permit plaintiffs to determine whether the court sees any obvious impediments to class certification before they proceed with noticing the class for settlement approval. Thus the court sees no reason, if the standard for preliminary approval of a settlement's terms is lower than that for final approval, the standard for preliminary certification of settlement classes should not also be more relaxed.

*Id.* at *5.

I reconcile these authorities by concluding that I can recommend a conditional certification of the two subclasses, but my recommendation cannot be a rubber-stamp of the movants' request; rather, I must have some certainty that the elements of FED. R. CIV. P. 23 (a) and (b)(2) are met or that there is no obvious impediment to the elements being met at a final hearing. I raise this split of authority because I cannot conduct a rigorous analysis and be completely certain that the two subclasses meet the requirements of FED. R. CIV. P. 23(a) and (b)(2) without an evidentiary hearing and without hearing the arguments of those who oppose the certification.

Nevertheless, I reach the following conclusions regarding the elements of FED. R. CIV. P. 23(a) and (b)(2) based on evidence that has been presented during the course of these cases. I address each of the five elements required by FED. R. CIV. P. 23(a) and (b)(2) in turn.

**23(a)(1) Numerosity.** Each of the subclasses includes persons or entities who purchased and still hold an interest in a life settlement, but not those who have voluntarily or involuntarily abandoned their interests. The disclosure statement filed by the debtors and the creditors' committee, which I have approved as containing adequate information under 11 U.S.C. § 1126, says that there are approximately 22,000 current holders of these interests. Rule 23(a)(1) requires

that the class be "so numerous that joinder of all classes is impracticable." The Fifth Circuit instructs that I cannot focus on the number alone, but I must also consider the geographical location of the potential class members, how easily class members can be identified, the nature of the action, the size of the claims, judicial economy, and avoidance of problems caused by multiple actions. *In re TWL Corp.*, 712 F.3d 886, 894 (5th Cir. 2013). I do not have information about the geographic dispersion of the class members. I have seen no indication that identifying each investor would be a problem; on the contrary it is my understanding that LPI has such records. However, based on the size and nature of these claims, the number of investors, and the already taxed resources of many of the parties, I do believe that separately trying each of these many claims would impose a great burden on the parties and the court system. Moreover, since each investor holds only fractional interests of these policies (not entire policies), they are dependent upon each other to pay premiums and upon the trustee to administer the portfolio. Both LPI and many of the investors are under financial strain. Therefore, protracted litigation on many fronts would likely put the entire portfolio and all of the investors' interests in danger of collapse. Accordingly, I believe that the numerosity requirement is or will be satisfied.

**23(a)(2) Commonality.** The Supreme Court has held that the party seeking certification has the burden to prove that "the class has common 'questions of law or fact.' Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 383 (2011). But, even the existence of one common question can satisfy Rule 23(a)(2). *Hamad v. Old Republic Nat. Title Ins. Co.*, 690 F.3d 698, 704 (5th Cir. 2012).

The movants contend that the same questions of law and fact apply to resolution of each class member's claim. The class action complaint asserts that all of the investors purchased unregistered securities backed by fractional interests in a life insurance policy—some directly and some through a trust with an IRA account. The complaint also asserts that each investor signed substantially similar documents, including an Agency and Special Power of Attorney Agreement and a Policy Funding Agreement. Those who invested through an IRA account were given a promissory note for tax-deferment purposes. The complaint seeks rescission under the Texas Securities Act because LPI sold unregistered securities to each class member and seeks a declaration that, although LPI is the nominal owner of the life insurance policies, the investors are the beneficial owners of the policies and death benefits.

Because the class members purchased the same or substantially similar securities, executed the same documents, and seek the same remedies, the movants argue that the questions of law and fact will be the same. I agree. When it comes to the rescission claims the common questions of fact and law are whether LPI sold the investors unregistered securities and whether the investors are entitled to rescind the investment contracts under the Texas Securities Act.

I also agree that there are common questions of law and fact as to the ownership issue, but I make two observations. Over the course of these bankruptcy cases, at various times I have been presented with copies of agreements that LPI used to document the investors' rights. I have been told that these documents are representative of those signed by all investors. But, because I have never been called upon to resolve the ownership issue, the documents were presented to me for illustrative purposes only. Recently, counsel for a proponent of a competing plan argued that there may be differences in the operative documents and some of the investors may not have signed their

agreements. So, the documents appear to be substantially the same for all investors, but it is possible different versions exist.

It could also be argued that commonality is not satisfied as to the ownership issue because even if the operative documents are the same for all investors, those documents are ambiguous and, as such, an injured party's ownership rights must be determined by extrinsic facts surrounding the transaction. While this may be true, this concern is ameliorated by the settlement itself. It provides each investor the opportunity to opt for beneficial ownership, regardless of the circumstances surrounding his transaction. Accordingly, I believe the element of commonality is satisfied.

**23(b)(3) Typicality.** The test for typicality is whether the claims of the named plaintiffs are similar to those they purport to represent. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). A class representative's claim is typical if it arose from the same practice, event or conduct as the other class members, and the claims are all based on the same legal theory. *Baricuatro v. Industrial Personnel and Management Services, Inc.*, 2013 WL 6072702, at * 7 (E.D.La., Nov. 18, 2013). The named plaintiffs assert that they purchased the same securities from LPI as the other putative class members, and that they are all entitled to a declaration that they own the fractional interests or are entitled to rescind. It appears to me that the named plaintiffs' claims are typical of the other putative class members.

**23(b)(4) Adequacy of Representation.** My observations of the actions of the named plaintiffs and their counsel in this action cause me to conclude that they have diligently protected and represented their own interests and those of the putative class members. I have no reason to believe they will not continue to do so. The only conflicts between the named plaintiffs and the

putative class members that I can discern are that some of the putative class members (i) do not agree to the terms of the proposed settlement agreement; and (ii) oppose the potential $33 million fee to class counsel. But, the settlement is subject to objection and must pass a final fairness test, and the class counsel's proposed fee is also subject to objection and a reasonableness review.

Based upon my observations thus far, I believe Keith L. Langston is competent to act as class counsel. I have no reason to doubt that he qualifies to act as class counsel under FED. R. CIV. P. 23(g)(1), considering the work he has done in identifying and investigating potential claims, his experience, his knowledge of applicable law, and the resources he has committed thus far. I have no reason to believe that he will not fairly and adequately represent the interests of the whole class.

For these reasons, I believe the movants have or will be able to meet the requirements of FED. R. CIV. P. 23(a)(4).

**Requirements of 23(b)(2).** Those who have voiced objections to class certification have argued that it violates FED. R. CIV. P. 23(b)(2). That rule requires that (i) the party opposing the class must have acted or refused to act on grounds generally applicable to the class, so that (ii) injunctive or declaratory relief is appropriate with respect to the class as a whole. NEWBERG ON CLASS ACTIONS § 4:27 (5th Ed.).

The first part of the inquiry—the act requirement—focuses on whether the class members were harmed in essentially the same way. *Casa Orlando Apts., Ltd. v. Federal Nat. Mortg. Ass'n,* 624 F.3d 185, 198 (5th Cir. 2010). I believe that requirement is met here. As to the ownership issue, LPI has taken the same stance with respect to all putative class members, that is that LPI is the owner of the policies and the death benefits and the investors are mere claimants. As to the

rescission issue, the complaint alleges that LPI sold the same unregistered securities to all of the investors.

The second requirement is more problematic. In *Walmart Stores, Inc. v. Duke.,* 564 U.S. 338, 360-61 (2011), the Supreme Court held that:

> Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. (emphasis in original).

In this case, the relief sought is a mixture of injunctive relief, declaratory relief and monetary damages. Some relief is clearly injunctive and applies to the class as a whole; namely, the injunction against further sales of unregistered securities. Likewise, the request to declare that the plaintiffs own the policies not LPI, applies to the class as a whole. But, the complaint also seeks monetary damages in the form of rescission, which may not qualify as appropriate claims for 23(b)(2) certification. *Kahler v. FIRSTPLUS Fin., Inc. (In re FIRSTPLUS Fin., Inc.),* 248 B.R. 60, 76 (Bankr. N.D. Tex. 2000).

The Supreme Court has said that "it is clear that individualized monetary claims belong in Rule 23(b)(3)." *Walmart Stores, Inc. v. Duke.,* 564 U.S. 338, 362 (2011) . In that case, the putative class consisted of 1.5 million current and former female employees of Walmart, who claimed that the corporate culture of Walmart created a bias against female employees and interfered with their chances of promotion. *Id.* at 344-45. The complaint included a claim for backpay, and the Court decided that Walmart's backpay liability to each female depended on the facts of each individual's employment circumstances. *Id.* 366.

The Court did not, however, foreclose the possibility that incidental monetary damages (that are not individualized) could be included in a Rule 23(b)(2) class. *Id.* at 360. Indeed, the Court specifically found it unnecessary to overrule *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), which permits monetary relief in a Rule 23(b)(2) class if it is only incidental to injunctive and declaratory relief. *Walmart Stores, Inc. v. Duke.*, 564 U.S. 338, 366 (2011). The *Allison* court defined "incidental" monetary damages as follows:

- They "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."
- They are damages that class members automatically would be entitled to once liability to the class (or subclass) as a whole is established.
- They can be computed objectively not by the subjective differences in each class member's circumstances.
- They should not require additional hearings to resolve the merits of class members' claims.
- They should not "introduce new and substantial legal or factual issues, nor entail complex individualized determinations."
- They should be in the nature of a group remedy.

*Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)

The portion of the class settlement that settles ownership appears to comply with *Walmart* and *Allison.* That provision does effectuate a split of death benefits (95% to the investor, 5% to the estates), but that relief flows from the settlement of the ownership issue itself. It is also automatic, can be computed objectively, should not require additional hearings to determine individual claims, and it is the nature of a group remedy. I conclude that the settlement of the ownership issue is not an individualized monetary remedy, and monetary damages associated with it are purely incidental.

The rescission remedy also appears to comply with *Allison.* The declaration that purchasers of fractional interests are entitled to rescission under the Texas Securities Act applies

to the class as a whole. It appears that the claim of each rescinding investor could be objectively determined based on the payments he made to LPI. Rescission damages (if elected) would flow directly from LPI's liability to the class as a whole. Accordingly, while the claims of each member will be different, they should not require a hearing to resolve the *merits* of the claims, much less the introduction of new and substantial legal or factual issues. So, this element of the settlement complies with *Walmart* and *Allison*.

Based upon the record before me, I believe that the class meets the requirements of Fed. R. Civ. P. 23(b)(2). I decline to consider at this time any request for relief under 23(b)(1) or (b)(3), not only because the movants have not briefed any such request, but because the plan of reorganization proposed by the movants is solely predicated on relief under 23(b)(2).

## PRELIMINARY APPROVAL OF THE CLASS SETTLEMENT

Unlike conditional certification of the subclasses, the law appears clear that I can make a recommendation on preliminary approval of the settlement if I have no grounds to doubt its fairness, it has no obvious deficiencies, and it appears to fall within the range of possible approval because there is a conceivable basis for presuming that the proponents can meet the standard for final approval. *In re NFL Player Concussion Injury Litig.*, 301 F.R.D. 191, 197-98 (E.D. Pa. 2014).

The standard for final approval in the Fifth Circuit is fairness, adequacy and reasonableness, considering the following factors: (i) evidence that the settlement is not the product of fraud or collusion; (ii) the complexity, expense, and likely duration of the litigation; (iii) the stage of litigation and available discovery; (iv) the probability of the plaintiff prevailing

on the merits; (v) the range of possible recoveries and certainty of damages; and (vi) the opinions of class counsel. *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983).

There is no evidence of fraud or collusion between LPI and the plaintiffs. In fact, for much of the case they have been adverse to each other. If this matter were to proceed to litigation, the effort would be time-consuming and expensive to all parties. It would tax the resources of the court.

The ownership issue is novel. While it may not be complex, its resolution either way could be injurious to the plaintiffs. For example, if the plaintiffs are determined not to own the fractional interests, they are mere creditors of the LPI estate. Conversely, if the plaintiffs prevail, then the LPI estate has no resources to manage the portfolio of policies. This could plunge the estate into chaos. Policies could be terminated due to lack of cohesive administration. Certainly, it is for these reasons and numerous others that class counsel approves the settlement.

It appears that the settlement was heavily negotiated, and falls within the range of a fair settlement. There are other offers of settlement pending as part of two competing plans of reorganization. By finding this class action settlement falls within the range of fairness, I do not purport to say at this time that it is better than those offers.

## THE FORM AND MANNER OF NOTICE

The proposed notice appears reasonable. I note that paragraph 10 of the notice holds a place to insert the date and time of the hearing for final approval in the District Court. The District Court has indicated that it may refer the final hearing to this court. I assume the parties will amend the notice to give notice of that possibility.

## DEADLINE TO OBJECT TO FINAL APPROVAL

The parties propose that the Court set the deadline to object as June 30, 2016, but it is not clear when the movants will send the notice. It seems reasonable, given the complexity of these issues, to give the putative class members a 28-day notice of the objection deadline. Therefore, if the notice is served on or before June 2, 2016, I believe the objection deadline is reasonable.

## REPORT AND RECOMMENDATION

For these reasons, I recommend that the District Court enter the proposed order submitted with the Joint Motion, subject to objection and final hearing as to both class certification and fairness of the proposed settlement. I recommend, however, that the parties revise the notice as mentioned above and give putative class members a 28-day notice of the objection deadline.

**###END OF REPORT AND RECOMMENDATION###**